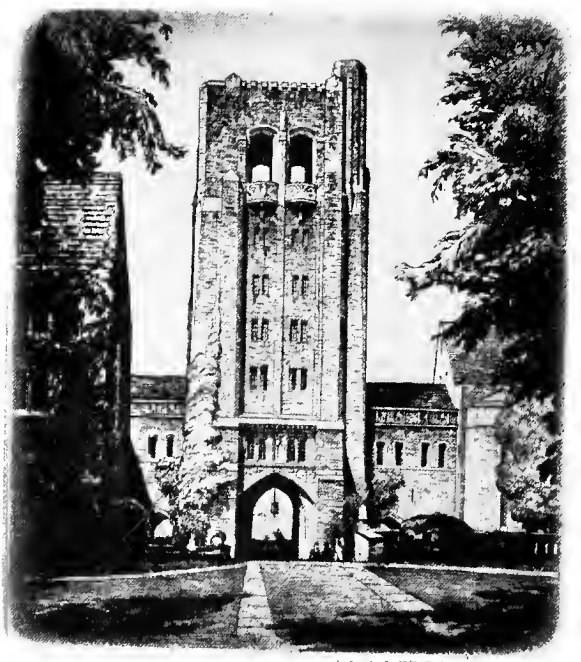

ROSCOE'S DIGEST

OF THE

LAW OF EVIDENCE

IN

CRIMINAL CASES.

BY

DAVID POWER, ESQ.,
ONE OF HER MAJESTY'S COUNSEL, AND LATE RECORDER OF IPSWICH.

Sixth American from the Sixth London Edition,

WITH NOTES AND REFERENCES TO AMERICAN CASES,

BY

GEORGE SHARSWOOD.

PHILADELPHIA:
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ADVERTISEMENT TO THE FIFTH EDITION.

In the preparation of the present edition of Roscoe's Criminal Evidence, the Editor has been greatly indebted to his friend Mr. Markby, of the Norfolk Circuit, for the able assistance which he has given him.

The introductory portion of the work has been rearranged with the view of rendering it more readable to the student of Criminal Law, and more easy of reference to all who may have occasion to consult it; and the chapter on "Practice" has been considerably enlarged.

The statutes and authorities have been brought up to the present time; and in the Appendix will be found all the recent statutes on Criminal Procedure which are most required in actual practice.

David Power.

Temple.

ADVERTISEMENT TO THE SIXTH EDITION.

In consequence of the illness and subsequent death of Mr. Power, Q. C., the preparation of this Edition has, in a great measure, fallen upon me. It has been prepared to meet the alterations introduced by the Criminal Statutes of 1861. The Cases have also been brought down to the present time.

William Markby.

ADVERTISEMENT

TO THE SIXTH AMERICAN EDITION.

That this work, both in England and America, has gone through Five Editions, and that the public is now presented with the Sixth, is a sufficient indication of the value attached to it by the Profession.

It has been found in practice to be a most complete compend of the Law of Criminal Evidence, and the best *vade mecum* of the advocate on trials.

An excellent arrangement, making it a book of easy reference, and great accuracy and perspicuity, as well as fulness in its references to authorities, have contributed to make it thus popular.

The American notes have been carefully revised, and the cases added to the present time.

G. S.

Philadelphia, September, 1866.

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A DIGEST, ETC.

THE general rules of evidence are the same in criminal and in civil proceedings. "There is no difference as to the rules of evidence," says Abbott, J., "between criminal and civil cases: what may be received in the one may be received in the other; and what is rejected in the one ought to be rejected in the other." R. v. Watson, 2 Stark. N. P. C. 155: 3 E. C. L. R.; R. v. Murphy, 8 C. & P. 306: 34 E. C. L. R. The enactments, however, of the Common Law Procedure Act, 1854, which materially altered the rules of evidence in certain cases, are, by sect. 103, confined to courts of civil judicature.

BEST EVIDENCE.

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Best evidence.] It is the first and most signal rule of evidence, that the best evidence of which the case is capable shall be given; for if the best evidence be not produced, it affords a presumption that it would make against the party neglecting to produce it. Gilb. Ev., 3 Bull. N. P. 293, per Jervis, C. J., in Twynam v. Knowles, 13 C. B. 224: 76 E. C. L. R.; Best on Ev., ch. 1, ss. 87 & 89.(1)

(1) Taylor v. Riggs, 1 Peters C. C. Rep. 596; Cutbush v. Gilbert, 4 S. & R. 551; Duckwell v. Weaver, 2 Ohio, 13; Fitzgerald v. Adams, 9 Georgia, 471.

The rule which requires the production of the best evidence is applied to reject secondary evidence which leaves that of a higher nature behind in the power of the party; but not to reject one of several eye-witnesses to the same facts, for the testimony of all is in the same degree. United States v. Gilbert, 2 Sumner, 19. "When there are several eye-witnesses to the same facts, they may be proved by the testimony of one only. All need not be produced. If they are not produced, the evidence may be less satisfactory or less conclusive, but still it is not incompetent." . . . "A witness who has seen

**Best evidence—written instruments.*] The most important application of this principle is that which rejects secondary, and requires primary evidence of the contents of written documents of every description, by the production of the written documents themselves.(1) The rule was so stated by the judges in answer to certain questions put to them by the House of Lords on the occasion of the trial of Queen Caroline (2 B. & B. 286): [6 E. C. L. R.]; and is perfectly general in its application; the only exceptions to it being founded on special grounds. These may be divided into the following classes: (1.) Where the written document is lost or destroyed: (2.) Where it is in the possession of an adverse party who refuses or neglects to produce it: (3.) Where it is in the possession of a party who is privileged to withhold it, and who insists on his privilege: (4.) Where the production of the document would be, on physical grounds, impossible, or highly inconvenient: (5.) Where the document is of a public nature, and some other mode of proof has been specially substituted for reasons of convenience. It is apparent, therefore, that in order to let in the secondary evidence in these cases, certain preliminary conditions must be fulfilled; what these conditions are we shall explain more particularly when we come to treat of *Secondary Evidence.*

It is not necessary, in every case where the fact that is to be proved has been committed to writing, that the writing should be produced, but (unless the contents of the written document is itself a fact in issue) only in those cases where the documents contain statements of facts which, by law, are directed or required to be put in writing, or where they have been drawn up by the consent of the parties for the express purpose of being evidence of the facts contained in them. Indeed in many cases the writing is not evidence, as in the case of R. v. Layer, *infra.*

The following cases are cited as instances of the general rule. Upon an indictment for setting fire to a house with intent to defraud an insurance company, in order to prove that the house was insured, the policy must be produced as being the best evidence, and the insurance office cannot give any evidence from their books unless the absence of the policy is accounted for. R. v. Doran, 1 Esp. 127; R. v. Kitson, 1 Dears, C. C. 187; S. C. 22 L. J., M. C. 118. Upon the same principle, the records and proceedings of courts of justice, existing in writing, are the best evidence of the facts there recorded. As, for instance, where it was necessary to prove the day on which a cause came on to be tried, Lord Ellenborough said that he could not receive parol evidence of the day on which the court sat at nisi prius, as that was capable of other proof by matter of record. Thomas v. Ansley, 6 Esp. 80. *Vide post*; Documentary Evidence. So, on an indictment for disturbing a Protestant congregation, Lord Kenyon ruled that the taking of the oaths under the Toleration Act, being matter of record, could not be proved by parol evidence. R. v. Hube, Peake, 132. In R. v. Rowland, 1 F. & F. 72, Bramwell, B., held, that on an indictment for per-

a party write several times is a good witness to prove his handwriting. But a clerk in the counting room of the party, who has seen him write innumerable times, would be in many cases a more satisfactory witness to prove the handwriting. But nobody can doubt that each would be a competent witness." Per Story, Ibid. 81. So the admissions of the prisoner that he had stolen from the person of another are not to be excluded though the person from whom the property was stolen is not produced as a witness. Commonwealth v. Kenney, 12 Metcalf, 235.

See also, Shoenberger v. Hachman, 1 Wright (Penna.), 87; Richardson v. Milburn, 17 Maryland, 67.

The testimony of a bystander, who overheard a conversation, is not secondary evidence of such conversation. Peeples v. Smith, 8 Richardson, 90.

(1) Hampton v. Windham, 2 Root, 199; Benton v. Craig, 2 Mississippi, 198; Cloud v. Patterson, 1 Stewart, 394; Campbell v. Wallace, 3 Yeates, 271; United States v. Reyburn, 6 Peters, 352.

If a witness in the course of his examination be asked to testify respecting a transaction, before the question is answered, it is competent for the other party to inquire and know whether the transaction be in writing, and if it be, the witness cannot be permitted to give parol evidence on the subject. Rice v. Bixler, 1 Watts & Serg. 445.

jury, in order to prove the proceedings of the county court, it was necessary to produce either the clerk's minutes, or a copy thereof bearing the seal of the court; the county court act (9 & 10 Vict. c. 95, s. 111) directing that such minutes should be kept, and that such minutes should be admissible as evidence. And it has been said generally, that where the transactions of courts which are not, technically speaking, of record are to be proved, if such courts preserve written memorials of their proceedings, *those memorials are the only authentic modes of proof which the law [*3] recognizes. 3 Stark. Ev. 1043, 1st ed. On an indictment under the repealed statute 8 & 9 Wm. 3, c. 26, s. 81, for having coining instruments in possession, it was necessary to show that the prosecution was commenced within three months after the offence committed. It was proved, by parol, that the prisoners were apprehended within three months, but the warrant was not produced or proved, nor were the warrant of commitment or the depositions before the magistrate given in evidence to show on what transactions, or for what offence, or at what time, the prisoners were committed. The prisoners being convicted, a question was reserved for the opinion of the judges, who held that there was not sufficient evidence that the prisoners were apprehended upon transactions for high treason respecting the coin within three months after the offence committed. R. v. Phillip, Russ. & Ry. 369.

But, on the other hand, where a memorandum of agreement was drawn up, and read over to the defendant, which he assented to, but did not sign, it was held that the terms of the agreement might be proved by parol. Doe v. Cartwright, 3 B. & A. 326: 5 E. C. L. R.; Trewhitt v. Lambert, 10 A. & E. 470: 37 E. C. L. R. So facts may be proved by parol, though a narrative of them may exist in writing. Thus a person who pays money may prove the fact of payment, without producing the receipt which he took. Rambert v. Cohen, 4 Esp. 213.(1) So where, in trover, to prove the demand the witness stated that he had verbally required the defendant to deliver up the property, and at the same time served upon him a notice in writing to the same effect, Lord Ellenborough ruled that it was unnecessary to produce the writing. Smith v. Young, 1 Campb. 439. So a person who takes notes of a conversation need not produce them in proving the conversation, as they would not be evidence if produced. Thus in R. v. Layer, a prosecution for high treason, Mr. Slaney, an Under-Secretary of State, gave evidence of the prisoner's confession before the council, though it had been taken down in writing. 12 Vin. Ab. 96. Similar illustrations of the same principle will be found at p. 60, under the title, *Examination of Prisoner*. So on an indictment for perjury committed upon a trial in the county court, any witness present at the time, is competent to prove what evidence was given, inasmuch as a county court judge is not bound to take any notes. R. v. Morgan, 6 Cox, Cr. C. 107, per Martin, B.; Harmer v. Bean, 3 C. & K. 307, per Parke, B. So the fact of a marriage may be proved by a person who was present, and it is not necessary to produce the parish register as the primary evidence. Morris v. Miller, 1 W. Bl. 632. So the fact that a certain person occupied land as tenant may be proved by parol, although there is a written contract. R. v. Inhab. of Holy Trinity, 7 B. & C. 611: 14 E. C. L. R.; 1 M. & R. 444. But the parties to the contract,

(1) As a general rule, when there is written evidence of a fact, parol or secondary evidence is inadmissible; but written acknowledgments and receipts of payment, when such payments are in issue are exceptions to the rule. Conway v. The State Bank, 8 English, 48; Weatherford v. Farrar, 18 Missouri, 474.

Southwick v. Hayden, 7 Cowen, 334; Heckert v. Haine, 6 Binney, 16; Wishart v. Downey, 15 Serg. & Rawle, 77.

But parol evidence that a receipt given for a note acknowledged that the note was in full payment of goods sold is inadmissible, when the receipt is in existence and no measures have been taken to procure it. Townsend v. Atwater, 5 Day, 298.

the amount of rent, and the terms of the tenancy, can only be shown by the writing. S. C. and Strother v. Burr, 5 Bing. 136: 15 E. C. L. R.; Doe v. Harvey, 8 Bing. 239: 21 E. C. L. R.; R. v. Merthyr Tydvil, 1 B. & Ad. 29: 20 E. C. L. R.

In the case of *printed* documents, all the impressions are originals, and according to the usual rule of multiplicate originals, any copy will be primary evidence.(1) Thus where, on a prosecution for high treason, a copy of a placard was produced by the person who had printed it, and offered in evidence against the prisoner, who it appeared had called at the printer's, and taken away twenty-five copies, it was ob- [*4] jected that the *original ought to be produced, or proved to be destroyed, or in the possession of the prisoner; but it was held that the evidence was admissible; that the prisoner had adopted the printing by having fetched away the twenty-five copies; and that being taken out of a common impression, they must be supposed to agree in the contents. "If the placard," said Mr. Justice Bayley, "were offered in evidence to show the contents of the original manuscript, there would be great weight in the objection, but when they are printed they all become originals; the manuscript is discharged; and since it appears that they are from the same press, they must be all the same." R. v. Watson, 2 Stark. N. P. 130: 3 E. C. L. R.

It has been said that the transactions and proceedings of public meetings may be proved by parol, as in the case of resolutions entered into, although it should appear that the resolutions have been read from a written or printed paper. And in support of this proposition a case is referred to where, in a prosecution against Hunt for an unlawful assembly, in order to prove the reading of certain resolutions, a witness produced a copy of the resolutions which had been delivered to him by Hunt as the resolutions intended to be proposed, and proved that the resolutions he heard read corresponded with that copy; this was held sufficient, though it was objected that the original paper from which the resolutions were read ought to have been produced, or that a notice to produce it ought to have been given. R. v. Hunt, 3 B. & A. 568: 5 E. C. L. R. But this decision was expressly grounded, by Abbott, C. J., who delivered the judgment of the court, on the admission by the prisoner, by the delivery of the copy to the witness, that it contained a true statement of the resolutions passed at the meeting. In a prosecution on the Irish Convention Act, the indictment averred that divers persons assembled together, and intending to procure the appointment of a committee of persons, entered into certain resolutions respecting such committee, and charged the defendant with certain acts done for the purpose of assisting in forming that committee, and carrying the resolutions into effect. To show what was done at the meeting in question, a witness was called, who stated that, at a general meeting, the secretary proposed a resolution, which he read from a paper. The proposition was seconded, and the paper was handed to the chairman and read by him. It was objected that the absence of the paper should be accounted for, before parol evidence of the contents of it was received. But the majority of the court were of opinion that this was not a case to which the distinction between primary and secondary evidence was strictly applicable; that the proposed evidence was intended to show, not what the paper contained, but what one person proposed, and what the meeting adopted; in short, to prove the transactions and general conduct of the assembly; and that such evidence could not be rejected because some persons present took notes of what passed. R. v. Sheridan, 31 How. St. Tr. 672.(2)

(1) A printed advertisement cannot be read without search after the original manuscript. Sweigart v. Lowncaster, 14 Serg. & Rawle, 200.

(2) See Moor v. Greenfield, 4 Greenleaf, 44. In order to prove that a certain ticket in a lottery had drawn a blank, a witness testified that he was a manager of the lottery, that he attended the drawing, and that a ticket with the combination numbers in question drew a blank. The testimony was

Best evidence—handwriting.] In proving handwriting the evidence of third persons is not inferior to that of the party himself. "Such evidence," says Mr. Phillipps, "is not in its nature inferior or secondary, and though it may generally be true that a writer is best acquainted with his own handwriting, and therefore his evidence will generally be thought the most satisfactory, yet his knowledge is acquired precisely by the same means as the knowledge of other persons *who have been [*5] in the habit of seeing him write, and differs not so much in kind as in degree. The testimony of such persons, therefore, is not of a secondary species, nor does it give reason to suspect, as in the case where primary evidence is withheld, that the fact to which they speak is not true." 1 Phill. Ev. 212, 6th ed.(1) Nor do the slightness and infrequency of the opportunities which the witness has had of judging of the handwriting make any difference as to his competency. These are only matters of observation to the jury; as also is the fact that the witness has had no recent opportunities of forming a judgment. In R. v. Horne Tooke, 27 How. St. Tr. 71, the witness had not seen Mr. Tooke's handwriting for twenty years previous to the trial; and in Lewis v. Sapio, Moo. & M. 39: 22 E. C. L. R., the witness had only seen the defendant write his surname.

If the evidence of third persons be admissible to prove handwriting, it seems necessarily to follow, that it is equally admissible for the purpose of *disproving* it, the question of *genuine* or *not genuine* being the same in both cases. Accordingly, although in an early case, where it was requisite to prove that certain alterations in a receipt were forged, it was held that the party who had written the receipt ought to be called as the best and most satisfactory evidence: R. v. Smith, O. B. 1768, 2 East, P. C. 1000; yet in subsequent cases of prosecutions for forgery it has been held that the handwriting may be disproved by any person acquainted with the genuine handwriting. R. v. Hughes, 2 East, P. C. 1002; R. v. McGuire, Id.; R. v. Hurley, 2 Moo. & Rob. 473; Case of Bank prosecutions, R. & R 378.(2)

In criminal cases the jury may form their opinion as to the genuineness of a document by a comparison of it with any other documents already in evidence before

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objected to, because the appointment of a manager could be proved by the record, because the drawing of the lottery could be proved only by the manager's books, and because the result could not be ascertained without producing the scheme. It was held that the testimony was admissible. Barnum v. Barnum, 9 Conn. 242.

The rule is, that secondary or inferior shall not be substituted for evidence of a higher nature which the case admits of. The reason of that rule is, that an attempt to substitute the inferior for the higher, implies that the higher could give a different aspect to the case of the party introducing the lesser "The ground of the rule is a suspicion of fraud." But before the rule is applied, the nature of the case must be considered, to make a right application of it; and if it shall be seen that the fact to be proved is an act of the defendant, which from its nature can be concealed from all others except him whose co-operation was necessary before the act could be complete, then the admission and declarations of the defendant either in writing or to others in relation to the act become evidence. United States v. Wood, 14 Peters, 431.

The rule requiring the production of the best evidence is applied to reject secondary evidence, which leaves that of a higher nature behind in the power of the party; it is not applied to reject one of several eye-witnesses to the same transaction. United States v. Gilbert, 2 Sumner, 19.

The contents of letters which are lost may be shown by any one, without accounting for the non-production of the person to whom they were written. Drisk v. Davenport, 2 Stewart, 266.

(1) Conrad v. Farron, 5 Watts, 536.

(2) It is not necessary to prove a bank note to be counterfeit by an officer of the bank. Martin v. The Commonwealth, 2 Leigh, 745. So it is not necessary to prove property in stolen goods by the owner. Lawrence v. The State, 4 Yerger, 145. See also The State v. Petty, Harper, 59; The State v. Hooper, 2 Bailey, 27; The State v. Tutt, Ibid. 44; The State v. Anderson, Ibid. 565; Hess v. The State, 5 Hammond, 5; Foulkes v. The Commonwealth, 5 Robinson, 836.

On an indictment for uttering a counterfeit bank bill, when the bank was out of the State, although within forty miles of the place of trial, the forgery was allowed to be proved by two witnesses who had very frequently received and paid out bills purporting to be made by such bank, and one of whom had once carried a large number of such bills to the bank, which were all paid as genuine, but neither of whom had ever seen the president or cashier write. Commonwealth v. Carey, 2 Pick. 47.

them, and shown to be the genuine production of the person whose handwriting is in question. But genuine documents cannot be put in evidence merely for the purpose of instituting a comparison. The rule in this respect has been altered by the 17 & 18 Vict. c. 125, s. 27, in civil cases. Tayl. Ev. 1489.

Best evidence—negative evidence of consent.] In certain prosecutions it is necessary to prove that the act with which the prisoner is charged was done without the consent, or against the will, of some third person; and a question has been raised, whether the evidence of that person himself is not the best evidence for that purpose. Although at one time, it appears to have been thought necessary to call the party himself, it is now settled that the want of consent may be proved in other ways. Where, on an indictment under 6 Geo. 3, c. 36, for lopping and topping an ash timber tree without the consent of the owner, the land steward was called to prove that he himself never gave any consent, and from all he had heard his master say (who had died before the trial, having giving orders for apprehending the prisoners on suspicion), he believed that he never did: Bayley, J., left it to the jury to say, whether they thought there was reasonable evidence to show that in fact no consent had been given. He adverted to the time of night when the offence was committed, and to the circumstance of the prisoners running away when detected, as the evidence to show that the consent required had not in fact been given. The prisoners were found guilty. R. v. Hazy, 2 C. & P. 458: 12 E. C. L. R. So on an indictment on 42 Geo. 3, c. 107, s. 1 (now repealed), for killing fallow-deer without consent of the owner, and on two [*6] other *indictments, for taking fish out of a pond without consent, evidence was given that the offence was committed under such circumstances as to warrant the jury in finding non-consent; and the persons engaged in the management of the different properties were called, but not the owners. The judges held the convictions right. R. v. Allen, 1 Moo. C. C. 154.

Best evidence—persons acting in a public capacity.] Where persons, acting in a public capacity, have been appointed by instruments in writing, those instruments are not considered the only evidence of the appointment, but it is sufficient to show that they have publicly acted in the capacity attributed to them. Thus in the case of all peace officers, justices of the peace, constables, &c., it is sufficient to prove that they acted in those characters without producing their appointments; and this even in the case of murder. Per Buller, J., Berryman v. Wise, 4 T. R. 366; R. v. Gordon, 1789, cited ib.(1) So of a surrogate, on an indictment for perjury in the ecclesiastical court. R. v. Verelst, 3 Campb. 432. So where the directors and overseers of a parish were by a local act to sue and be sued in the name of their vestry clerk, it was held that proof of the latter having acted as vestry clerk was sufficient *primâ facie* evidence of his being regularly appointed such clerk. McGahey v. Alston, 2 M. & W. 211. So of an attested soldier engaged in the recruiting service. Walton v. Gavin, 16 Q. B. 48: 71 E. C. L. R.; and see the case of R. v. Gordon, 1 Leach, 515, *post*, p. 17. So of a commissioner for taking affidavits. R. v. Howard, 1 Moo. & Rob. 187. So of an attorney, though he may have once ceased to take out his certificate; it being presumed that he has been readmitted. Pierce v. Whale, 5 B. & C. 68: 11 E. C. L. R. But in R. v. Essex, Dear. & B. C. C. 369, the prisoner, who was clerk to a savings bank, was convicted on an indictment

(1) Bassel v. Reed, 2 Ohio, 410. Thus also that defendant was an innkeeper, though his license was on record. Owings v. Wyant, 1 Har. & McHen. 393. And oral proof of a clergyman's or magistrate's authority to marry is *prima facie* sufficient in a prosecution for bigamy. Damon's Case, 6 Greenleaf, 148. See Dean v. Gridley, 10 Wend. 254.

charging him with embezzlement, the property being laid in A. B. The only evidence of A. B. being a trustee was his own statement that he had so acted, but that, before the commission of the offence, he had attended one meeting only. He was also manager of the bank, and it did not appear that any act had been done by him which was not consistent with his holding that office only. This was held on a case reserved to be insufficient.

Best evidence—admission by party.] Where a party is himself a defendant in a civil or criminal proceeding, and is charged as bearing some particular character, the fact of his having acted in that character will, in all cases, be sufficient evidence, as an admission that he bears that character, without reference to his appointment being in writing.(1) Thus in an action for penalties against a collector of taxes, under 43 Geo. 3, c. 99, s. 12, the warrant of appointment was not produced, it being held that the act of collecting the taxes was sufficient to prove him to be collector. Lister v. Priestly, Wightw. 67. So on an information against an officer for receiving pay from government for a greater number of men than had been mustered into his corps, Lord Ellenborough held, that the fact of his being commandant might be proved from the returns, in which he described himself as major commandant of the corps, without adducing direct evidence of his appointment by the king. R. v. Gardner, 2 Campb. 513. So in an action against a clergyman for non-residence, the acts of the defendant as parson, and his receipt of the emoluments of the *church, [*7] will be evidence that he is parson without formal proof of his title. Bevan v. Williams, 3 T. R. 635 (a); Smith v. Taylor, 1 Bos. & Pul. N. R. 210. Again, upon an indictment against a letter-carrier for embezzlement under 2 Wm. 4, c. 4, proof that he acted as such was held to be sufficient, without showing his appointment. R. v. Borrett, 6 C. & P. 124: 25 E. C. L. R.

The rule by which the admissions of a party are treated as the best evidence against himself has been carried in civil cases to the extent of allowing even the contents of a written document, which are directly in issue, to be proved by such evidence, without in any way accounting for the non-production of the document itself. Whether at all, or how far, this rule is applicable to criminal cases, does not appear to have been much discussed. There does not, on principle, seem any reason why the admissions of a prisoner should not be receivable in evidence as well when they relate to the contents of a written document, as when they amount to direct confessions of guilt. The rule is generally laid down in the broadest terms: *optimum habemus testem confitentum reum.* Everything which the prisoner says against himself is proper for the consideration of the jury, who are to ascribe such weight to it as may seem to them to deserve. 1 Russ. on Crimes, 218 n. The law, as applicable to civil cases, is laid down in Slatterie v. Pooley, 6 M. & W. 669. The reason, says Parke, B., in giving judgment, "why such statements or acts are admissible without notice to produce or accounting for the absence of the written instrument is, that they are not open to the same objection which belongs to parol evidence from other sources, where the written evidence might have been produced; for such evidence is excluded, from the presumption of its untruth arising from the very nature of the case where better evidence is withheld; whereas, what a party himself admits to be true may reasonably be supposed to be so." See also R. v. Welsh, 1 Den. C. C. R. 199.(2)

(1) The authority of an agent to act for a corporation, need not be proved by record or a writing, but may be presumed from acts and the general course of business. Warner v. The Ocean Insurance Co., 16 Maine, 439.

(2) "It may be laid down, I think, as an undeniable proposition, that the admissions of a party

Secondary evidence—lost documents.] We have already seen that in certain cases secondary evidence of the contents of written documents is admissible. The most frequent case is that in which the document has been lost or destroyed. In order to lay the necessary foundation for the admission of secondary evidence in this case, it must be shown that the document has once existed, and has either actually ceased to exist, or that all reasonable efforts have been made to find it and have failed.(1)

The degree of diligence to be exercised in searching for a document will depend in a great measure on its importance Gully v. Bishop of Exeter, 4 Bing. 298: 13 E. C. L. R.; Gathercole v. Miall, 15 M. & W. 319, 335. In the case of a useless document, the presumption is that it is destroyed. Per Bayley, J., in R. v. E. Farleigh, 6 D. & R. 153. And, where the loss or destruction of a paper is highly probable, very slight evidence is sufficient. Per Abbott, C. J., in Brewster v. Jewell, 3 B. & A. 296: 5 E. C. L. R. Thus where depositions have been delivered to the clerk of the peace or his deputy, and it appears that the practice is on a bill being thrown out, to put away the depositions as useless, slight evidence of search is sufficient, and the deputy need not be called, it being his duty to deliver the depositions to his principal. Freeman v. Ashell, 2 B. & C. 496: 9 E. C. L. R. See Boyle v. Wiseman, 10 Ex. 647.(2)

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are competent evidence against himself, only in cases when parol evidence would be admissible to establish the same facts, or in other words, when there is not in the judgment of the law, higher and better evidence in existence to be produced. It would be a dangerous innovation upon the rules of evidence, to give any greater effect to confessions or admissions of a party, unless in open court, and the tendency would be to dispense with the production of the most solemn documentary evidence." Nelson, J., in Welland Canal Co. v. Hathaway, 8 Wendell, 486; The Dutchess Cotton Manufactory v. Davis, 14 Johns. 328; All Saints' Church v. Lovitt, 1 Hall, 191; Jenner v. Joliffe, 6 Johns. 9; Hasbrouck v. Baker, 10 Johns. 249. See Day v. Seal, 14 Johns. 404. Even the admission under oath of the party who executed the instrument will not enable the court to dispense with the subscribing witness. Kinney v. Flynn, 2 Rhode Island, 319.

(1) When a witness refuses to produce a document after being served with a *subpœna duces tecum*, parol evidence is not admissible. Richards v. Stewart, 2 Day, 328; Lynd v. Judd, 3 Ibid. 499. It seems that there is no case where parol evidence has been admitted, merely because a paper is in the hands of a third person, and the court in their discretion have refused a *subpœna duces tecum*. Gray v. Pentland, 2 Serg. & Rawle, 31. See Deaton v. Hill, Hayw. 73. A written contract deposited in the hands of a witness in a foreign state, by the parties, may be proved by the deposition of the depositary, and need not be produced in court. Baily v. Johnson, 9 Cowen, 115.

An original paper in the hands of a person, who cannot be reached by the process of the court so as to compel its production, may be proved by parol. Ralph v. Brown, 3 Watts & Serg. 395. The admissions of a party proven by parol testimony, are not admissible to prove the contents of a deed or written instrument, without the absence of the instrument is accounted for by evidence of notice to produce it or its loss. The absence of the instrument in another State is not sufficient reason for admitting parol evidence of its contents. Threadgill v. White. 11 Iredell, 591.

But upon the preliminary question of the competency of a witness, parol evidence of an instrument is admissible without producing it or proving its loss. Hays v. Richardson, 1 Gill & Johns. 366; Stebbins et al. v. Sachet, 5 Conn. 258; Carmalt v. Platt, 7 Watts, 318; Hernden v. Givens, 16 Alabama, 262; Den v. Achmore, 2 Zabriskie, 261; or to impeach his credit. The State v. Ridgely, 2 Har. & McHen. 120; Clark v. Hall, 2 Ibid. 378.

The existence and subsequent loss of an instrument must be first proved, before a copy thereof or parol evidence of its contents can be introduced. Young v. Mackall, 3 Maryland Chancery Dec. 398; S. C., 4 Maryland, 362; Dunnock v. Dunnock, Ibid. 140; Floyd v. Mintrey, 5 Richardson, 361; Molineaux v. Collier, 13 Georgia, 406; Perry v. Roberts, 17 Missouri, 36; Millard v. Hall, 24 Alabama, 209.

The amount of evidence required to prove the loss of a written instrument, for the purpose of admitting secondary evidence of its contents, depends, in a great measure, upon the nature of the instrument and the circumstances of the case. Waller v. School District, 22 Conn. 326; Harper v. Scott, 12 Georgia, 125; Meek v. Spencer, 8 Indiana, 118.

The law requires *bona fide* and diligent search for the paper alleged to be lost, in the place where it is most likely to be found: Glenn v. Rogers, 3 Maryland, 312; mere notice to produce is not enough to justify the adverse party in introducing a paper in evidence. The State v. Wisdom, 8 Port. 511.

Notice to produce a notice is not requisite to let in evidence of its contents. Atwell v. Grant, 11 Maryland, 101.

(2) United States v. Reyburn, 6 Peters, 352; Minor v. Tillotson, 7 Ibid. 99; Cary v. Campbell, 10 Johns. 363; Pendleton v. The Commonwealth, 4 Leigh, 694; Van Dusen v. Frink, 15 Pick. 449; Braintree v. Battles, 6 Vermont, 395; Bennet v. Robinson, 3 Stewart, 227.

Where it is the duty of the party in possession of a document to deposit it in a particular place, and it is not found in that place, the presumption is that it is [*8] lost or destroyed. R. v. Stourbridge, 8 B. & C. 96: 15 E. C. L. R. And where an attorney or officer is applied to generally for documents, the court will assume, until the contrary is proved, that all the documents relating to the subject of inquiry

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Except when the paper has been wantonly destroyed by the party himself. Price v. Tallman, 1 Coxe, 447; Broadwell v. Riles, 3 Halsted, 275: or he has had it in his power to supply the loss. McCalley v. Franklin, 2 Yeates, 340.

Loss must be shown. Sterling v. Potts, 2 Southard, 773; Boynter v. Rees, 8 Pick. 329; Bozerth v. Davidson, 2 Penn. 617; Dawson v. Graves, 4 Call, 127; United States v. Porter, 3 Day, 283; Cauffman v. The Congregation, 6 Binney, 59; Andrews v. Hooper, 13 Mass. 472; Taunton Bank v. Richardson, 5 Pick. 436; Mitchell v. Mitchell, 3 Stewart & Porter, 81; Boothe v. Dorsey, 11 Gill & Johns. 247; Parks v. Dunkle, 2 Watts & Serg. 291.

The party himself is competent to prove the loss to let in secondary evidence. Chamberlain v. Gorham, 20 Johns. 144; Blanton v. Miller, 1 Hayw. 4; Donelson v. Taylor, 8 Pick. 390; Jackson v. Johns, 5 Cowen, 74; Jackson v. Betts, 6 Ibid. 377; 9 Ibid. 208; Grimes v. Talbot, 1 Marsh, 205; Shrawsders v. Harper, 1 Harrington, 444; Hamit v. Lawrence, 2 A. K. Marshall, 366; Bass v. Brooks, 1 Stewart, 44; McNeil v. McClintock, 5 N. Hamp. 355; Adams v. Leland, 7 Pick. 62; Ward v. Ross, 1 Stewart, 136; Davis v. Spooner, 3 Pick. 284; Patterson v. Winne, 5 Peters, 233; Porter v. Ferguson, 4 Florida, 102; Wade v. Wade, 12 Illinois, 89; Pharis v. Lambert, 1 Sneed, 228; Glassell v. Mason, 32 Alabama, 719. *Contra* Sims v. Sims, 2 Rep. Const. Ct. 225: its previous existence having been first proved *aliunde*. Mecker et al. v. Jackson, 3 Yeates, 442. He is sworn specially in such cases to make answer. Jackson v. Packhurst, 4 Wend. 309. The evidence of loss is addressed to the court alone. Jackson v. Brier, 16 Johns. 193; Page v. Page, 15 Pick. 368; Witter v. Latham, 12 Conn. 392. The instrument must be proved to have been duly executed. Kimball v. Morell, 4 Greenl. 368; McPherson v. Rathbone, 2 Wend. 216; Jackson v. Vail, Ibid. 175.

A party to a cause is a competent witness to prove the loss or destruction of an original paper, in order to the introduction of collateral evidence of its contents. The affidavit of the party is a mode proper to be adopted for the introduction of the evidence of the party to the cause of the loss of an original paper, and upon other collateral questions such affidavit should exclude all presumption that the party may have the paper in his own possession. Woods v. Gasatt, 11 N. Hamp. 442. See Colman v. Walcott, 4 Day, 388.

When one party to a suit is sworn to prove the loss of a written instrument with a view to secondary evidence, though the adverse party may be examined to disprove the loss and account for the instrument, yet he cannot, under the color of this right, give testimony denying directly or indirectly the former existence of the instrument, or the matters designed to be evinced by it. The party affirming the loss cannot be sworn, until after the former existence of the instrument has been established by independent evidence; and when sworn, his testimony, as well as that of his adversary, is, in general, to be confined to the single question of loss. Woodworth v. Barker, 1 Hill, 171.

It is not, however, a universal and inflexible rule that a plaintiff must himself make oath to the loss of a paper, of which he is presumed to have the custody, and of diligent search for it, before he can introduce secondary evidence of its contents. Foster v. Mackay, 7 Metcalf, 531.

Presumptive evidence of loss is not enough. Taunton Bank v. Richardson, 5 Pick. 436; Jackson v. Woolsey, 11 Johns. 446; Patterson v. Winne et al., 5 Peters, 233; S. C., 9 Ibid. 633; Jackson v. Root, 18 Johns 60; Central Turnpike v. Valentine, 10 Pick. 142; Bouldin v. Massie, 7 Wheat. 182; Jackson v. Mely, 10 Johnson, 374.

A deposition should not be rejected because the witness speaks of papers not produced, if it appear that the papers are such as would not probably be preserved for so great a length of time, and are not in the possession or in the power of the witness or the party who offers the deposition. Tilghman v. Fisher, 9 Watts, 441.

Proof that a ship's papers were seized with her, and delivered to the court by which she was condemned, but that a certain paper belonging to her could not be found there, on search, is sufficient evidence of loss to warrant parol evidence of its contents. Francis v. Ocean Ins. Co., 6 Cowen, 404; Braintree v. Battles, 6 Vermont, 395.

Ex parte affidavits of witnesses are not admissible to prove the loss or contents of a written instrument. Viles v. Moulton, 13 Vermont, 510.

It is enough to show reasonable diligence. Minor v. Tillotson, 7 Peters, 99. When proof by a witness that he assisted the plaintiff in searching among his papers is not sufficient, see Sims v. Sims, 2 Rep. Const. Ct. 225. Evidence which leaves the mind in doubt whether success would not have attended a further search will not do. Studdart v. Vestry, 2 Gill & Johns. 227. A search for a lost paper made more than a year before the trial, is not sufficient to justify the introduction of the secondary evidence of the paper. Porter v. Wilson, 1 Harris, 641. See further as to what is reasonable diligence, Fletcher v. Jackson, 23 Vermont, 581; Hall v. Van Wyck, 10 Barbour, Sup. Ct. 376; Meakim v. Anderson, 11 Ibid. 215.

If an instrument be lost to the party in consequence of an irregular or defective transmission by mail, it will let in secondary evidence. U. S. Bank v. Sill, 5 Conn. 106. See Thalhimer v. Brinkerhoff, 6 Cowen, 90.

Secondary evidence of the contents of a written instrument is admissible when it has been destroyed voluntarily, through mistake or by accident. Riggs v. Taylor, 9 Wheat. 483; Bank of Kentucky v. McWilliams, 2 J. J. Marshall, 256; Kennedy v. Fowke, 5 Har. & Johns. 63; McDowell v. Hall, 2 Bibb, 610; Maxwell v. Light, 1 Call, 117; Fouax v. Fouax, 1 Pennington, 166; Brown v. Littlefield, 7 Wendell, 454.

are produced. McGahey v. Alston, 2 M. & W. 213. But where an attorney was applied to for a document which related to his own private affairs, and by his direction a search was made in his office, and the document was not found, the Court of Queen's Bench refused to say that the Court of Quarter Sessions was wrong in deciding that there had not been a sufficient search for the purpose of rendering secondary evidence admissible. R. v. Saffron Hill, 1 E. & B. 93: 72 E. C. L. R.; S. C. 22 L. J. M. C. 22.

It is not necessary in every case to call the person to whose custody the document is traced. R. v. Saffron Hill, *ubi supra*. But some doubt seems to have existed whether, if he be not called, evidence can be given of answers made by him to inquiries respecting the document. Such evidence appears to have been received in R. v. Morton, 4 M. & S. 48, but was rejected in R. v. Denio, 7 B. & C. 620: 14 E. C. L. R. In R. v. Kenilworth, 7 Q. B. 642: 53 E. C. L. R., the court seems to incline to the opinion that for this preliminary purpose such evidence ought to be received; in R. v. Saffron Hill, 1 E. & B. 93: 72 E. C. L. R., evidence of this kind had been received, but as the court thought that, even if receivable, it was insufficient for the purpose, the point remained undecided. However, in R. v. Braintree, 28 L. J. M. C. 1, the Court of Queen's Bench thought that answers to such inquiries were admissible to satisfy the conscience of the court that the search had been a reasonable one.

Secondary evidence—documents in the hands of adverse party.] In the case where a document is in the hands of an adverse party, a notice to produce it in court must be given to him, before secondary evidence of its contents can be received. Its object is not, as was formerly thought, to give the opposite party an opportunity of providing the proper testimony to support or impeach the document, but it is merely to enable him to produce it if he likes at the trial, and thus to secure the best evidence of its contents. Dwyer v. Collins, 7 Ex. R. 639. There is no distinction between civil and criminal cases with regard to the production of documents after notice given to produce them, and with regard to the admissibility of secondary evidence in case of their non-production. R. v. Le Merchand, coram Eyre, B., 1 Leach, 300 (n). In R. v. Layer, for high treason, it was proved by a witness, that the prisoner had shown him a paper partly doubled up, which contained the treasonable matter, and then immediately put it in his pocket; and no objection was made to the witness giving parol evidence of the paper. 6 State Trials, 229 (fo. ed.); 16 Howell's St. Tr. 170, S. C.; R. v. Francia, 15 Howell's St. Tr. 941.

A notice to produce will let in secondary evidence in criminal as well as civil cases, where the document to be produced appears to have been in the hands of the agent or servant of the prisoner under such circumstances as that it might be presumed to have come to his own hands. Colonel Gordon was indicted for the murder of Lieutenant-Colonel Thomas in a duel. The letter from Gordon containing the challenge was carried by Gordon's servant, and delivered to Thomas's servant, who brought a letter in answer, and delivered it to Gordon's servant; but it did not ap- [*9] pear in fact, that the letter was ever delivered *to Gordon himself. Mr. Baron Eyre permitted an attested copy of the latter letter to be read against the prisoner, and left it to the jury as evidence, if they were of opinion that the original had ever reached the prisoner's hands. Hotham, B., concurred; but Gould, J., thought that positive evidence ought to be given that the original had come to the prisoner's hands. R. v. Gordon, O. B. 1784; 1 Leach, 300 (n). Though the evidence was rightly received, there seems to be an error in leaving the preliminary question of

fact to the jury: all such questions are for the court alone. See Boyle v. Wiseman, *infra*, p. 12. Where a prisoner's attorney produced a deed as part of the evidence of his client's title upon the trial of an ejectment, in which the prisoner was lessor of the plaintiff, and the deed was delivered back to the attorney when the trial was over, it was held to be in the prisoner's possession, and the prisoner not producing it in pursuance of notice, secondary evidence of its contents was received. Per Vaughan, B., R. v. Hunter, 4 C. & P. 128: 19 E. C. L. R. But in order to render a notice to produce available, the original instrument must be shown to be in the possession of the opposite party, or of some person in privity with him, who is bound to give up possession of it to him. Therefore, where a document is in the hands of a person as a stakeholder between the defendant and a third party, a notice to produce will not let in secondary evidence of its contents. Parry v. May, 1 Moo. & R. 279. See also Laxton v. Reynolds, 18 Jur. 963, Exch.

Secondary evidence—notice to produce—when dispensed with.] Where from the nature of the prosecution the prisoner must be aware that he is charged with the possession of the document in question, a notice to produce it is unnecessary.(1) Thus, upon an indictment for stealing a bill of exchange, parol evidence of its contents may be given, without any proof of a notice to produce. R. v. Aickles, 1 Leach, 294; 2 East, P. C. 675. So upon the trial of an indictment for administering an unlawful oath, it may be proved by parol that the prisoner read the oath from a paper, although no notice to produce that paper has been given. R. v. Moor, 6 East, 419 (n).

But an indictment for setting fire to a dwelling-house, with intent to defraud an insurance office, is not such a notice to the prisoner as will dispense with a notice to produce the policy of insurance, so as to allow the prosecutor to give secondary evidence of its contents. R. v. Ellicombe, 5 C. & P. 522: 24 E. C. L. R.; S. C. 1 Moo. & R. 260; R. v. Kitson, 1 Dear. C. C. R. 187; S. C. 22 L. J. M. C. 118.

A notice to produce is not requisite where the document tendered in evidence is a duplicate original: per Lord Ellenborough, Philipson v. Chace, 2 Camp. 110; per Bayley, J., Colling v. Treweek, 6 B. & C. 398: 13 E. C. L. R.; or a counterpart: Burleigh v. Stibbs, 5 T. R. 465; Roe d. West v. Davis, 7 East, 353; Mayor of Carlisle v. Blamire, 8 East, 487. Or where the instrument to be given in proof is a notice, as a notice of action: Jory v. Orchard, 2 B. & P. 39; a notice of the dishonor of a bill of exchange: Keene v. Beaumont, 2 B. & P. 288; or a notice to quit: 2 B. & P. 41.(2) Nor is a notice to produce necessary where the party has fraudulently or forcibly obtained possession of the document, as from a witness in

(1) Commonwealth v. Messenger et al., 1 Binney, 273; The People v. Halbroke, 13 Johnson, 90. Or when the party has fraudulently obtained possession, or has it in court. Pickering v. Meyers, 2 Bailey, 113.

If the plaintiff is deprived of the instrument on which the action is brought by a fraudulent and forcible act of the defendant, the plaintiff may give secondary evidence of its contents, and he is not obliged to notify the defendant to produce it. Gray v. Kernahan, 2 Rep. Const. Ct. 65.

On a trial for forgery it is competent to prove by the party attempted to be defrauded, without notice to produce papers, that the defendant had previously brought to him the draft of an instrument which he saw and read, but never executed, and which was different from the deed afterwards brought to him as the same, and as such executed by him. The State v. Shurtliff, 18 Maine, 368.

(2) Where a copy of a paper is delivered to a party, and the original of the same is kept by the person delivering the copy, the original cannot be read in evidence to affect the party to whom the copy is delivered, with a knowledge of its contents, without notice being first given to the latter to produce such copy, and a sufficient ground being laid for the admission of a copy in evidence. The Commonwealth v. Parker, 2 Cushing, 212.

Parol evidence may be given of the contents of a paper not produced or accounted for, if the object is not to prove the facts which the writing would prove, but only something collateral, as its identity with or difference from another writing. West v. State, 2 Zabriskie, 212.

fraud of his *subpœna duces tecum*. Goodered v. Armour, 3 Q. B. 956: 43 E. C. L. R (1)

It is sufficient to dispense with a notice to produce, that the party in possession of [*10] the document has it with him in court. Dwyer v. *Collins, 7 Ex. R. 639, overruling Bate v. Kinsey, 1 Cr. M. & R. 38.(2)

Secondary evidence—notice to produce—form of.] It is not necessary that a notice to produce should be in writing; and if a notice by parol and in writing be given at the same time, it is sufficient to prove the parol notice alone. Smith v. Young, 1 Campb. 440; 2 Russell, 677. Nor is a notice to produce necessary if the document be known and can be proved to be not in existence. R. v. Haworth, 4 C. & P. 254: 19 E. C. L. R.; R. v. Spragge, cited in How v. Hall, 14 East, 276 (n). But it is better, and it is the universal practice, to give the notice in writing. No particular form of notice is requisite if it sufficiently appear what the document is which is required to be produced, and when and where that is to be done. Lawrence v. Clark, 14 M. & W. 251. Where under a notice to produce "all letters, papers, or documents touching or concerning the bill of exchange mentioned in the declaration," the party served was called upon to produce a particular letter, Best, C. J., was of opinion that the notice was too vague, and that it ought to have pointed out the particular letter required. France v. Lucy, Ry. & Moo. N. P. C. 341: 21 E. C. L. R.; see also Jones v. Edwards, McCl. & Y. 149. But a notice to produce "all letters written by plaintiff to defendant relating to the matters in dispute in this action," Jacob v. Lee, 2 Moo. & R. 33, or "all letters written to and received by plaintiff between 1837 and 1841, both inclusive, by and from the defendants, or either of them, and all papers, &c., relating to the subject-matter of this cause," Morris v. Hanson, 2 Moo. & R. 392, has been held sufficient to let in secondary evidence of a particular letter not otherwise specified. And see Rogers v. Custance, 2 Moo. & R. 179.

Secondary evidence—notice to produce—to whom and when.] In criminal as well as in civil cases it is sufficient to serve the notice to produce, either upon the defendant or prisoner himself, or upon his attorney.(3) Cates, q. t. v. Winter, 3 T. R. 306; McNally on Ev. 355; 2 T. R. 203 (n); 2 Russell, 678. And it may be left with a servant of the party at his dwelling-house. Per Best, C. J., Evans v.

(1) When there was evidence sufficient to warrant the belief that the person or agent of whom the defendant claimed had got possession of a bill of sale, from himself to the plaintiff, and fled the country with it, it was held that further proof of search, or of notice to the defendant to produce it, was unnecessary. Every presumption is to be made *in odium spoliatoris*. Cheatham v. Riddle, 8 Texas, 162.

Secondary evidence of the contents of a writing, which is in the possession of a third person residing out of the jurisdiction of the court, and which cannot be presumed to be in the possession of the opposite party, is admissible without giving previous notice to said party to produce the original. Shephard v. Giddings, 22 Conn. 282.

Parol evidence is admissible to show the contents of a paper beyond the jurisdiction of the court. Brown v. Wood, 19 Missouri, 475.

The naked fact of voluntary destruction, without explanation, of a paper, is held such presumptive evidence of fraudulent design as to preclude all secondary evidence. Bayley v. McMickle, 9 California, 430.

(2) A notice given at the bar during the progress of a trial to produce a paper, is not sufficient unless it appears satisfactorily that the paper is in court at the time, and in possession of the party upon whom demand is made, or if elsewhere, that it could be easy of access. Atwell v. Miller, 6 Maryland, 10.

Notice a few minutes before is not enough unless the paper is in court. McPherson v. Rathbone, 7 Wendell, 216. See Pickering v. Meyers, 2 Bailey, 113.

(3) What notice sufficient, see Bogart v. Brown, 5 Pick. 18; Bemis v. Charles, 1 Metcalf, 440. When a paper is in possession of the attorney of the party, he should have notice to produce it, and not a *subpœna duces tecum*. McPherson v. Rathbone, 7 Wendell, 216.

Sweet, R. & M. 83: 21 E. C. L. R. It must be served within a reasonable time, but what shall be deemed a reasonable time must depend upon the circumstances of each particular case.(1) The prisoner was indicted for arson. The commission-day was the 15th of March, and the trial came on upon the 20th. Notice to produce a policy of insurance was served on the prisoner in gaol upon the 18th of March. His residence was ten miles from the assize town. It being objected that this notice was too late, Littledale, J., after consulting Parke, J., said, "We are of opinion that the notice was too late. It cannot be presumed that the prisoner had the policy with him when in custody, and the trial might have come on at an earlier period of the assize. We therefore think that secondary evidence of the policy cannot be received." R. v. Ellicombe, 5 C. & P. 522: 24 E. C. L. R; 1 Moo. & R. 260; S. C. R. v. Haworth, 4 C. & P. 254: 19 E. C. L. R; S. P. So where the notice to produce a policy of insurance was given to the prisoner in the middle of the day preceding the trial, the prisoner's residence being thirty miles from the assize town, it was held to be too late. R. v. Kitson, Dears. C. C. R. 187; S. C. 22 L. J. M. C. 118. Notice served on the attorney at his office on the evening before the trial, at half-past *seven, was held by Lord Denman, C. J., to be insufficient to let in secondary [*11] evidence of a letter in his client's possession. Byrne v. Harvey, 2 Moo. & R. 89; and see also Lawrence v. Clark, 14 M. & W. 250.

In R. v. Barker, 1 F. & F. 326, a notice to produce policies of insurance served on the prisoner's attorney on Tuesday evening, the policies being then twenty miles off, and the trial taking place on the Thursday, was held sufficient, it being shown that there was an opportunity of procuring the policies, if the prisoner had chosen to do so.

Service of a notice on a Sunday is bad. Per Patteson, J., in Hughes v. Budd, 8 Dowl. P. C. 315.

Secondary evidence—consequences of notice to produce.] The only consequence of giving a notice to produce is that it entitles the party giving it, after proof that the document in question is in the hands of the party to whom it is given, or of his agent, to go into secondary evidence of its contents, but does not authorize any inference against the party failing to produce it. Cooper v. Gibbons, 3 Campb. 363. It would seem, however, that the refusal to produce is matter of observation to the jury.(2) Semb. per Lyndhurst, C. B., 4 Tyrwh. 662; 1 Cr. M. & R. 41. But see Doe v. Whitehead, 8 A. & E. 671: 55 E. C. L. R.

If a party to the suit refuses to produce a document when called on, he cannot afterwards produce it as his own evidence: Laxton v. Reynolds, 18 Jur. 963, Ex.; and if the defendant refuses to produce a document, and the plaintiff is thereby compelled to give secondary evidence of its contents, the defendant cannot afterwards produce it as part of his own case, in order to contradict the secondary evidence. Doe v. Hodgson, 12 Ad. & E. 135: 64 E. C. L. R. If he calls for papers, and inspects them, they will be rendered evidence for the opposite party.(3) Wharam

(1) A paper being traced into the possession of a prisoner in close custody, notice to produce it was served on him four days before the day of trial; his residence being four and a half miles distant, held that the notice was sufficient to authorize the admission of secondary proof. The State v. Hester, 2 Jones's Law, N. C., 83.

(2) Every intendment is to be made against a party to whose possession a paper is traced, and who does not produce it on notice. Life & Fire. Co. v. Mechanics' Co., 7 Wendell, 31. But the party is permitted to purge himself on oath from the possession. Vasse v. Mifflin, 4 Wash. C. C. R., 519.

(3) If a book or document be called for by a notice to produce it, and it be produced, the mere notice does not make it evidence; but if the party giving the notice takes and inspects it, he takes

v. Routledge, 5 Esp. 235. Wilson v. Bowie, 1 C. & P. 10: 12 E. C. L. R. Though it is otherwise, if he merely calls for them without inspecting them. Sayer v. Kitchen, 1 Esp. 210. Secondary evidence of papers cannot be given until the party calling for them has opened his case, before which time there can be no cross-examination as to the contents. Graham v. Dyster, 2 Stark. N. P. 23: 3 E. C. L. R. As against a party who refuses, on notice, to produce a document, it will be presumed that it bore the requisite stamp, but the party refusing is at liberty to prove the contrary. Crisp v. Anderson, 1 Stark. N. P. 35: 2 E. C. L. R.; Closmadeue v. Carrel, 18 Com. B. 36: 86 E. C. L. R.

Secondary evidence—privileged communications.] The grounds upon which a party can withhold a document which he acknowledges to possess, and which he is called upon to produce, will be stated hereafter in treating of privileged communications in general. It has been held, that it is the party who seeks to give secondary evidence who must satisfy the court that the witness refuses to produce the deed, and is justified in doing so. The party in possession of the document must, therefore, be served with a *subpœna duces tecum* in the ordinary way, and he must appear in court and claim his privilege. If the privilege be claimed by the witness on behalf of himself, the question, whether or not he is entitled to it, will be decided on his evidence only; but, if the privilege be claimed by a witness on behalf of another person, as by an attorney on behalf of his client, it may be necessary to call that per-
[*12] son; as, if he were *present, he might waive his privilege. But, in the case of an attorney, his assertion, that in withholding the document he is acting by his client's direction, will generally be sufficient. Tayl. Ev. 407; Doe d. Gilbert v. Ross, 7 M. & W. 102; Newton v. Chaplin, 10 C. B. 356; Phelps v. Prew, 3 E. & B. 430: 77 E. C. L. R. See further *post*, tit. *Privilege of Witness.*

Secondary evidence—physical inconvenience.] The nature of the obstacles which render it impossible, or highly inconvenient, to produce a document on physical grounds, must be proved in the usual way. This being done to the satisfaction of the court, secondary evidence of the contents will be admitted. Thus, where in an indictment for unlawfully assembling, the question was, what were the devices and inscription on certain banners carried at a public meeting, it was held that parol evidence of the inscriptions was admissible. R. v. Hunt, 3 B. & C. 566: 10 E. C. L. R. So the inscriptions on a monument may be proved by parol. Doe v. Cole, 6 C. & P. 357: 25 E. C. L. R. But where a notice was suspended by a nail to the wall of an office, it was held that it must be produced. Jones v. Tarleton, 9 M. & W. 675. Secondary evidence may be given of tablets let into walls; or where the original is in a foreign country and cannot be removed. Alison v. Furnival, 1 C. M. & R. 277; see Boyle v. Wiseman, 10 Ex. R. 647.

Secondary evidence—public documents.] It is not laid down what are public documents; but, as in all other cases, it is the party who seeks to give secondary evidence

it as testimony to be used by either party if material to the issue. Penobscot Boom Corporation v. Lamson, 16 Maine, 224.

A paper produced on notice must be proved, unless he who produces it is a party to it or claims a beneficial interest under it. Lessee of Rhoads v. Selin, 4 Wash. C. C. Rep. 715.

Proof of the handwriting of the signature to a lost instrument, when the knowledge of the witness as to that handwriting has been acquired since he saw the instrumeot, must be of the most positive and unequivocal kind; such as seeing the party write or acknowledge his signature. Porter v. Wilson, 1 Harris, 641; Stone v. Thomas, 12 Ibid. 209. Witnesses to prove the contents of a lost instrument may state the substance thereof without giving the exact words. Commonwealth v. Roark, 8 Cush. 210.

of the document, who must satisfy the court that the document is of a public nature, within the meaning of the rule. Many documents of this kind will be found mentioned in the chapter on *Documentary evidence.* It is to be observed, that there is in this case this peculiarity, that a particular kind of evidence is required by the law to be substituted for the original, and no other evidence of contents of public documents is admissible. What this evidence is will be found in the chapter already alluded to.

Secondary evidence—duty of judge.] The preliminary question of fact upon which the admissibility of the evidence depends, is for the decision of the judge, not of the jury. And in order to decide this question, he must receive all the evidence which is tendered by either party upon the point, if such evidence is otherwise proper. Therefore, where a party who had made a *primâ facie* case for the reception of secondary evidence of a document, proceeded to prove its contents by the parol evidence of a witness who had seen the original, on which the opposite party interposed, and showing a document to the witness, asked him if that was the original, which the witness denied; it was held that the judge was bound to decide the collateral question, whether the document thus offered was the original or not, and upset or receive the secondary evidence accordingly. Boyle v. Wiseman. 1 Jur. N. S. 894.

As to degrees of secondary evidence.] In Brown v. Woodman, 6 C. & P. 206: 25 E. C. L. R.; it was said by Parke, J., that there are no degrees of secondary evidence; and he held that a defendant might give parol evidence of the contents of a letter, of which he had kept a copy, and that he was not bound to produce the copy. So where two parts of an agreement were prepared, but one only was stamped, which was in *the custody of the defendant, who, on notice, refused to produce it, [*13] the court ruled that the plaintiff might give the draft in evidence, without putting in the part of the agreement which was unstamped (1) Gamons v. Swift, 1 Taunt. 507. This principle was distinctly affirmed in Doe v. Ross, 7 M. & W. 102, and in Hall v. Ball, 3 M. & Gr. 242: 42 E. C. L. R. The only exception is where, as in the case of public documents, some particular species of evidence has been specially substituted for the original. But, even in this case, if good reason can be shown, why neither the original evidence nor the substituted evidence can be produced, secondary evidence of the ordinary kind will be admissible. Tayl. Ev. 459; Thornton v. Shetford, 1 Falk. 284; McDougall v. Gowry, Ry. & M. 392: 21 E. C. L. R.; Anon. 1 Vint. 257.

It is hardly necessary to say that, even if secondary evidence be admissible, a copy of a document is, in itself, no evidence of the contents of the original; and it can

(1) Proof of the contents of a lost paper should be the best the party has in his power to produce, and at all events such as to leave no reasonable doubt as to the substantial parts of the paper. Renner v. Bank of Columbia, 9 Wheat. 581.

If, in an indictment for forgery, the instrument be destroyed or suppressed by the prisoner, the tenor may be proved by parol evidence. The next best evidence is the rule; therefore, if there be a copy which can be sworn to, that is the next best evidence. United States v. Britton, 2 Mason, 464.

Copies of deeds made by disinterested persons, of good character, and under circumstances that create no imputation of fraud, may be received in evidence when the original is proved to be lost. Allen v. Parish, 3 Hammond, 107.

Due notice having been given to produce a letter, written by one party to another, and the latter not producing it, the former proved by his clerk that he copied the letter in a letter-book, and that it was his invariable custom to carry letters thus copied to the post-office, and seldom handed them back; but could not recollect that he sent this particular letter: held sufficient evidence of sending the letter, and that a copy was admissible evidence. Thelhimer v. Brinckerhoff, 6 Cowen, 90; United States v. Gilbert, 2 Sumner, 81. A letter-press copy, made at the time of writing the original paper, cannot be read in evidence as an original. Chapin v. Siger, 4 McLean, 378.

only become so when verified by the oath of a witness. Fisher v. Samuda, 1 Camp. 103; Tayl. Ev. 460. Still less is a copy of a copy any evidence of the contents of the original. Evringham v. Roundhill, 2 Moo. & Ry. 138; Zielman v. Pooley, 1 Stark. N. P. 168. But it might become so, if in addition to being itself verified, the copy from which it was taken was verified also.

[*14]

*PRESUMPTIONS.

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General nature of presumptive evidence.] No subject of criminal law has been more frequently or more amply discussed than that of presumptive evidence, and no subject can be more important; the nature of the presumptions made in criminal cases being the feature of English law which distinguishes it most strongly from all the continental systems. It is not possible to discuss in this place, at any length, the principles of evidence, but it is necessary to point out what is the general nature of presumptive evidence. "A presumption of any fact is properly an inference of that fact from other facts that are known; it is an act of reasoning." Per Abbott, C. J., Rex v. Burdett, 4 B. & A. 161: 6 E. C. L. R. When the fact itself cannot be proved, that which comes nearest to the proof of the fact is the proof of the circumstances that necessarily and usually attend such fact, and these are called *presumptions* and not *proofs;* for they stand instead of the proofs of the fact till the contrary be proved. Gilb. Ev. 157.(1) The instance selected by Chief Baron Gilbert to illustrate the nature of presumption is, where a man is discovered suddenly dead in a room, and another is found running out in haste with a bloody sword; this is a violent presumption that he is the murderer; for the blood, the weapon, and the hasty flight, are all the necessary concomitants of such facts; and the next proof to the sight of the fact itself is the proof of those circumstances that usually attend such fact. Id.

It is evident that, in every trial, numberless presumptions must be made by the jury; many so obvious that we are hardly aware that they are necessary, and these present no difficulty; but with regard to others, great care and caution are necessary in making them, and it is for this reason that there are certain practical rules which it is always desirable to observe on this subject.

There are indeed some presumptions which, as the phrase is, the law itself makes; [*15] that is, the law forbids, under certain circumstances *and for certain purposes, any other than one inference to be drawn, whether that inference be true or false. There are but few such presumptions in criminal cases, and those few mostly in favor of the prisoner. Where presumptions against the prisoner have been imperatively

(1) Wheeler's C. C. 132, a; Ih. 100.

directed by the law, the rule has generally been looked on with disfavor; as, for instance, the presumption required by the 21 Jac. 1, c. 27, that a woman delivered of a bastard child, who should endeavor to conceal its birth, should be deemed guilty of murder. This odious statute was repealed by 11 G. 4 & 1 W. 4, c. 66, s. 12.

These two kinds of presumptions are generally distinguished as presumptions of law and presumptions of fact, respectively. With regard to presumptions of law, there is not much difficulty, the circumstances under which they arise being generally pretty clearly defined. ' It is not so, however, with regard to presumptions of fact, there being frequently the difficulty not only of deciding whether a particular presumption ought to be made at all, but which of several presumptions arising out of the same state of facts is the right one.

The difference between the rules as to presumptions in civil and criminal cases seems to arise from this: that in civil cases it is always necessary for a jury to decide the question at issue between the parties, and, whatever be their decision, the rights of the parties will accordingly be affected; however much, therefore, they may be perplexed, they cannot escape from giving a verdict founded upon one view or the other of the conflicting facts before them; presumptions, therefore, are necessarily made on comparatively weak grounds. But, in criminal cases, there is always a result open to the jury, which is practically looked upon as merely negative, namely, that which declares the accused to be *not guilty* of the crime with which he is charged. In cases of doubt it is to this view that juries are taught to lean. 1 Phill. Ev. 156, 7th ed.; McNally Ev. p. 578. Great caution is doubtless necessary in all cases of presumptive evidence; and, accordingly, Lord Hale has laid down two rules with regard to the acting upon such evidence in criminal cases. "I would never," he says, "convict any person of stealing the goods *of a certain person unknown*, merely because he would not give an account how he came by them, unless there was due proof made that a felony was committed of these goods." And again, "I would never convict any person of murder or manslaughter, unless the fact were proved to be done, or, at least, the body found dead." 2 Hale, 290. So it is said by Sir William Blackstone, 4 Comm. 359, that all presumptive evidence of felony should be admitted cautiously, for the law holds that it is better that ten guilty persons escape, than that one innocent suffer. The following case on this subject was cited by Garrow, *arguendo* in R. v. Hindmarsh, 2 Leach, 571. The mother and reputed father of a bastard child were observed to take it to the margin of the dock in Liverpool, and after stripping it, to throw it in the dock. The body of the infant was not afterwards seen, but as the tide of the sea flowed and reflowed into and out of the dock, the learned judge who tried the father and mother for the murder of their child, observed that it was possible the tide might have carried out the *living* infant, and the prisoners were acquitted.

"With respect to the comparative weight due to direct and presumptive evidence, it has been said that circumstances are in many cases of greater force and more to be depended on than the testimony *of living witnesses; inasmuch as witnesses [*16] may either be mistaken themselves, or wickedly intend to deceive others; whereas circumstances and presumptions naturally and necessarily arising out of a given fact cannot lie. Per Mountenoy, B., Annesley v. Lord Anglesea, 9 St. Tr. 426; 17 Howell, 1430. It may be observed, that it is generally the property of circumstantial evidence to bring a more extensive assemblage of facts under the cognizance of a jury, and to require a greater number of witnesses, than where the evidence is direct, whereby such circumstantial evidence is more capable of being disproved if untrue. See Bentham's Rationale of Judicial Evidence, vol. 3, p. 251. On the

other hand, it may be observed, that circumstantial evidence ought to be acted on with great caution, especially where an anxiety is naturally felt for the detection of great crimes. This anxiety often leads witnesses to mistake or exaggerate facts, and juries to draw rash inferences; there is also a kind of pride or vanity felt in drawing conclusions from a number of isolated facts, which is apt to deceive the judgment. Not unfrequently a presumption is formed from circumstances which would not have existed as a ground of crimination, but for the accusation itself; such are the conduct, demeanor, and expressions of a suspected person, when scrutinized by those who suspect him. And it may be observed, that circumstantial evidence, which must in general be submitted to a court of justice through the means of witnesses, is capable of being perverted in like manner as direct evidence, and that, moreover, it is subjected to this additional infirmity, that it is composed of inferences each of which may be fallacious." Phill. Ev. 458, 8th ed.(1)

General instances of presumption.] As almost every fact is capable of being proved by presumptive as well as by positive evidence, it would be impossible to enumerate the various cases in which the former evidence has been admitted. It may be useful, however, to state some particular instances of presumptive proof which may occur in the course of criminal proceedings.

Proof of the possession of land, or the receipt of rent, is *primâ facie* evidence of seizin in fee.(2) Co. Litt. 15 a, B. N. P. 103. So possession is presumptive evidence of property in chattels. A deed or other writing thirty years old is presumed to have been duly executed, provided some account be given of the place where found, &c. B. N. P. 255. The license of a lord to inclose waste may be presumed after twelve or fourteen years' possession, the steward of the lord having been cognizant of it. Doe v. Wilson, 11 East, 56; Bridges v. Blanchard, 1 A. & E. 536: 28 E. C. L. R. The flowing of the tide is presumptive evidence of a public navigable river, the weight of such evidence depending upon the nature and situation of the channel. Miles v. Rose, 5 Taunt. 705: 1 E. C. L. R.; 1 Marsh, 813; S. C., R. v. Montague, 4 B. & C. 602: 10 E. C. L. R. The existence of an immemorial custom may be presumed from an uncontradicted usage of twenty years. R. v. Joliffe, 2 B. & C. 54: 9 E. C. L. R.; 3 D. & R. 240, S. C. So the continuance of things *in statu quo* will be

(1) As to circumstantial evidence, see McCann v. The State, 13 Smedes & Marsh. 147; The State v. Roe, 12 Vermont, 93; The People v. Videto, 1 Parker Crim. Rep. 603; Rippey v. Miller, 1 Jones' Law N. C. 479; Moore v. Ohio, 2 Ohio (N. S.), 500. Even in the case of a capital offence it is not necessary that the evidence should produce an absolute certainty upon the minds of the jury. Sumner v. The State, 5 Blackf. 579. If it is apparent that the accused is so situated that he could give evidence of all the facts and circumstances as they existed, and he fails to offer such proof, the natural conclusion is that if produced instead of rebutting it would sustain the charge. Com. v. Webster, 5 Cushing, 295; The People v McWhorter, 4 Barbour, 438.

When the evidence is circumstantial only, the jury in order to convict, must find the circumstances to be clearly proved as facts, and must also find that those facts clearly and unequivocally imply the guilt of the prisoner, and that they cannot be reasonably reconciled with any hypothesis of his innocence. U. States v. Douglass, 2 Blatchford, C. C. 207.

The true test as to whether evidence amounts to proof in criminal cases is, whether the circumstances proved produce moral conviction, to the exclusion of every reasonable doubt; and if this result is caused by the evidence, it can make no difference whether the testimony that leads to it is positive or circumstantial. Mickle v. The State, 27 Alabama, 20.

In the application of circumstantial evidence, the utmost caution should be used. It is always insufficient, when, assuming all to be proved which the evidence tends to prove, some other hypothesis may still be true. Algheri v. The State, 25 Mississippi, 584; Rippey v. Miller, 1 Jones' Law N. C. 479.

In a case of circumstantial evidence, the fact that the accused was of a peaceful temper and habits, was held to be admissible. Carroll v. The State, 3 Humphreys, 315.

(2) The People v. Reed, 11 Wend. 158.

generally presumed; as where the plaintiff being slandered in his official character proves his appointment to the office before the libel, his continuance in office at the time of the libel need not be proved though averred (1) R. v. Budd, 5 Esp. 230. So the law presumes that a party intended that which is the immediate or probable consequence of his act. R. v. Dixon, 3 M. & S. 11, 15.(2)

So a letter is presumed, as against the writer, to have been written *upon [*17] the day on which it bears date: Hunt v. Massey, 5 B. & Ad. 902: 27 E. C. L. R.; 3 Nev. & M. 109; and whether written by a party to the suit or not: Poten v. Glossop, 2 Ex. R. 191; and a bill is presumed to be made on the day it is dated: Owen v. Waters, 2 M. & W. 91; except when used to prove a petitioning creditor's debt: Anderson v. Weston, 6 New Cases, 296, 301. So the presumption is that indorsements on a note admitting the receipt of interest were written at the time of their date. Smith v. Battens, 1 Moo. & R. 341. Indeed it is a general presumption that all documents were made on the day they bear date. Davies v. Lowndes, 7 Scott, N. R. 214: 81 E. C. L. R.; Poten v. Glossop, 2 Ex. R. 191.

Presumption of innocence and legality.] The law presumes a man to be innocent until the contrary is proved, or appears from some stronger presumption. In other words, a man cannot be presumed to have committed a crime without some evidence of it. But any evidence, however small, if it be such that a reasonable man might fairly be convinced by it, is sufficient for the purpose.(3)

Presumption against immorality.] There is also a general presumption against immoral conduct of every description. Thus legitimacy is always presumed: Banbury Peerage case, 1 Sim. & S. 163; and cohabitation is generally presumptive proof of marriage: Doe d. Fleming v. Fleming, 4 Bing. 266: 13 E. C. L. R.; except in cases of bigamy. So it will not be presumed that a trespass or other wrong has been committed: Best Ev. 416; and there is always a presumption in favor of the truth of testimony. Id. 419. Where a woman, whose husband twelve months previously had left the country, married again, the presumption that she was innocent of bigamy was held to preponderate over the usual presumption of the duration of life. R. v. Inhab. of Twyning, 2 B. & A. 386. But the observations of Bayley, J., and Best, J., in Rex v. Twyning, with respect to conflicting presumptions, were questioned by the court in Rex v. Harborne, 2 Ad. & E. 544: 29 E. C. L. R.; where it was decided, that the Court of Quarter Sessions were right in presuming that the first wife was living, although such presumption led to the conclusion that the husband had been guilty of bigamy. The court did not, in this case, say that the decision in R. v. Twyning was wrong, but they observed that there was no such absolute presumption in favor of innocence as to override all other presumptions; and they put the case of a man being shown to be alive a few hours before the second marriage, as one in which the presumption that he was alive at the time of the second marriage would

(1) A state of relations between parties once shown to exist, is presumed to continue until a change is proved to have occurred. Eames v. Eames, 41 N. Hamp. 177.

(2) A person is presumed to intend the ordinary consequences of his acts; and the burden of proof is upon a person charged with crime to rebut this presumption by evidence of a different intent. The People v. Orcutt, 1 Parker's Crim. Rep. 252.

(3) In a criminal case, the establishment of a *prima facie* case only, does not take away the presumption of the defendant's innocence, nor shift the burden of proof: Ogletree v. The State, 28 Alabama, 693; The People v. Milgate, 5 California, 127.

The killing being proved, the law implies malice, and it devolves on the defendant to repel the presumption. The People v. Marsh, 6 California, 543; The People v. Stonecifer, Ibid. 405. See Gray v. Gardiner, 3 Mass. 399.

clearly be made. And it is to be observed, that the circumstances of the two cases differed so much as fully to justify the Court of Quarter Sessions in coming to opposite conclusions upon them. See upon the point of conflicting presumptions, Middleton v. Barned, 4 Ex. 241.

Presumption omnia rité esse acta.] This well-known presumption is of very common application. Upon this principle it is presumed that all persons assuming to act in a public capacity have been duly appointed.(1) Thus in R. v. Gordon, Leech's Cr. Ca. 515, on an indictment for the murder of a constable in the execution of his office, it was held to be not necessary to produce his appointment; and that it was [*18] sufficient if it was proved that he was known to act *as constable. The same presumption applies in favor of the due discharge of official and public duties.(2)

Presumptions from the course of nature.] It is a presumption of law that males under fourteen are incapable of sexual intercourse. So it is a presumption of fact that the period of gestation in women is about nine calendar months. The exact limits of this period are, both legally and scientifically, very unsettled; and, if there were any circumstances from which an unusually long or short period of gestation might be inferred, or if it were necessary to ascertain the period with any nicety, it would be desirable to have special medical testimony upon the subject. The subject was elaborately discussed in the Gardiner Peerage case, and the scientific evidence given in that case will be found in the report of it by Le Marchant. For ordinary purposes, however, it will be a safe presumption that fruitful intercourse and parturition are separated by a period not varying more than a week either way from that above mentioned.

There is no presumption of *law* that life will not continue for any period however long, but juries are justified in presuming, as a fact, that a person is dead who has not been heard of for seven years: Hopewell v. De Pinna, 2 Campb. 113; this is in analogy to the period fixed by the 1 Jac. 1, c. 11, s. 2 (see now 24 & 25 Vict. c. 900, s. 57), which absolves a husband or wife from the penalties of the crime of bigamy after an absence of seven years.(3)

Presumption of guilt arising from the conduct of the party charged.] In almost every criminal case a portion of the evidence laid before the jury consists of the conduct of the party, either before or after being charged with the offence, presented not

(1) Dean v. Gridley, 10 Wendell, 254; Bryden v. Taylor, 2 Har. & Johns. 396. So the presumption is that an officer has done his duty. Winslow v. Beall, 6 Call, 44.

(2) In favor of the acts of public officers the law will presume all to have been rightly done, unless the circumstances of the case overturn the presumption. Ward v. Barrows, 2 Ohio, 241.

The presumption is that the committing magistrate did his duty in reducing the examination to writing, until the contrary is proved. Davis v. The State, 17 Alab. 415; The State v. Eaton, 3 Harrington, 554; The State v. Parrish, Busbee's Rep. 239; Peter v. The State, 4 Smedes & Marshall, 31.

(3) Miller et al. v. Beater, 3 S. & R. 490; King v. Paddock, 18 Johns. 141; Wambaugh v. Scharck, 1 Penn. 229; Ionis et al. v. Campbell et al., 1 Rawle, 373; Crouch et ux. v. Eveleth, 15 Mass. 305; Battin's Lessee v. Bigelow, Peters C. C. Rep. 452.

When a person has been absent seven years from the place of his domicile, his death is presumed to have taken place at some time within the seven years, and not in all cases at the expiration of that period. The State v. Moore, 11 Iredell, 160.

When a party has been absent from his place of residence for more than seven years, and has not been heard from during that period, and is afterwards seen in his own State, hearsay evidence of the fact is not admissible, but the person who saw him should be brought to testify to the fact. Smothers v. Mudd, 9 B. Monroe, 490.

The presumption, in law, of a person's death, arises only after a seven years' absence, without intelligence, though a jury may find it under circumstances, from a shorter time. Puchett v. The State, 1 Sneed, 355; Stevens v. McNamara, 36 Maine, 176; Rice v. Lumley, 10 Ohio (N. S.), 596.

There is no positive rule as to when the presumption of death arises. Merritt v. Thompson, 1 Hilton (N. Y.), 550.

as part of the *res gestæ* of the criminal act itself, but as indicative of a guilty mind. The probative force of such testimony has been elaborately, carefully, and popularly considered by Bentham, in his *Rationale of Judicial Evidence*, ch. 4. In weighing the effect of such evidence nothing more than ordinary caution is required. The best rule is for the jury to apply honestly their experience, and to draw such inferences as experience indicates in matters of the gravest importance. This will, in general, be found a safer guide than a consideration of some of the extreme cases which are related in many of the books on evidence. These must be considered as somewhat exceptional, and it may be fairly said that this is a very useful kind of evidence, and one which no judge need seek to withdraw from the consideration of a jury.(1)

Presumption of guilt arising from the possession of stolen property.] It has already been stated that possession is presumptive evidence of property, *suprà*, p. 15; but where it is proved, or may be reasonably presumed, that the property in question is stolen property, the *onus probandi* is shifted, and the possessor is bound to show that he came by it honestly; and, if he fail to do so, the presumption is that he is the thief. In every case, therefore, either the property must be shown to have been stolen by the true owner swearing to its identity, and that he has lost it, or, if this cannot be done, the circumstances must be such as to lead in themselves to the conclusion that the property was not honestly come by. In the latter class of cases there are two presumptions: first, that the property was stolen; secondly, that it was stolen by the prisoner. The circumstances under which *the former of these pre- [*19] sumptions may be safely made are tolerably obvious. "Thus," it is said in 2 East, P. C. 656, "a man being found coming out of another's barn, and upon search corn being found upon him of the same kind with what was in the barn, is pregnant evidence of guilt. So persons employed in carrying sugar and other articles from ships, and wharves, have often been convicted of larceny at the Old Bailey, upon evidence that they were detected with property of the same kind upon them, recently upon coming from such places, although the identity of the property, as belonging to such and such persons, could not otherwise be proved. But this must be understood of articles like those above mentioned, the identity of which is not capable of strict proof from the nature of them." In R. v. Dredge, 1 Cox, Cr. Ca. 235, the prisoner was indicted for stealing a doll and other toys. The prosecutor proved that he kept a large toy shop, and that the prisoner came into the shop dressed in a smock frock. After remaining there some time, from some suspicion that was excited, he was searched, and under his smock frock was found concealed the doll and other toys. The prosecutor could not go further than to swear that the doll had once been his, but he could not swear that he had not sold it, and he had not missed it: and from the mode in which he kept his stock it was not likely that he would miss that or any other of the articles found on the prisoner. Erle, J., directed an acquittal. In R. v. Burton, Dears. C. C. 282, the prisoner was indicted for stealing pepper. He was found coming out of a warehouse in which there was a quantity of pepper both loose

(1) Offer to bribe the officer and attempt to escape are admissible. Dean v. The Commonwealth, 4 Grattan, 541; Whaley v. The State, 11 Georgia, 123; Fanning v. The State, 14 Missouri, 386.

It is competent to show that the defendant advised an accomplice to escape. The People v. Rathbone, 21 Wendell, 509.

Evidence that the defendant in an indictment refused to fly, when advised to do so, after suspicions against him were excited, is inadmissible in defence. The Commonwealth v. Hersey, 2 Allen, 173.

"Flight may be very strong evidence of guilt, or it may weigh nothing, according to the circumstances under which it takes place. The legal presumption from flight is against the prisoner, and it lies upon him to rebut it." Fox, J., Chapman's Trial, pamph. p. 213.

and in bags; when stopped and accused, he threw some pepper on the ground, and said, "I hope you will not be hard with me." Upon the case of R. v. Dredge being cited, Maule, J., pointed out the distinction that in this case the prisoner had, in fact, admitted that the pepper had not been honestly come by; and he added, "if a man go into the London Docks sober, and comes out of one of the cellars wherein are a million gallons of wine, very drunk, I think that would be reasonable evidence that he had stolen some of the wine in that cellar, though you could not prove that any wine was missed." In R. v. Hooper, 1 F. & F. 85, the prisoner was charged with stealing 190 lbs. weight of Lydney coal. He was left with a ton of that sort of coals in a cart at twelve o'clock, and delivered them, according to his orders, at one o'clock. At half-past twelve o'clock he sold 190 lbs. weight of Lydney coal to a person living in the same town, but there was no evidence of the quantity delivered being less than a ton, or of any other coal having been missed. Willes, J., left it to the jury to say, whether the 190 lbs. of coal sold by the prisoner was stolen property.

If the property be proved to have been stolen, or may fairly be presumed to have been so, then the question arises whether or not the prisoner is to be called upon to account for the possession of them. This he will be bound to do, and on his failing to do so, the presumption against him will arise, if, taking into consideration the nature of the goods in question, they can be said to have been *recently* stolen. In what cases goods are to be considered recently stolen cannot be defined in any precise manner, but the following cases show what some of the judges have thought on the subject. Where stolen property (it does not appear of what description) was found in the possession of a person, but sixteen months had elapsed since the larceny, Bayley, J., held that he could not be called to account for the manner in which *it [*20] came into his possession. Anon. 2 C. & P. 457: 14 E. C. L. R. Where two ends of woollen cloth in an unfinished state, consisting of about twenty yards each, were found in the possession of the prisoner, two months after they had been stolen, Patterson J., held that the prisoner ought to explain how he came by the property. "The length of time," said that learned judge, "is to be considered with reference to the nature of the articles which are stolen. If they were such as pass from hand to hand readily, two months would be a long time; but here that is not so." R. v. Partridge, 7 C. & P. 551: 32 E. C. L. R. But Parke, B., directed an acquittal where the only evidence against the prisoner was that certain tools had been traced to his possession, three months after their loss: R. v. Adams, 3 C. & P. 160: 14 E. C. L. R.; and Maule J., did the same, where a horse, alleged to have been stolen, was not traced to the possession of the prisoner until six months from the date of the robbery. R. v. Cooper, 3 C. & Kir. 318.

What the person found in possession of stolen property is called upon to do is, to account for how he came by it. In R. v. Crowhurst, 1 C. & K. 370: 47 E. C. L. R., the prisoner was indicted for stealing a piece of wood; upon the piece of wood being found by the police constable in the prisoner's shop about five days after it was lost, he stated that he bought it of a man named Nash, who lived about two miles off. Nash was not called as a witness for the prosecution, and no witness was called by the prisoner. Alderson, B., said to the jury, "In cases of this nature you should take it as a general principle that, when a man in whose possession stolen property is found gives a reasonable account of how he came by it, as by telling the name of the person from whom he received it, and who is known to be a real person, it is incumbent on the prosecutor to show that the account is false; but if the account given by the prisoner be unreasonable or improbable on the face of it, the onus of proving its

truth lies on the prisoner." It appears, therefore, that the learned judge thought that in this case the prisoner's account was sufficiently reasonable to shift the burden of proof back again on to the prosecutor, but the report does not state whether or not the case was left to the consideration of the jury. In R. v. Wilson, 26 L. J., M. C. 45, the prisoner was indicted for stealing some articles of dress. It was proved that the property was stolen and sold by the prisoner. The prisoner on being apprehended said, that C. and D. brought them to his house and that he sold them. In consequence of this C. and D. were apprehended, and C. was tried and convicted for stealing other articles taken from the prosecutor's house at the same time as the articles in question; D. was discharged. The constable made inquiries as to the statement made by the prisoner of how he came by the goods, but no evidence of what transpired on such inquiries was received, being objected to by the prisoner's counsel. Neither C. nor D. were called as witnesses for the prosecution, and no witness was called by the prisoner. The jury found the prisoner guilty, and the conviction was upheld by the Court of Criminal Appeal, upon the ground, as stated by Pollock, C. B., that there was some evidence for the jury upon which the prisoner might be convicted.

"If a horse be stolen from A.," says Lord Hale, "and the same day B. be found upon him, it is a strong presumption that B. stole him; yet I do remember, before a very learned and wary judge, in such an instance, B. was condemned and executed at Oxford assizes; and yet, within two assizes after, C., *being apprehended for [*21] another robbery, upon his judgment and execution, confessed he was the man that stole the horse, and being closely pursued, desired B., a stranger, to walk his horse for him, while he turned aside upon a necessary occasion and escaped, and B. was apprehended with the horse, and died innocently." 2 Hale P. C. 289. The following remarks by Mr. East on this subject are well deserving of attention. "It has been stated before that the person in whose possession stolen goods are found must account how he came by them, otherwise he may be presumed to be the thief; and it is a common mode of defence, to state a delivery by a person unknown, and of whom no evidence is given; little or no reliance can consequently be had upon it. Yet cases of that sort have been known to happen, where persons really innocent have suffered under such a presumption; and, therefore, when this excuse is urged, it is a matter of no little weight to consider how far the conduct of the prisoner has tallied with his defence, from the time when the goods might be presumed to have first come into his possession." 2 East, P. C. 665.

The irreparable nature of the sentence of death which so frequently followed conviction in former days perhaps tended to increase the anxiety which both these learned persons evince on the subject of presumptive evidence.(1)

(1) Pennsylvania v. Myers, Addison, 320; State v. Jenkins, 2 Tyler, 379.

The presumption that he, who is found in possession of stolen goods recently after the theft was committed is himself the thief, applies *only*, when this possession is of a kind which manifests that the stolen goods never came to the possessor *by his own act*, or at all events, with his undoubted concurrence. State v. Smith, 2 Iredell's N. C. Law Reps. 412. Thus where the defendant and two of his sons were indicted for stealing tobacco, which had been stolen in the night, was found next day in an outhouse of defendant, occupied by one of his negroes, and in which the defendant kept tobacco of his own, and the tobacco so found was claimed by him as his own, though proved to be the tobacco that had been stolen; held that it was error in the judge to charge the jury "that the possession of the stolen tobacco found on defendant, raised in law a strong presumption of his guilt." Ibid. The possession of a stolen thing is evidence to some extent against the possessor of a taking by him. Ordinarily, it is stronger or weaker in proportion to the period intervening between the stealing and the finding in possession of the accused; and after the lapse of a considerable time, before a possession is shown in the accused, the law does not infer his guilt. State v. Williams, 9 N. Carolina, 140.

The accused, even when the stolen goods are found in his possession and under his control within a short time after the larceny is committed, and a presumption of guilt is raised, is not bound to

Presumption of guilt arising from the possession of property in other cases.] There are cases in which the possession of property carries with it the presumption of guilt, although the property has not been stolen; mostly cases where the property itself carries with it indications of a criminal act. Instances of cases in which such a presumption is drawn are the possession of filings or clippings of gold or silver coin, of more than five pieces of foreign counterfeit coin, of coining tools (see 24 & 25 Vict. c. 99), the possession of instruments or paper for forging exchequer bills and bank-notes (see 24 and 25 Vict. c. 98), the possession of deer, or implements for taking deer, of implements for housebreaking, of goods belonging to ships wrecked or stranded (see 24 & 25 Vict., c. 96), the possession of naval and military stores (see 9 & 10 Will. 3, c. 41, and other acts). These presumptions will be discussed under the headings of the principal offences to which they relate.

Presumption of malice.] Much of the difficulty connected with this subject will be removed by considering what malice is in the legal sense of the term. "Malice in its legal sense denotes a wrongful act done intentionally without just cause or excuse." Per Littledale, J., in McPherson v. Daniels, 10 B. & C. 272: 21 E. C. L. R. "We must settle what is meant by the term 'malice,'" said Best, J., in R. v. Harvey, 2 B. & C. 268: 9 E. C. L. R.; the legal import of this term differs from its acceptation in ordinary conversation. It is not, as in ordinary speech, only an expression of hatred and ill-will to an individual, but means any wicked or mischievous intention of the mind. Thus in the crime of murder, which is always stated in the indictment to be committed with malice aforethought, it is not necessary in support of such indictment to show that the prisoner had any enmity to the deceased; nor would proof of absence of ill-will furnish the accused with any defence, when it is proved that the act of killing was intentional and done without any justifiable cause.

[*22] All, therefore, that is meant by the presumption of malice is that *when a man commits an unlawful act, unaccompanied by any circumstances justifying its commission, it is presumed that he has acted advisedly and with an intent to produce the natural consequences of such an act. Thus in R. v. Dixon, 3 M. & S. 11, upon an indictment against the defendant, who was employed to make bread for a military asylum, for delivering bread made from unwholesome materials, it was held to be unnecessary to allege in the indictment, and therefore, of course, unnecessary to prove that the defendant intended to injure the health of any one, as that was an inference of law arising from the doing of the act. Where a man was convicted of setting fire to a mill, with intent to injure the occupiers thereof, a doubt occurred, under the words of the 43 Geo. 3, c. 58, whether an intent to injure or defraud some person ought not to be proved; or at least some fact from which such intention could be inferred, beyond the mere act of setting the mill on fire; but the judges were of opinion that a person who does an act wilfully necessarily intends that which must be the consequence of the act, viz., injury to the owner of the mill burned. R. v. Farrington, Russ. & Ry. 207. And in R. v. Philp, 1 Mood. C. C. 263, where a part owner of a ship was indicted for setting fire to it with intent to prejudice his co-owners, it was held that the intent to prejudice was implied by the act, and that no proof of the intent was, therefore, necessary.

Presumption of intent to defraud.] This presumption is very similar to that of

show to the reasonable satisfaction of the jury that he became possessed of them otherwise than by stealing; the evidence may fall far short of establishing that, and yet create in the minds of the jury a reasonable doubt of his guilt. State v. Merrick, 19 Maine, 398.

malice; it is always made whenever the natural consequence of the act is to defraud, and no proof is necessary that such was the intention of the prisoner. The only cases which have arisen upon this head of presumption relate to forgery and arson, with respect to which the law has been somewhat modified by statute; it is therefore considered more convenient to discuss it in the chapter relating to those classes of offences.

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General nature of hearsay evidence.] EVIDENCE of facts with which the witness is not acquainted of his own knowledge, but which he merely states from the relation of others, is inadmissible upon two grounds. First, that the party originally stating the facts does not make the statement under the sanction of an oath; and secondly, that the party against whom the evidence is offered would lose the opportunity of examining into the means of knowledge of the party making the statement. A less ambiguous term by which to describe this species of evidence is *second-hand evidence.*

Evidence to explain the nature of the transaction.] The term hearsay evidence is frequently applied to that which is really not so in the sense in which that term is generally used. Thus where the inquiry is into the nature and character of a certain transaction, not only what was done, but also what was said by those present during the continuance of the transaction is admissible; and this is sometimes represented as an exception to the rule which excludes hearsay evidence. But this is not hearsay evidence; it is original evidence of the most important and unexceptionable kind. In this case, it is *not a secondhand relation of facts which is received, but [*24] the declarations of the parties to the facts themselves, or of others connected with them in the transaction, which are admitted for the purpose of illustrating its peculiar character and circumstances. Thus it has been held on a prosecution for high treason, that the cry of the mob who accompanied the prisoner, may be received in evidence as part of the transaction. R. v. Lord George Gordon, 21 How. St. Tr. 534; Best Ev. 572; R. v. Damaru, Fost. Cr. Law, 213; 15 How. St. Tr. 522. See also Crouch v. The Great Western Railway Company, 1 Q. B. 51: 41 E. C. L. R.;

R. v. Hall, 8 C. & P. 358: 34 E. C. L. R.; Doe v. Hardy, 1 Moo. & Rob. 525 This evidence must not be confounded with evidence of what is said by the accused party himself, which is always capable of being received on another ground, namely, as an admission. See tit. Confessions.(1)

(1) Where evidence of an act done by a party is admissible, his declarations made at the time, having a tendency to elucidate or give a character to the act, and which may derive a degree of credit from the act itself, are also admissible as part of the *res gestæ*. Sessions v. Little, 9 N. H. 271.

There are some cases in which the declarations of a prisoner are admitted in his favor, mainly upon the principle of being part of the *res gestæ;* as to account for his silence where that silence would operate against him. United States v. Craig, 4 Wash. C. C. Rep. 729. So to explain and reconcile his conduct. State v. Ridgely, 2 Har. & McHen. 120; Robetaille's case, 5 Rogers, 171. See Tomkins v. Saltmarsh, 14 Serg. & R. 275.

Where a prisoner indicted for murder has produced evidence of declarations by the deceased, with a view to raise the presumption that he committed suicide, it is competent for the State to give in evidence the reasons assigned by him for his declaration. State v. Crank, 2 Bailey, 66. See Little v. Lebby, 2 Greenl. 242; Kimball v. Morrell, 4 Greenl. 368; Gorham v. Canton, 5 Id. 266; State v. Powell, 2 Halst. 244; Bennet v. Hethington, 16 Serg. & R. 193.

When the state of mind, sentiment, or disposition of a person at a given period become pertinent topics of inquiry, his declarations and conversations, being part of the *res gestæ*, may be resorted to. Bartholemy v. The People, 2 Hill, 248.

It is not competent for a prisoner indicted for murder to give in evidence his own account of the transaction related immediately after it occurred, though no third person was present when the homicide was committed. State v. Tilly, 3 Iredell's N. C. Law Rep. 424.

On the trial of a party who is indicted for knowingly having in his possession an instrument adapted and designed for coining or making counterfeit coin, with intent to use it or cause or permit it to be used in coining or making such coin, he cannot give in evidence his declarations to an artificer, at the time he employed him to make such instrument, as to the purposes for which he wished it to be made. Commonwealth v. Kent, 6 Metcalf, 583.

Semble, in a criminal prosecution for damages, mere naked admissions made by the party libelled are in general incompetent evidence against the people, even to establish facts tending to a justification; otherwise as to conversations or declarations which are part of the *res gestæ*. Bartholemy v. The People, 2 Hill, 249. The declaration of a person, who is wounded and bleeding, that the defendant has stabbed her, made immediately after the occurrence, though with such an interval of time as to allow her to go from her own room up stairs into another room, is admissible in evidence after her death, as a part of the *res gestæ*. Commonwealth v. Pike, 3 Cushing, 181.

On an indictment for a misdemeanor the declarations of the defendant were held admissible in evidence when they accompanied, explained, and characterized the acts charged. The State v. Huntly, 3 Iredell, 418. Whenever the bodily or mental feelings of an individual at a particular time are material to be proved, the expression of such feelings, made at or soon before that time, is evidence—of course subject to be weighed by the jury. Roulhac v. White, 9 North Carolina, 63.

The declarations of a party are admissible in his favor when they are so connected with some material act as to explain or qualify it, or show the intent with which it was done. Russell v. Frisbie, 19 Conn. 205.

In an indictment for larceny, declarations at the time of his arrest by the prisoner as to his claim of ownership to the property taken, are not admissible in evidence. The State v. Wisdom, 8 Port. 511.

The declarations of third persons are not admissible in evidence as part of the *res gestæ*, unless they in some way elucidate or tend to give a character to the act which they accompany, or may derive a degree of credit from the fact itself. If they can have no effect upon the act done, and derive no credit from it, but depend for their effect upon the credit of the party who makes them, they are not admissible merely because they have some connection with the act or relate to it. Woods v. Banks, 14 N. Hamp. 101.

When an act of a party is admissible in evidence, his declarations, at the time, explanatory of that act, are also admissible, as a part of the *res gestæ*. Wetmore v. Mell, 1 Ohio, 26; Dawson v. Hall, 2 Michigan, 390.

To make declarations a part of the *res gestæ* they must be contemporaneous with the main fact—not however precisely concurrent in point of time. If they spring out of the transaction, elucidate it, are voluntary and spontaneous, and made at a time so near to it as reasonably to preclude the idea of deliberate design, they are then to be regarded as contemporaneous. Mitcham v. The State, 11 Georgia, 615; Handy v. Johnson, 5 Maryland, 450.

Representations made by a sick person to a medical attendant as to his symptoms, are admissible. Johnson v. The State, 17 Alabama, 618.

Any evidence giving an account of the acts of the accused on the day of the murder, is competent against him. Campbell v. The State, 23 Alabama, 44.

What declarations are part of the *res gestæ* cannot be determined by any precise general rule, but only upon consideration of all the circumstances of each case. Meek v. Perry, 36 Mississippi, 190.

In a murder case, the declarations of the murdered man charging the defendant with the murder when brought with others into his presence, are admissible, not as dying declarations, but as part of the circumstances relating to the conduct of the accused when first charged with the crime. The State v. Nash, 10 Iowa, 81.

The rule that declarations of a party at the time of doing an act which is legal evidence, are admissible as parts of the *res gestæ*, does not apply so as to admit, as against third persons, declarations of a past fact, having the effect of criminating the latter. The People v. Simonds, 19 California, 275.

Evidence of complaint in case of rape.] The evidence which is almost always given in cases of rape that the woman made a complaint of having been violated, is not hearsay, but original evidence of a fact, which is most important, and which cannot be ascertained in any other way. There seems indeed to have been at one time some obscurity about the extent to which this inquiry could be pursued, and, of course, if the investigation were not confined to the mere fact itself that this particular complaint was made, the evidence would be secondhand, and open to all the objections of that species of evidence. It will, perhaps, be convenient to examine the cases in this place. In R. v. Brazier, 1 East, P. C. 444, the prisoner was charged with assaulting a child of five years old, with intent to ravish her. The child was not tendered as a witness, but evidence was given of her complaint, and of the particulars of it. The subject was twice discussed by the judges: on the first occasion, all except Gould and Willes, JJ., thought the evidence inadmissible; these two judges held that the presumption of law as to the incompetence of the child was conclusive, and that the evidence was admissible on that ground; and Buller, J., held the same, if by law the child could not be examined upon oath, about which he doubted. On the second occasion, however, all the judges being assembled, unanimously were of opinion that the child ought to have been tendered as a witness, and, if found to be competent, examined; and that, *consequently*, the evidence of her statement ought not to have been received. "It does not, however," adds the author, "appear to have been denied by any in the above case that the fact of the child's having complained of the injury recently after it was received is confirmatory evidence." This case is wrongly quoted all through the books. In R. v. Clarke, 2 Stark. N. P. C. 242: 3 E. C. L. R, it was ruled by Holroyd, J., that the particulars of the complaint could not be given in evidence. In R. v. Webber, 2 Moo. & R. 212, Parke, B., seemed to think, that because the counsel for the defence could on cross-examination elicit the particulars of the statement, that it would be better to permit the evidence to be given at once in chief. But the reasoning seems in no way con-

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The exclamation or declarations of the prisoner at the time of the crime. Mitcham v. The State, 2 Georgia, 615. So silence is a fact, but to be weighed with great caution. Johnson v. The State, 17 Alabama, 618.

Declarations of the prisoner, unless part of the *res gestæ*, are inadmissible in his behalf. Tipper v. The Commonwealth, 1 Metcalfe (Kent), 6; Dickes v. The State, 11 Indiana, 557.

The acts or declarations of the prisoner are not admissible evidence for him, unless they occurred within the period covered by the criminating evidence, or tend in some way to explain some fact or circumstance proved against him, or to impair or destroy the force of some evidence for the prosecution. Chaney v. The State, 31 Alabama, 342.

In a trial for murder, it is competent for the defendant to prove how he was employed at the time he met with the person he is charged to have killed, and what was his conduct a short time before the affray which resulted in the killing. Stewart v. The State, 19 Ohio, 302.

In proceedings for assault with intent to kill, the evidence tended to show that defendant was assaulted by the injured party and several others: held that declarations of these persons made at the time of the assault, illustrative of its object and motive, were admissible in evidence as part of the *res gestæ*. The People v. Roach, 17 California, 297.

A declaration made by the accused, on the day of the crime, explaining how blood came upon his hands, is not admissible as part of the *res gestæ*. Scaggs v. The State, 8 Smedes & Marshall, 722.

For the purpose of proving a bargain and sale, the declarations of the parties thereto at the time, are a part of the *res gestæ*, and competent to rebut the presumption arising from the possession of stolen property. Leggett v. The State, 15 Griswold, 283.

On the trial of a defendant indicted for knowingly having in his possession an instrument adapted and designed for coining, or making counterfeit coin, it was held that he could not give in evidence his own declarations to an artificer, at the time he employed him to make such instrument, as to the purposes for which he wished it to be made. Commonwealth v. Kent, 6 Metcalf. 221.

When one is indicted for murder, he cannot give in evidence his own conversations, had after going half a mile from the place of murder. Gardner v. The People, 3 Scammon, 83.

Although the declarations or admissions of a party are evidence against himself, yet they do not when offered justify him in introducing proof of his counter declarations made at a different time, unless the latter form a part of the *res gestæ*. Roberts v. Trawick, 22 Alabama, 490.

See generally, Kirby v. The State, 7 Yerger, 259; Evans v. Jones, 8 Ihid. 461; Lund v. Tyngsborough, 9 Cushing, 36; Cornelius v. The State, 7 English, 782.

clusive; for not only would the rules of evidence be thereby unnecessarily infringed, but it is obvious that, from the relation in which the woman who is said to have been violated stands to the prisoner, there can be no danger in allowing him to take advantage of any statements by her which make in his favor; those statements standing, in fact, in the place of admissions. In R. v. Megson, 9 C. & P. 420: 38 E. C. [*25] L. R., where *the prosecutrix had died before the trial, and without her deposition having been taken, Rolfe, B., received evidence (the prisoner's counsel not objecting) that she had made a complaint, on her return home, of an outrage having been committed upon her, but held that the particulars of such complaint were not admissible. In a case where the prosecutrix was called, but did not appear, and it was objected on the part of the prisoners that evidence of recent complaint is receivable only to confirm the prosecutrix's story, and that as her evidence was not before the jury it could not be confirmed, Parke, B., rejected evidence of the prosecutrix having made a complaint. R. v. Guttridge, 9 C. & P. 471: 38 E. C. L. R. In R. v. Osborne, Car. & M. 622: 41 E. C. L. R., the counsel for the prosecution proposed to ask whose name was mentioned in the complaint, which Cresswell, J., of course refused to permit. In that case the question whether a name *was* mentioned was admitted by the counsel for the prisoner to be unobjectionable, but it seems to be clearly out of the strict line. In R. v. Nicholas, 2 C. & K. 246: 61 E. C. L. R., the rape was on a child of ten years old, who was considered an incompetent witness, and the aunt was called, and was asked whether the child made any statement to her; she replied in the affirmative, and it was then proposed by the counsel for the prosecution to ask her the particulars of the statement, which Pollock, C. B., refused. It does not appear from the report that the evidence of the *fact* of complaint was objected to, though R. v. Guttridge, *ubi suprà*, was referred to in the course of the discussion.

It thus appears that these cases are unanimous, that where the person who makes the complaint is called as a witness and is competent, the fact that the complaint was made, and the bare nature of it, may be given in evidence. Where the person who makes the complaint is not called as a witness, or, on being called, is found to be incompetent, the decisions are somewhat conflicting. On the one hand it has been sought in this case to introduce the whole statement; on the other, attempts have been made to exclude, under these circumstances, all evidence about the statement whatever. Both contentions have some countenance of authority, but it is conceived that neither is strictly accurate; the true rule being, as is submitted, to admit evidence of the fact of complaint in all cases, and in no case to admit anything more. The evidence, when restricted to this extent, is not hearsay, but, in the strictest sense, original evidence; when, however, these limits are exceeded, it becomes hearsay in a very objectionable form. There is every reason, therefore, why it should be admitted to the extent indicated, and none why it should be admitted any further.

Evidence of complaint in other cases.] The same rule applies to other cases as to rape; namely, that where a person has been in any way outraged, the fact that this person made a complaint is good evidence, both relevant and admissible. Thus, in R. v. Wink, 6 C. & P. 397: 25 E. C. L. R., upon an indictment for robbery, evidence was given (without objection) by the prosecutor, that he made a complaint the next morning to a constable. He also stated (no objection being made) that he mentioned the name of a person, as the name of one of the persons who had robbed him, but this seems objectionable. The counsel for the prosecution then proposed to ask whose name was mentioned, but Patteson, J., refused to permit it, adding,

" but, when you examine the constable, you may ask him, whether, in *con- [*26] sequence of the prosecutor mentioning a name to him, he went in search of any person, and, if he did, who that person was." Cresswell, J., in the case of R. v. Osborne, Car. & M. 622: 41 E. C. L. R., objects to the latter part of this dictum; but the questions suggested are certainly very common, and rarely objected to, and, indeed, they hardly seem objectionable. On an indictment for shooting at the prosecutor, Patteson, J., held that evidence was admissible to show that the prosecutor, immediately after the injury, had made communication of the fact to another, but that the particulars could not be given in evidence. R. v. Ridsdale, York Spring Assizes, 1837; Stark, Ev. 469 n.

There is a case of R. v. Foster, 6 C. & P. 325: 25 E. C. L. R., in which the prisoner was charged with manslaughter. A wagoner was called, who stated that immediately after the accident he went up to the deceased, and asked him what was the matter. It was objected that the reply of the deceased, which went to explain the cause of the accident, was not evidence, but Gurney, B., said that it was the best possible testimony that, under the circumstances, could be adduced, to show what it was that had knocked the deceased down; and he added that the case of Aveson v. Lord Kinnaird, *infrà*, bore strongly upon the point. A somewhat similar case is that of Thompson et ux. v. Trevanion, Skin. 402, where, in an action for an assault upon the wife, Holt, C. J., allowed what the wife said " immediate upon the hurt received, and before that she had time to devise and contrive anything for her own advantage," to be given in evidence.

These two cases are difficult to reconcile with established principles. It is to be observed that both extend to the particulars of what was said, and though they were both made in close proximity to the event to which they profess to relate, it seems very questionable indeed whether that ground alone, as is presumed by Lord Holt, is sufficient to render them admissible. In R. v. Foster there was the additional circumstance that the person who made the statement was dead; but it seems to require much consideration whether, as a general rule, the statements of a deceased person as to the circumstances of the injury which caused his death, made immediately after the injury, but not under circumstances which entitle them to be considered as dying declarations, are receivable in evidence.(1)

(1) In a criminal trial, the introduction by the State of a conversation between a witness and defendant, which contained no confessions by the latter, and was otherwise irrelevant, will not warrant the admission of a paper produced and read at the interview by the defendant. The introduction of immaterial testimony on one side, does not justify the admission of illegal testimony on the other. Cook v. The State, 4 Zabriskie, 843.

If one party offers incompetent testimony, which is admitted without objection, the other party may introduce evidence of a like character, to rebut it. Herbush v. Goodwin, 5 Foster, 452.

No subsequent act or declaration of one defendant is competent evidence against another, indicted jointly with him. Thompson v. The Commonwealth, 1 Metcalfe (Ky.), 13.

Statements of the deceased before the murder, that he was going to the place of the murder and prisoner was to accompany him, not made in the presence of the prisoner, are not admissible against him. Kirby v. The State, 9 Yerger, 383.

Threats of other persons against the deceased, or admissions by them that they had committed the crime, are only hearsay, and cannot be received in evidence. The State v. Duncan, 6 Iredell, 236; Rhea v. The State, 10 Yerger, 258.

A statement made by the deceased at the time of the murder, but denied by the prisoner, though admissible as part of the *res gestæ*, is no evidence of the truth of the facts stated. Haile v. The State, 1 Swan, 248.

Threats by the deceased against the accused, made to a third person, not shown to have been communicated, are not admissible for the defendant. The State v. Jackson, 17 Mississippi, 544.

The admission against his interest, of a deceased person, of an act subjecting him to infamy and heavy penal consequences, is admissible as evidence of the fact, as between third persons. Coleman v. Frasier, 4 Richardson, 146.

Upon the trial of one for murder, it is not competent to prove the declarations of a third person, leading to the conclusion that he was guilty of the murder, and not the prisoner, as evidence in ex-

Hearsay evidence—exceptions as to admissibility of.] Though, as a general rule, hearsay, or, as it may more properly be called, secondhand evidence is inadmissible, there are a considerable number of exceptions to the rule, which appear to be founded partly on the principle of necessity; hearsay being sometimes almost the only species of evidence which is available; and partly on the statement, of which evidence is given, having been made under circumstances which render its being false highly improbable. They may be conveniently divided into the following heads: 1. Evidence which has already been given in judicial proceedings, and which cannot be obtained from the original source. 2. Statements contained in ancient documents on the subject of ancient possession. 3. Statements of deceased persons on questions of pedigree. 4. Evidence of reputation on questions of public or general right. 5. Statements of deceased persons speaking against their own interest. 6. Statements of deceased persons making entries, &c., in the regular course of their duty or employment. 7. Statements having reference to the health or sufferings of the person who makes them. 8. Dying declarations.

[*27] **Evidence which has already been given in judicial proceedings.*] This subject will be found discussed in the chapter on *Depositions*.

Statements contained in ancient documents on the subject of ancient possession.] This evidence rarely occurs in criminal cases. It will be found discussed in Best Ev. Part 3, Book 2, Chap. 3; Tayl. Ev. Part 2, Chaps. 7, sqq.; Stark. Ev. Part 1, Chap. 3; Ph. & Arn. Ev. Chap 8, s. 1.

Statements of deceased persons on questions of pedigree.] The written or verbal declarations of deceased members of a family are admissible on questions of pedigree.(1) Declarations in a family, descriptions in a will, incriptions upon monuments, in

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culpation of the prisoner, if such third person examined as a witness, had implicated the prisoner by his testimony; it might have been received for the purpose of discrediting him, but is not competent testimony to establish the innocence of the prisoner, by fixing the crime upon the declarant. Smith v. The State, 9 Alabama, 990.

(1) Douglas v. Sanderson, 1 Dall, 118; Jackson v. Cooley, 8 Johns, 128; Gray v. Goodrich, 7 Johns. 95. Hearsay is good to prove the fact of death: Jackson v. Etz, 5 Cowen, 314; Pancoast v. Addison, 1 Har. & J. 356; see Jackson v. Boneham, 15 Johns. 226; Ewing v. Savary, 3 Bibb, 236; but not the place of birth: Wilmington v. Burlington, 4 Pick. 174 (see 1 Pick. 247); Independence v. Pompton, 4 Halst. 209; Sbeam v. Clay, 1 Litt. 266; Albertson v. Robeson, 1 Dall. 9. So in a case of pedigree, hearsay of marriage is admissible, but not where it is to be shown as a substantive independent fact. Westfield v. Warren, 3 Halst. 249. Hearsay is only admissible where the fact is ancient, and no better evidence can be obtained. Briney v. Hanse, 3 Marsh. 326. And must be confined to what deceased persons have said. Gervin v. Meredith, 2 Car. Law Rep. 635. As to ex parte affidavits made abroad or by deceased persons, see 2 Stark. on Ev. 611, n. 3.

The acts and declarations of the parties being given in evidence on both sides, on the question of marriage, an advertisement announcing their separation, and appearing in the principal commercial newspaper of the place of their residence, immediately after their separation, is part of the *res gestæ*, and admissible in evidence. Whether or not it was inserted by the party, and if it was, what were his motives, are questions of fact for the jury. Jewell's Lessee v. Jewell, 1 Howard's S. C. Rep. 219.

The age of one member of a family, may be proved by information of another member, derived from family reputation, and declarations of a deceased mother, unless it appears that better evidence is in the power of the party. Watson v. Brewster, 1 Barr, 381.

The declarations of a deceased member of a family, that the parents of it never were married, are admissible in evidence, whether his connection with that family was by blood or marriage. Jewell's Lessee v. Jewell, 1 Howard's S. C. Rep. 219.

Hearsay is not evidence even in cases of pedigree, unless it appears that the person from whom the information is derived, is dead. Mooers v. Bunker, 9 Foster, 420; Emerson v. White, Ibid. 482. The declarations of deceased members of a family may be proved to show the time of the birth of a child belonging to that family, although there may be a family register of births in existence; for the one kind of evidence is of no higher dignity than the other. Clements v. Hunt, 1 Jones' Law N. C. 400.

It is not in cases of pedigree alone that hearsay evidence of the fact of death is admissible. Primm v. Stewart, 7 Texas, 178.

Bibles(1) and registry books, are all admitted upon the principle that they are the natural effusions of a party who must know the truth; and who speaks upon an occasion when the mind stands in an even position, without any temptation to exceed, or fall short of the truth, and that to exclude would be to exclude nearly all available evidence. Per Whitelocke v. Baker, 13 Ves. 514. But a pedigree collected from "registers, wills, monumental inscriptions, family records and history," is not evidence, although signed by members of the family: Davies v. Lowndes, 5 Bing. N. C. 161: 35 E. C. L. R.; except to show the relationship of persons described in it as living. S. C. 6 M. & Gr. 474: 46 E. C. L. R.; 7 Scott N. R. 141: 81 E. C. L. R.

The declarations must be by persons connected by family or marriage with the person to whom they relate; and therefore what has been said by servants and intimate acquaintances:(2) Johnson v. Lawson, 2 Bing. 86: 8 E. C. L. R.; 9 B. Moore, 183, S. C.; or by illegitimate relations: Doe v. Barton, 2 Moo. & R. 28; is not admissible. See Doe v. Davies, 10 Q. B. 314: 59 E. C L. R. The declarations need not be contemporaneous with the matters declared. Thus a person's declaration that his grandmother's maiden name was A. B. is admissible. Per Brougham, C., Monkton v. Att.-Gen., 2 Russ. & M. 158.

If the declarations have been made after a controversy has arisen with regard to the point in question, they are inadmissible. Berkeley Peerage case, 4 Camp. 415. The term controversy must not be understood as meaning merely an existing suit. 2 Russ. & M. 161; Walker v. Beauchamp, 6 C. & P. 552: 25 E. C. L. R. See further, Crouch v. Hooper, 16 Beav. 182.(3)

Evidence of reputation on questions of public or general right.] On questions of public or general right; as a manorial custom: Denn v. Spray, 1 T. R. 466; the boundaries between parishes and manors:(4) Nicholls v. Parker, 14 East, 331; or a ferry: Pin v. Curell, 6 M. & W. 234; a feeding *per cause de vicinage* existing by immemorial custom: Prichard v. Powell, 10 Q. B 589: 59 E. C. L. R.; explained in Earl of Dunraven v. Llewelyn, 15 Q. B. 811, 812: 69 E. C. L. R.; hearsay or public reputation is admissible. But reputation is not evidence of a particular fact. Weeks v. Sparke, 1 M. & S. 687. So though general reputation is evidence, tradition of a particular fact is not; as that a house once stood in a particular spot. Ireland v. Powell, Peake Ev. 15; Cooke v. Banks, 2 C. & P. 481: 12 E. C. L. R. Declarations of old persons, concerning the boundaries of parishes, have been received in evidence, though they were parishioners, and claimed rights of common on the waste, which the declarations had a tendency to enlarge. Nicholls v. *Parker, 14 East, 331; Plaxton v. Dare, 10 B. & C. 19: 21 E. C. L. R. [*28] But the declarations of a deceased lord of the manor, as to the extent of the waste, are not evidence. Crease v. Barrett, 5 Tyrwh. 458; 1 Cr., M. & R. 919. Where the question is, whether certain lands are in the parish of A. or B., ancient leases,

(1) Douglas v. Sanderson, 1 Dall. 116; Curtis v. Patton, 6 Serg. & R. 135; Berry v. Waring, 2 Har. & Gill, 103.

(2) Chapman v. Chapman, 2 Conn. 347; Jackson v. Browner, 18 Johns. 37; Butler v. Haskill, 4 Dessaus. 651; Banert et ux. v. Day, 3 Wash. C. C. Rep. 243.

(3) The rule, *post litem motam*, has not been recognized in the United States. Boudereau v. Montgomery, 4 Wash. C. C. Rep. 186.

(4) As to boundaries. Howell v. Tilder, 1 Hsr. & McHen. 84; Bladen v. Macubbin, Ibid. 230; Long v. Pellett, Ibid. 531; Hall v. Gitting's Lessee, 2 Har. & Johns. 121; Ralston v. Miller, 3 Randolph, 44; Jackson v. Vidder, 2 Caines, 210; Caufman v. The Congregation, 6 Binn. 59; Wolf v. Wyeth, 11 Serg. & Rawl. 149; Van Deusen v. Turner, 12 Pick. 532; Harriman v. Brown, 8 Leigh, 697.

Reputation and hearsay is such evidence as is entitled to respect on a question of boundary, when the lapse of time is so great as to render it difficult to prove the existence of the original landmarks. Hillman v. Ward, 1 Watts & Serg. 68.

in which they are described as lying in parish B., are evidence of reputation that the lands are in that parish. Plaxton v. Dare, 10 B. & C. 17: 21 E. C. L. R.; and see Brett v. Beales, M. & M. 416: 22 E. C. L. R. The declaration of an old person, who is still living, is not admissible as proof of reputation. Per Patteson, J., Woolway v. Rowe, 1 A. & E. 117: 28 E. C. L. R.; Phill. Ev. 284, 8th ed. In order to admit of evidence of reputation, it is not necessary that user should be shown. Crease v. Barrett, *supra*. Declarations of this kind are not evidence *post litem motam*. R. v. Cotton, 3 Camp. 444.(1)

Statements of deceased persons speaking against their own interests.] The declarations of deceased persons made against their own interest are admissible; as where a man charges himself with the receipt of money, it is evidence to prove the payment. Goss v. Watlington, 3 B. & B. 132: 7 E. C. L. R.; Whitnash v. George, 8 B. & C. 556: 17 E. C. L. R. So a statement by a deceased occupier of land, that he rented it under a certain person, is evidence of such person's seizin. Uncle v. Watson, 4 Taunt. 16. So a deed by a deceased party shown to be in the receipt of the rents and profits, in which S. is stated to be the legal owner in fee, is evidence of such ownership for a party claiming under S. Doe v. Coulthred, 7 A. & E. 235: 34 E. C. L. R. So a written attornment to L., by a tenant in possession, is evidence of L.'s seizin. Doe v. Edward, 5 A. & E. 95: 31 E. C. L. R. The principle is, that occupation being presumptive evidence of a seizin in fee, any declaration claiming a less estate is against the party's interest. Crease v. Barrett, 5 Tyrwh. 473; 1 Crom. M. & R. 931. In all these cases it must appear that the effect of the declaration is to charge the party making it. Calvert v. Archbishop of Cant., 2 Esp. 646. If the party who made the entry be alive, although out of the jurisdiction of the court, so that he cannot be called, the proof of the entry is inadmissible. Stephen v. Gwennap, 1 Moo. & R. 121; Smith v. Whittingham, 6 C. & P. 78: 25 E. C. L. R. And *semble*, that if the declaration be oral, it is in like manner admissible in evidence. Stapylton v. Clough, 2 E. & B. 933: 77 E. C. L. R.; Bradley v. James, 13 C. B. 822: 76 E. C. L. R.

The declarations of persons who, at the time of making them, stood in the same situation and interest as the party to the suit, are evidence against that party; thus the declaration of a former owner of the plaintiff's land, that he had not the right claimed by the plaintiff in respect of it, is admissible: Woolway v. Rowe, 1 A. & E. 114: 28 E. C. L. R.; and even although he is alive, and not produced, S. C. The declarations of tenants are not evidence against reversioners, although their acts are. Per Patteson, J., Tickle v. Brown, 4 A. & E. 378: 31 E. C. L. R.

Statements of deceased persons making entries, &c., in the regular course of their duty or employment.] Where a person in the course of his employment makes a declaration, such declaration, after the death of the party, has in certain cases been admitted as evidence; as where an attorney's clerk indorsed a memorandum of delivery on his master's bill, this was held to be evidence of the delivery. Champneys v. Peck, 1 Stark. N. P. 404: 1 E. C. L. R. See also Furness v. Cope, 5 Bing. 114: 15 E. C. L. R.; Chambers v. Bernasconi, 4 Tyrwh. 531: 1 Cr., M. & [*29] *R. 347. So a notice indorsed as served by a deceased attorney's clerk, whose duty it was to serve notices, is evidence of service. Doe v. Turford, 3 B. & Ad. 890:

(1) Historical facts of general and public notoriety, may be proved by reputation, and that by historical works, but not of a living author. Morris v. Harmer's Lessee, 7 Peters, 554; see 3 Wheeler's Crim. Cas. 87, 88, &c.; Gregory v. Baugh, 4 Randolph, 611.

23 E. C. L. R. So an entry of dishonor of a bill, made by the clerk of a notary in the usual course of business, is evidence after the clerk's decease, of the fact of dishonor. Poole v. Dicas, 1 New Cases, 649. So contemporaneous entries by a deceased shopman or servant in his master's books in the ordinary course of business, stating the delivery of the goods, are evidence for his master of such delivery. Price v. Lord Torrington, 1 Salk. 285. See also 3 B. & Ad. 898.(1) But it would appear that the person who made the entry, must have done the business to which it refers. Brain v. Preece, 11 M. & W. 773; and see Doe v. Skinner, 3 Ex. R. 84.

In order to make such entries evidence, it must appear that the person who made them is dead; it is not sufficient that he is abroad, and is not likely to return. Cooper v. Marsden, 1 Esp. N. P. 1.

Statements having reference to the health or sufferings of the person who makes them.] Upon this exception there is scarcely any direct authority. In R. v. Blandy, 15 How. St. Tr. 1135, the prisoner was charged with having poisoned his father, and the doctor was allowed, without objection, to state all that the deceased said in answer to inquiries respecting his health; but not only was he allowed to do this, but he also went on, still without objection, to state the answers of the deceased to inquiries put by him respecting the person who administered the poison which the deceased had taken, though no evidence was given which showed that the deceased was then *in articulo mortis;* this case, therefore, could not now be considered an authority for any purpose. In Aveson v. Lord Kinnaird, 6 East, 188, the facts were somewhat peculiar. The action was brought on a policy of insurance, effected by a husband on the life of his wife. The defence was that the wife was a hard drinker, and was in ill-health at the time the policy was effected. The surgeon who had examined the woman on behalf of the office was called by the plaintiff, and he swore positively to his belief of her good health at the time, and said that he formed his opinion principally from the satisfactory answers which she gave to his inquiries. A witness was then called for the defence, who stated that she saw the deceased a day or two after the surgeon had examined her; that she then complained of being unwell; and said that she was unwell when she went to see the surgeon, with other similar statements. A verdict was found for the defendant, and a rule for a new trial obtained by the plaintiff, on the ground that evidence of these statements ought not to have been received, which rule was discharged. It was assumed by all the judges, that what was said by the deceased to the surgeon was evidence of her state of health at the time; and they all thought that, this evidence having been produced by the plaintiff, it was open to the defendant to rebut it by showing that she had made different statements on another occasion upon the same subject. In the Gardiner Peerage case, reported by Le Marchand, a great many doctors were examined on the part of the claimant as to their experience of cases of protracted gestation. In order to ascertain the circumstances of these cases, it was necessary to

(1) Where a witness testified in respect to certain entries and memoranda made by him in the usual course of business, that it was his uniform practice to make such entries, &c., when the transaction occurred, and to make them truly, that he had no doubt the entries in question were so made, but that he had no recollection of the facts or transactions to which they related; *held*, that they might be given in evidence. Bank of Monroe v. Culver et al., 2 Hill, 531.

Entries and memoranda made by third persons in the usual course of business as notaries, clerks, &c., cannot be given in evidence on the ground merely that they are absent beyond the jurisdiction of the court; though otherwise when they are dead. Brewster v. Doane, 2 Hill, 537.

The declarations of the payee of a negotiable note, made while he retains it in his possession, are admissible in evidence, although he may previously have written thereon his indorsement to a third person, in whose name the action is brought. Whittier v. Vose, 16 Maine, 403.

inquire into the *data* upon which the witnesses had formed their calculations, but these depended on the answers of women to certain medical inquiries involving facts [*30] which had taken place some months previously. *Evidence of what these answers were was repeatedly objected to, and finally rejected by the committee, upon the advice of Lords Gifford and Redesdale. In R. v. Johnson, 2 C. & K. 354 : 61 E. C. L. R., the prisoner was charged with having murdered her husband, and in order to prove the state of health of the deceased prior to the day of his death, a witness was called who had seen him a day or two before that time ; and on this witness being asked in what state of health the deceased appeared to be when he last saw him, he began to state a conversation which had then taken place between the deceased and himself on this subject. This was objected to on behalf of the prisoner, but Alderson, B., said that he thought that what the deceased person said to the witness was reasonable evidence to prove his state of health at the time.

The result of the cases seems to be this: that if it becomes necessary to inquire into the state of health at a particular time of a person who is deceased, a witness may detail what the deceased person has himself said on that subject at that time, and this whether he be a medical man or not. But perhaps a medical man might go further, and even in case of a person who is still living, state the answers to inquiries made by him having reference to such person's health; this evidence is frequently given in cases of assault, in order to prove what the person assaulted has suffered. See per Lawrence, J., in Aveson v. Lord Kinnaird, 6 East, 198.

Dying declarations.] Evidence of this kind, which is peculiar to the case of homicide, has been considered by some to be admissible from necessity, since it often happens that there is no third person present to be an eye-witness to the fact, and the usual witness in other felonies, viz., the party injured himself, is got rid of: 1 East, P. C. 353. But it is said by Eyre, C. B., that the general principle upon which evidence of this kind is admitted, is that it is of declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced, and the mind is induced, by the most powerful considerations, to speak the truth. A situation so solemn and so awful is considered by the law as creating an obligation equal to that which is imposed by an oath administered in court: R. v. Woodcock, 1 Leach, 502.(1) Probably it is

(1) State v. Ferguson, 2 Hill, S. Car. Rep. 619; Oliver v. The State, 17 Alabama, 587; McLean v. The State, 16 Ibid. 672. Dying declarations of a person who has been killed, made with regard to the circumstances which caused his death, are to be received with the same degree of credit as the testimony of the deceased would have been had he been examined on oath. Green v. The State, 13 Missouri, 382; *Contra*, see Lambeth v. The State, 1 Cush. 322.

By the common law, in indictments for murder, the declarations of the deceased, made after the mortal wound, and under the apprehension of death, are admissible in evidence. Woodside v. The State, 2 Howard (Miss.), 655; Campbell v. The State, 11 Georgia, 353; Nelson v. The State, 7 Humph. 542; Smith v. The State, 9 Humph. 9; Hill v. The Commonwealth, 2 Grattan, 594; Moore v. The State, 12 Alabama, 764; Commonwealth v. Murray, 2 Ashmead, 41; Commonwealth v. Williams, Ibid. 69; Green v. The State, 13 Missouri, 382; Vass's Case, 3 Leigh, 786; McDaniel v. The State, 8 Smedes & Marsh. 401; Anthony v. The State, 1 Meigs, 265; Donnelly v. The State, 2 Dutcher, 463, 601; The State v. Scott, 12 Louisiana, 274; Brakefield v. The State, 1 Sneed, 215; Kilpatrick v. The Commonwealth, 7 Casey, 198; The State v. Cornish, 5 Harrington, 502; Bull's Case, 14 Grattan, 613; Thompson v. The State, 24 Georgia, 297; McHugh v. The State, 31 Alabama, 317; Brown v. The State, 32 Mississippi, 433; The Commonwealth v. Casey, 11 Cushing, 417; Walston v. The Commonwealth, 16 B. Monroe, 15; Starkey v. The People, 17 Illinois, 17; The State v. Dominique, 30 Missouri, 585; The People v. Lee, 17 California, 76; The People v. Ybarra, Ibid. 166; The Commonwealth v. Casey, 12 Cushing, 246; Burrell v. The State, 18 Texas, 713; The People v. Glenn, 10 California, 32; The State v. Nash, 7 Clarke, 347; The State v. Terrell, 12 Richardson Law, 321; The State v. Gillich, 7 Clarke, 287; Robbins v. The State, 8 Ohio (N. S.), 131; The State v. Brunette, 13 Louisiana, 45.

Such evidence is only admissible under a rule of necessity, and constitutes the only case in which evidence is admissible against the accused, without the opportunity of a cross-examination. Nelms v. The State, 13 Smedes & Marsh. 500.

the concurrence of both these reasons which led to the admission of this species of evidence.

The declaration must have been made by a person who, if alive, would have been a competent witness. Thus, on an indictment for the murder of a girl four years of age, Park, J., refused to hear evidence of her declarations, observing that, however precocious her mind might be, it was impossible that she could have had that idea of a future state which is necessary to make such a declaration admissible. In this decision Parke, B., concurred. R. v. Pike, 3 C. & P. 598 : 14 E C. L. R. But when the child is of an intelligent mind, impressed with the nature of an oath, and expecting to die, the declaration is receivable. See R. v. Perkins, 2 Moo. C. C. 135, where the child was eleven years old, stated *post.* It is no objection to the evidence that the deceased person was *particeps criminis* (as a woman who has been killed in attempting to procure abortion). R. v. Tinkler, 1 East, 354. So the statement of the deceased must be such as would be admissible if he were alive and could be examined as a witness; consequently, a declaration upon matters of opinion, as dis-

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The proof of the deceased's apprehension of death is not confined to his declarations, but the fact may be satisfactorily established by the circumstances of the case. Hill v. The Commonwealth, 2 Grattan, 594; McLean v. The State, 16 Alabama, 672; Commonwealth v. Murray, 2 Ashmead, 41; Commonwealth v. Williams, Ibid. 69; The People v. Green, 1 Parker Crim. Rep. 11; Lewis v. The State, 9 Smedes & Marsh. 115; Montgomery v. The State, 11 Stanton, 424.

In order to make dying declarations admissible in evidence, the deceased must not only be actually in a dying condition, but must believe that he is so. This belief may be inferred from the statements of the party, and also from the nature of the wound and other circumstances. Campbell v. The State, 11 Georgia, 353; The People v. Green, 1 Parker C. R. 11; The People v. Grunzig, Ibid. 299; The People v. Knickerbocker, Ibid. 302; The State v. Peace, 1 Jones' Law N. C. 251.

If, at the time of the declarations, he was in fact in a condition to make them competent, a hope of a recovery at a subsequent time would not render them incompetent. The State v. Tilghman, 11 Iredell, 513.

In order to make the declarations of the deceased evidence, it is not necessary that he should be *in articulo mortis.* The State v. Tilghman, 11 Iredell, 513; The State v. Poll, 1 Hawks, 442.

Declarations made in the last illness, by one who said he should die, but whom the physician had just told he might recover, are not admissible as dying declarations. People v. Robinson, 2 Parker C. B. 235.

When a *prima facie* case has been made out, it is a question of fact for the jury whether or not the declarations were made in immediate prospect of death. Campbell v. The State, 11 Georgia, 353.

The only satisfactory principle upon which the dying declarations of a person deceased can be admitted to establish the circumstances of his death, appears to be that they were made at a time when all expectation of recovery was abandoned. Dunn v. The State, 2 Arkansas, 229.

The question whether statements offered as dying declarations are admissible as such, is for the court. The State v. Howard, 32 Vermont, 380.

The declaration of a person wounded and bleeding that the defendant had stabbed her, made immediately after the occurrence, is competent to be put in evidence after her death, as part of the *res gestæ.* The Commonwealth v. McPike, 3 Cushing, 181.

When on a trial for murder, the declarations of the deceased have been offered in evidence, and an attempt has been made on the other side to destroy the effect of such declarations, by showing the bad character of the deceased, the State, for the purpose of corroborating the evidence, may prove that the deceased made other declarations to the same purport a few moments after he was stricken, though it did not appear that he was then under the apprehension of immediate death. The State v. Thomason, 1 Jones' Law N. C. 274.

The dying declarations of a party are only admissible on a trial of homicide, when the death of the deceased is the subject of the charge and the circumstances of the subject of them. Lambeth v. The State, 23 Mississippi, 323.

The deceased was shot at night by an unknown person; his declaration that the prisoner was the only slave on the place at enmity with him, was not admitted. Mose v. The State, 35 Alabama, 421.

Dying declarations must be restricted to the act of killing, and the circumstances immediately attending the act and forming a part of the *res gestæ.* The State v. Shelton, 2 Jones' Law N. C. 360.

On the trial of a man for the murder of his wife, her declarations made *in extremis* as to the cause of her death, are competent evidence against the prisoner. The People v. Green, 1 Denio, 614; Moore v. The State, 12 Alabama, 164.

It makes no difference that there are other witnesses by whom the same facts might be shown which are sought to be established by the dying declarations. The People v. Green, 1 Parker's Crim. Rep. 302.

The dying declarations of a wounded man as to his belief respecting the intention of his assailant to injure him, are not competent. McPherson v. The State, 22 Georgia, 478.

[*31] tinguished *from matters of fact, will not be receivable. R. v. Selier, Carr Supp. Cr. L. 233. Dying declarations in favor of the party charged with the deatl were admitted by Coleridge, J., in R. v. Scaife, 1 Moo. & R. 551. It is no objec tion to a dying declaration that it has been elicited by questions put to the de ceased :(1) R. v. Fagent, 7 C. & P. 238 : 32 E. C. L. R. See also R. v. Reason, Str. 499; R. v. Woodcock, 1 Leach, 500. In the last case the deceased was ex amined upon oath by a magistrate, and the examination signed by both. The ques tion, whether a dying declaration is admissible in evidence, is exclusively for th consideration of the court. Per Lord Ellenborough, R. v. Huck, 1 Stark. N. P 523. See also R. v. John, 1 East, P. C. 358; 1 Phill. Ev. 304, 8th ed., 291 9th ed.(2)

Dying declarations—admissible only in cases of homicide, where the circumstance of the death are the subject of the declaration.] It is a general rule, that dying decl rations, though made with a full consciousness of approaching death, are only admi sible in evidence where the death of the deceased is the subject of the charge, and th circumstances of the death are the subject of the dying declarations: per Abbot C. J., R. v. Mead, 2 B. & C. 600: 9 E. C. L. R. Therefore, where a prisoner wa indicted for administering savin to a woman pregnant, but not quick with child, wit intent to procure abortion, and evidence of the woman's dying declarations was te dered, Bayley, J., rejected it, observing, that although the declarations might rela to the cause of the death, still such declarations were admissible in those cases on where the death of the party was the subject of inquiry. R. v. Hutchinson, 2 B. C. 608 (*n*): 9 E. C. L. R. A man having been convicted of perjury, a rule for new trial was obtained, pending which the defendant shot the prosecutor, who die On showing cause against the rule, an affidavit was tendered of the dying declaratio of the prosecutor as to the transaction out of which the prosecution for perjury aros but the court were of opinion that this affidavit could not be read. R. v. Meed, 2 & C. 605 : 4 D. & R. 120, S. C. So evidence of the dying declarations of the par robbed has been frequently rejected on indictments for robbery. R. v. Lloyd, 4 C. P. 233 : 19 E. C. L. R.; also by Bayley, J., on the Northern Spring Circuit, 182 and by Best, J., on the Midland Spring Circuit, 1822. 1 Phill. Ev. 285, 8th e 282, 9th ed.

In one case where A. and B. were both poisoned by the same means, upon indictment against the prisoner for the murder of A., evidence was allowed by Co man, J., after consulting Parke, B., to be given of the dying declarations of B.; t ground alleged being "that it was all one transaction." 2 Moo. & Rob. 53. I in R. v. Hind, 29 L. J., M. C. 148, a case similar to that of R. v. Hutchinson, *sup* Pollock, C. B., said, "The rule we are supposed to adhere to is that laid down R. v. Mead; there Abbott, C. J., says that the general rule is that evidence of t description is only admissible where the death of the deceased is the subject of charge, and the circumstances of the death the subject of the dying declaration."

Dying declarations—the situation of the party who makes them.] Dying de

(1) Vass v. The Commonwealth, 3 Leigh, 786.

(2) The State v. Howard, 32 Vermont, 380; Wilson v. Boerem, 15 Johns. 286; Jackson v. denburg, 1 Johns. 159; Jackson v. Kniffer, 2 Johns. 31. See Gray v. Goodrich, 7 Johns. 95; Farland v. Shaw, 2 Car. Law Rep. 102.

When dying declarations are interrupted and evidently not all that the deceased wished o tended to say, they are not admissible. Vass's Case, 3 Leigh, 786.

rations are only admissible when made by a person who is under the influence of an impression that his dissolution is impending. There must be no hope, not only of ultimate recovery, but of *a prolonged continuance of life. If that impres- [*32] sion exist in the mind of the sufferer, it will not render the statement inadmissible that death does not in fact take place till some time afterwards.

In order to judge whether or not such is the state of the mind of the person in question, the whole of the circumstances must be looked at. It may be as well shortly to state in chronological order some of the cases in which the statements have been admitted or rejected; premising, however, that it is by no means suggested that they can become precise precedents for any future cases that may arise; it being impossible to bring before the mind by a verbal relation, however minute, many circumstances which take place at a trial by which the mind of the presiding judge would be influenced. Without such precaution a perusal of the reports of these cases, and still more so of the abridgment which is here given, might lead to serious error, but with it they will be useful as showing the aspect under which the question has been hitherto viewed.

In R. v. Woodcock, 1 Leach, 503, and R. v. John, 1 East, 357: S. C. 1 Leach, 504 (*n*), this kind of evidence was received under circumstances which would not now be considered sufficient to render it admissible. In the first, the surgeon distinctly stated that he did not think the deceased was aware of her situation; in the second, the deceased had never expressed the slightest apprehension of danger; and in neither case were there any circumstances which led to a different conclusion. In R. v. Woodcock, no case was reserved by Eyre, C. B., for the opinion of the judges; but in R. v. John, the judges, on a case reserved, held that the evidence was wrongly received. These cases have been frequently misquoted.

In R. v. Christie, Car. Supp. C. L. 202, the deceased asked his surgeon if the wound was necessarily mortal, and, on being told that a recovery was just possible, and that there had been an instance where a person had recovered from such a wound, he replied "I am satisfied," and after this made a statement; it was held by Abbott, C. J., and Park, J., to be inadmissible. In R. v. Van Butchell, 3 C. & P. 631: 14 E. C. L. R., the deceased said, "I feel that I have received such an injury in the bowel that I shall never recover;" and, on his doctor trying to cheer him, he said that he felt satisfied he should never recover. Hullock, J., rejected the evidence, saying that a man might receive an injury from which he might think that he should ultimately never recover, but still that would not be sufficient to dispense with an oath. See R. v. Reaney, *infra*. In R. v. Crockett, 4 C. & P. 544: 19 E. C. L. R., the surgeon said, "I had told the deceased she would not recover, and she was perfectly aware of her danger; I told her I understood she had taken something, and she said she had, and that damned man had poisoned her. I asked her what man, and she said Crockett. She said she hoped I would do what I could for her for the sake of her family. I told her there was no chance of her recovery." Bosanquet, J., thought a degree of hope was shown, and struck out the evidence. In R. v. Hayward, 6 C. & P. 157: 25 E. C. L. R., Tindal, C. J., observed that "any hope of recovery, however slight, existing in the mind of the deceased at the time of the declaration being made, would undoubtedly render the evidence of such declarations inadmissible." In R. v. Spilsbury, 7 C. & P. 187: 32 E. C. L. R., Coleridge, J., said, "It is an extremely painful matter for me to decide upon; but when I consider that this species of proof is an anomaly, and contrary to all the rules of evidence, and that, if received, it would have the greatest weight *with the [*33] jury, I think I ought not to receive the evidence, unless I feel fully convinced that

the deceased was in such a state as to render the evidence clearly admissible. appears from the evidence that the deceased said he thought he should not recove as he was very ill. Now people often make use of expressions of that kind who hav no conviction that their death is near approaching. If the deceased in this case ha felt that his end was drawing very near, and that he had no hope of recovering, should expect him to be saying something of his affairs, and of who was to have h property, or giving some directions as to his funeral, or as to where he would l buried, or that he would have used expressions to his widow purporting that the were soon to be separated by death, or that he would have taken leave of his friend and relations in a way that showed he was convinced that his death was at hand As nothing of this sort appears, I think there is not sufficient proof that he was with out any hope of recovery, and that I, therefore, ought to reject the evidence." I R. v. Perkins, 9 C. & P. 395: 38 E. C. L R.; S. C. 2 Moo. C. C. 135, a boy be tween ten and eleven years of age was severely wounded by a gun loaded with shot and died the next morning. On the evening of the day upon which he was wounded he was seen by two surgeons. One of them, who was then of opinion that he could not survive many days, said to him, "My good boy, you must know you are now laboring under a severe injury, from which, in all probability, you will not recover and the effects of it will most likely kill you." The other surgeon told him, "You may recover; it is impossible for me to say, but I don't think it likely that you will be alive by the morning." The boy made no reply, but his countenance changed and he appeared distressed. From questions put to him, he seemed fully aware that he would be punished hereafter if he said what was untrue. He then made a state ment to the surgeons. All the judges, except Bosanquet, Patteson, Coleridge, JJ. thought the statements made under the apprehension and expectation of immediat death. In R. v. Megson, 9 C. & P. 418: 38 E. C. L. R., two days before the death o the deceased, the surgeon told her she was in a very precarious state. On the following day, being much worse, she said to him that she had been in hopes of getting better but as she was getting worse, she thought it her duty to mention what had taken place. She then proceeded to make a statement. Rolfe, B., held that this state ment was not admissible, as it did not sufficiently appear that, at the time of making it, deceased was without the hope of recovery. In R. v. Howell, 1 Den. C. C. 1 the deceased had received a gunshot wound, and repeatedly expressed his conviction that he was mortally wounded. He was a Roman Catholic, and an offer was made to fetch a priest, which he declined. This was insisted on as showing either that th deceased had no sense of religion, or that he did not expect immediate death; but th judges, upon a case reserved, were unanimously of opinion that the evidence was pro perly received. In R. v. Reaney, Dears. & B. C. 151, the prisoner, eleven days befor his death, signed a statement concluding with the words, "I have made this statemen believing I shall not recover." On the same day he said, "I have seen the surgeon to day, and he has given me some little hope that I am better, but I do not myself think that I shall ultimately recover." The evidence was received by Willes, J., the poin being reserved for the consideration of the Court of Criminal Appeal. All the judge [*34] present (Pollock, C. B., Wightman and Willes, JJ., Martin and *Watson, BB. were of opinion that the evidence was properly received. Much reliance was placed by the counsel for the prisoner on the word "ultimately," but Pollock, C. B., said, "No doubt, in order to render the statement admissible in evidence as a dying declaration it is necessary that the person who makes it should be under an apprehension of death, but there is no case to show that such apprehension must be of death in a certain number of hours or days. The question turns rather upon the state of the

person's mind at the time of making the declaration, than upon the interval between the declaration and the death." Wightman, J., said that the statement must be made under an impression "that death must in a comparatively short lapse of time ensue." Martin, B., thought the question one for the judges at the trial exclusively, and not for the Court of Appeal, but that opinion stands alone. The case is also reported in 26 L. J., M. C., 143, and more fully in 7 Cox Cr. Ca. 209, and there are some important discrepancies between the reports, but on the whole there does not seem to be any alteration of the law, as it previously stood, arising out of this case. Willes, J., in both the two last-mentioned reports, is said to have expressed his opinion that the deceased could not, consistently with the expressions he used, have supposed that he was about to linger a long time.(1)

Interval of time between the declaration and death.] With respect to the interval of time which may have elapsed between the uttering of the dying declarations and the moment of death, it is clear that, if the impression exists in the mind of the declarant that dissolution is shortly impending, it will not make any difference that death does not in fact take place until some time afterwards: 1 Phill. Ev. 298, 8th ed., 285, 9th ed., 2 Russ. Cr. 753; nor does there appear to be any case in which the evidence has been rejected on this ground. In all the reported cases, however, the statements have been made within a few days of death actually taking place, and in most cases within a few hours.(2)

Dying declarations—admissibility of question for judge.] It is scarcely necessary to say that the opinion expressed by Eyre, C. B., in R. v. Woodcock, Leach, 503, that the admissibility of a dying declaration is in some degree a question for the jury, is erroneous. It is for the judge alone.

Dying declarations—where reduced into writing.] When a dying declaration is taken formally by a magistrate and reduced into writing, although perhaps more authentic, it is of no value as a deposition unless made in the presence of the prisoner, and accompanied by the proper formalities for taking depositions. It has been held that, if a dying declaration had been reduced into writing, and signed by the deceased, secondary evidence cannot be given of its contents. Per Coleridge, J., R. v. Gay, 7 C. & P. 230: 32 E. C. L. R. But mere notes of the declaration taken down by one of the parties who were present would not be even admissible. See *supra*, p. 3.(3)

Dying declarations—degree of credit to be given to.] With respect to the effect of dying declarations, it is to be observed that, although there may have been an utter abandonment of all hope of recovery, *it will often happen that the [*35] particulars of the violence to which the deceased has spoken were likely to have occurred under circumstances of confusion and surprise calculated to prevent their being accurately observed. The consequences, also, of the violence may occasion an injury to the mind, and an indistinctness of memory as to the particular transaction.

(1) The State v. Moody, 2 Hayw. 31; The State v. Poll, 1 Hawks, 442; Montgomery v. The State, 11 Ohio, 424; The State v. Tilghman, 11 Iredell, 513.

(2) The State v. Ferguson, 2 Hill S. Car. Rep. 619.

If dying declarations have been reduced to writing and signed, the writing must be produced or accounted for. The State v. Tweedy, 11 Iowa, 350.

(3) A written statement of dying declarations taken down by a magistrate is admissible as secondary evidence, if the magistrate swears that he cannot recollect the statement of the deceased. Beets v. The State, 1 Meigs, 106.

The deceased may have stated his inferences from facts, concerning which he ma have drawn a wrong conclusion, or he may have omitted important particulars, fro not having his attention called to them. Such evidence, therefore, is liable to b very incomplete. He may naturally, also, be disposed to give a partial account o the occurrence, although possibly not influenced by animosity or ill-will. But i cannot be concealed, that animosity and resentment are not unlikely to be felt i such a situation. The passion of anger once excited may not have been entirel extinguished, even when all hope of life is lost. See R. v. Crockett, 4 C. & P 544: 19 E. C. L. R., *ante*, p. 32, where the declaration was, "that damned ma has poisoned me," which may be presumed to be vindictive; and R. v. Bonner, C. & P. 386: 25 E. C. L. R., where the dying declaration was distinctly proven t be incorrect. Such considerations show the necessity of caution in receiving impres sions from accounts given by persons in a dying state; especially when it is considered that they cannot be subjected to the power of cross-examination; a power quite a necessary for securing the truth as the religious obligation of an oath can be. Th security, also, which courts of justice have in ordinary cases for enforcing truth, b the terror of punishment and the penalties of perjury, cannot exist in this case. Th remark before made on verbal statements which have been heard and reported b witnesses applies equally to dying declarations; namely, that they are liable to b misunderstood and misreported, from inattention, from misunderstanding, or fro infirmity of memory.(1) In one of the latest cases upon the subject, the species o proof is spoken of as an anomaly, and contrary to all the general rules of evidence yet as having, where it is received, the greatest weight with juries. Per Coleridge J., R. v. Spilsbury, 7 C. & P. 196: 32 E. C. L. R., 1 Phill. Ev. 305, 8th ed., 293 9th ed. "When a party comes to the conviction that he is about to die, he is in th same practical state as if called on in a court of justice under the sanction of an oath and his declarations as to the cause of his death are considered equal to an oath, bu they are, nevertheless, open to observation. For though the sanction is the same the opportunity of investigating the truth is very different, and therefore the accuse is entitled to every allowance and benefit that he may have lost by the absence of th opportunity of more full investigation by the means of cross-examination." Pe Alderson, B., R. v. Ashton, 2 Lewin, C. C. 147. See also the remarks of Pollock C. B., to the same effect in delivering the judgment of the Court of Criminal Appea in R. v. Reaney, *supra*, p. 33.

Dying declarations—evidence in answer to proof of.] Dying declarations are, c course, open to direct contradiction in the same manner as any other part of the cas for the prosecution; and as a prisoner is at liberty to show that a prosecutor wh appears in court against him is not to be believed upon his oath (see *post*), he seem to be equally at liberty to prove that the character of the deceased was such that n reliance is to be placed on his dying declarations. 2 Russell on Crimes, by Greaves [*36] 764. As the declarations of a dying *man are admitted on a supposition tha in his awful situation, on the confines of a future world, he had no motive to mis represent, but, on the contrary, the strongest motives to speak without disguise an

(1) The substance of dying declarations may be proved. It need not be the exact words. Ward The State, 8 Blackford, 101, Montgomery v. The State, 11 Stant. 424. When the declaration is n of facts known to the deceased, but of an opinion or suspicion, as an inference from other facts, th jury should disregard it as evidence in itself. The State v. Arnold, 13 Iredell, 184; Nelms v. Th State, 13 Smedes & Marsh. 500.

without malice, it necessarily follows that the party against whom they are produced in evidence may enter into the particulars of his state of mind and of his behavior in his last moments, and may be allowed to show that the deceased was not of such a character as was likely to be impressed with a religious sense of his approaching dissolution. See 1 Phill. Ev. 298, 9th ed.

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*CONFESSIONS. [*37]

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Ground of admissibility.] The confessions of prisoners are received in evidence upon the same principle upon which admissions in civil suits are received, viz., the presumption that a person will not make an untrue statement against his own interest. 1 Phill. Ev. 397, 9th ed.(1)

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(1) State v. Guild, 5 Halst. 163; The People v. McFall, 1 Wheeler's Cr. C. 108.

The Commonwealth is not bound to accept an admission of defendant that the fact offered to be proved is true, but may go on to establish it by evidence. Commonwealth v. Miller, 3 Cushing, 243.

As to confessions generally. Brister v. The State, 20 Alabama, 107; Alfred v. The State, 2 Swan, 581; The State v. York, 37 N. Hamp. 175; The State v. Wentworth, Ibid. 196; Shiffiet's Case, 14 Grattan, 652; The State v. George, 5 Jones' Law, 233; Bob v. The State, 32 Alabama, 560; The State v. Gregory, 5 Jones' Law, 315; The State v. Lamb, 28 Missouri, 228; Meyer v. The State, 19 Arkansas, 156; Fouts v. The State, 8 Ohio (N. S.), 98; Hartung v. The People, 4 Parker C. R. 319; Keenan v. The State, 8 Wisconsin, 132; Drumright v. The State, 29 Georgia, 430; Lynes v. The State, 36 Mississippi, 617; Cain v. The State, 18 Texas, 387; The People v. Harriden, 1 Parker C. R. 344; Hendrickson v. The People, Ibid. 406; The People v. Thayers, Ibid. 595; Liles v. The State, 30 Alabama, 24; Scott v. The State, Ibid. 503; The Commonwealth v. Reny, 8 Gray, 501; Aiken v. The State, 35 Alabama, 399.

As to confessions by slaves, see Seaborn v. The State, 20 Alabama, 15; Spencer v. The State, 71 Ibid. 192; The State v. Clarissa, 11 Ibid. 57.

Evidence that defendant was in the habit of drinking cannot be given by him to explain or account for declarations. Whitney v. The State, 8 Missouri, 165.

The fact that the defendant was intoxicated, "that he was excited and scattering in his conversation, and that no one who heard him could repeat all that he said," does not render his declarations or confessions of guilt inadmissible. Eskridge v. The State, 25 Alabama, 30.

A statement by the prisoner before he was charged with the crime is admissible against him. The State v. Vaigneur, 5 Richardson, 391.

A conversation between a witness and the prisoner having been given in evidence by the State, it was held that other conversations on the same matter between the same persons, were not admissible on behalf of the defendant. The State v. McPherson, 9 Iowa, 53.

The giving in evidence, against the defendant in a criminal case, of his statements at the time of

Nature and effect of confessions.] Confessions may be divided into two classes: judicial and extra-judicial. They may also be divided into plenary and non-plenary.

A plenary judicial confession, *i. e.*, a confession made by the accused before a tribunal competent to try him, is sufficient whereon to found a conviction.

It is said by Lord Hale, that where the prisoner freely tells the fact, and demands the opinion of the court, whether it be felony, though upon the fact thus shown it appears to be felony, the court will not record his confession, but admit him to plead to the felony *not guilty*. 2 Hale P. C. 225.

A plenary judicial confession is in other words a plea of *guilty*.

An extra-judicial confession is good evidence, but not conclusive, even though plenary. Whether or not a plenary extra-judicial confession, uncorroborated in any [*38] way whatever, is sufficient whereon to *found a conviction, has been the subject of some discussion. It is said to have been decided to be so in R. v. Wheeling, 1 Leach Cr. Ca. 311 (*n*); but it seems doubtful, whether the language is to be taken in the unqualified sense which, at first sight, it appears to bear. The subject is ably discussed by Mr. Greaves in a note to 2 Russ. Cr. 825; and he is of opinion that it has never been expressly *decided*, that the mere confession of a prisoner *alone*, and without any other evidence, is sufficient to warrant a conviction.(1)

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his arrest, as tending to show that he then gave a false account of himself, does not entitle him to show that he had previously, on other occasions, given a different and true account of the same facts. The Commonwealth v. Goodwin, 14 Gray, 55.

When a conversation has been testified, it is competent for defendant to give evidence of a subsequent conversation with the same witness. The People v. Green, 1 Parker's Com. Rep. 11.

A confession made at one time is not destroyed by a denial made at another time. Jones v. The State, 13 Texas, 168.

Words uttered in sleep by a defendant in a criminal case are not admissible in evidence against him. The People v. Robinson, 19 California, 40.

The record of the examination before a justice is evidence on the trial of the prisoner even if it show no confession but only refusals to answer. The People v. Banker, 2 Parker's C. R. 26. But it cannot be used by him in his defence. Nelson v. The State, 2 Swan, 237.

Admissions made to a clergyman are admissible as evidence in a criminal case, if not made to him in his professional character, in the course of discipline enjoined by his church. The People v. Gates, 13 Wend. 311.

A letter written by the defendant after his arrest and before trial, in relation to confessions made by an accomplice, is admissible in evidence against him. The State v. Watson, 31 Missouri, 361.

The confessions of an accused person should not be excluded, because the facts themselves have been proved by witnesses who were present when they transpired. Such confessions and the testimony are of the same grade of evidence. Austin v. The State, 14 Arkansas, 556.

(1) Confessions ought always to be received with great caution, lest the language of the witness should be substituted for that of the accused. Law v. Merrill, 6 Wend. 268; Malin v. Malin, 1 Id. 625; State v. Gardiner, Wright's Rep. 393.

The confession of an infant is competent, but the jury should be careful in weighing it. Mather v. Clark, 2 Atk. 209. A boy of twelve years and five months may be convicted on his own confession and executed. Capacity to commit a crime necessarily supposes capacity to confess it. State v. Guild, 5 Halst. 163. See also Comm. v. Yard, Mina Trial, Pamphlet, p. 10. The case of a boy of twelve years, where it was left to the jury (the point being doubtful) to determine, as a matter of fact, whether the confession was voluntary. State v. Aaron, 1 Southard, 231. The case of a boy ten years old. Case of Stage et al., 5 Rogers Rec. 177.

When there is evidence from which the jury may reasonably infer the commission of the offence charged, sufficient foundation is laid for admitting the voluntary confessions of the prisoner; the prosecution being still held to the production of proof requisite to warrant conviction. The State v. Laliyer, 4 Minnesota, 368.

A mere confession of the party charged with crime uncorroborated by circumstances is insufficient to justify conviction. Bergen v. The People, 17 Illinois, 426; The People v. Rulloff, 3 Parker C. R. 401.

Extra-judicial confessions of a prisoner are not sufficient to warrant a conviction, without proof *aliunde* of the *corpus delicti*. Brown v. The State, 32 Mississippi, 433; Same v. The State, 33 Ibid. 347.

The extra-judicial confession of a prisoner indicted for murder, without proof *aliunde* of the death of the party, is insufficient to convict him. Strongfellow v. The State, 26 Mississippi, 157.

There must be satisfactory evidence that a crime has been committed; as that, in case of larceny, the property has been feloniously taken and carried away, even when the prisoner shows satisfactory indications of guilt. Tyner v. The State, 5 Humphreys Rep. 383; People v. Hennessey, 15 Wend. 147; Keithler v. The State, 10 Smedes & Marsh. 192; Stephen v. The State, 11 Georgia, 225; The People v. Badgley, 16 Wend 53; *Contra*, The State v. Cowan, 7 Iredell, 239; *Contra*, The State v. Lamb, 25 Missouri, 218.

Degree of credit to be given to.] With regard to the degree of credit which a jury ought to attach to a confession, much difference of opinion has existed. By some it has been considered as forming the highest and most satisfactory evidence of guilt. Per Grose, J., delivering the opinion of the judges in R. v. Lambe, 2 Leach, 554. "The voluntary confession of the party in interest," says Chief Baron Gilbert, "is reckoned the best evidence; for, if a man swearing for his interest can give no credit, he must certainly give most credit when he swears against it." Gilb. Ev. 137. So it is stated by the court in R. v. Warwickshall, 1 Leach, 263, that a free and voluntary confession is deserving of the highest credit, because it is presumed to flow from the highest sense of guilt, and therefore it is admitted as proof of the crime to which it refers. On the other hand, it is said by Mr. Justice Foster (Discourses, 243), that hasty confessions made to persons having no authority to examine, are the weakest and most suspicious of all evidence. Proof may be too easily procured, words are often misreported, through ignorance, inattention, or malice, and they are extremely liable to misconstruction. Moreover, this evidence is not, in the usual course of things, to be disproved by that sort of negative evidence by which the proof of plain facts may be, and often is confronted. This opinion has also been adopted by Sir W. Blackstone. 4 Com. 357. It has been said that it is not to be conceived that a man would be induced to make a free and voluntary confession of guilt, so contrary to the feelings and principles of human nature, if the facts confessed were not true. 1 Phill. Ev. 110, 7th ed. It cannot be doubted, however, that instances have occasionally occurred, in which innocent persons have confessed themselves guilty of crimes of the gravest nature. Three men were tried and convicted of the murder of a Mr. Harrison. One of them confessed himself guilty of the fact, under a promise of pardon; the confession, therefore, was not given in evidence against him, and a few years afterwards it appeared that Mr. Harrison was alive. MS. case, cited 1 Leach, 264 (*n*). Mr. Phillipps also, after stating that in criminal cases a confession carries with it a greater probability of truth than a confession in civil suits, the consequences being more serious and highly penal, and alluding to the maxim, *habemus optimum testem, confitentem reum*, adds, "but it is to be observed there may not unfrequently be motives of hope and fear, inducing a person to make an untrue confession, which seldom operate in the case of admissions. And further, in consequence also of the universal eagerness and zeal which prevail for the detection of guilt when offences occur of an aggravated character, in consequence also of the necessity of using testimony of suspicious witnesses for the discovery of secret crimes, the evidence of confessions is subject, in a very remarkable degree, to the imperfections attaching generally to hearsay evidence. See per Alderson B., R. v. Simons, 6 C. & P. 541: 25 E. C. L. R.; also *5 C. & P. 542: 24 E. C. L. R. For these reasons the state- [*39] ments of prisoners are often excluded from being given in evidence in cases where they would be unobjectionable as the admission of a party to a civil suit." 1 Phill. Ev. 397, 9th ed.

What confessions are not admissible in evidence.] *Primâ facie*, as a matter of course, a confession by the prisoner is admissible as evidence against him. But there are certain grounds which may be shown by him sufficient to exclude the confession. The law, however, as it at present stands, is involved in considerable obscurity; and,

If the prisoner is in law capable of committing crime he is liable to be convicted upon his own confession. Studstill v. The State, 7 Georgia, 2.

Confessions should be received with great caution, for experience has shown that they often mislead and sometimes convict an innocent person. United States v. Nott, 1 McLean, 499.

until it has received further discussion, it is impossible to mark out precisely the limits of exclusion and admission. Thus much is certain, that no confession by the prisoner is admissible which is made in consequence of any inducement of a temporal nature, having reference to the charge against the prisoner, held out by a person in authority; and, on the whole, the tendency of the present decisions seems to be to admit any confessions which do not come within this proposition; but that this is so has not yet been distinctly stated, nor has the meaning to be attached to each branch of the proposition been as yet distinctly ascertained, as a perusal of the following cases will show.

It is usual to speak of a *threat* or *inducement* as excluding the confession; and whether a man says, "if you *do* confess I *will not do* so and so," or whether he says, "if you *do not* confess I *will do* so and so," makes very little difference, if in substance the person accused is unduly influenced. All that is here said, therefore, will be applicable to both threats and inducements.(1)

What is an inducement.] The reported cases in which statements by prisoners have been held inadmissible are very numerous. Previous to the decision in R. v Baldry, 2 Den. C. C. 430, S. C., 1 Cox Cr. Ca. 530: 21 L. J., M. C. 130, which will be noticed presently, they had gone a very great length. In R. v. Drew, 8 C. & P. 140: 34 E. C. L. R., the prisoner was told "not to say anything to prejudice himself, as what he said would be taken down, and would be used for or against him at his trial." Coleridge, J., considered this to be an inducement to make a statement, and rejected the evidence. In R. v. Morton, 2 Moo. & R. 514, the constable said to the prisoner, "What you are charged with is a very heavy offence, and you must be very careful in making a statement to me or to anybody else that may tend to injure you; but anything that you can say in your defence we shall be ready to hear, or to send to assist you." Coleridge J., said: "Upon reflection, I adhere to my decision in R. v. Drew," and rejected the evidence. In R. v. Farley, 1 Cox Cr. Ca.

(1) Confessions or disclosures made under any threat, promise, or encouragement of any hope or favor, are inadmissible in criminal prosecutions. The State v. Phelps, 11 Vermont, 116; Boyd v. The State, 2 Humphreys, 37; The State v. Grant, 9 Shepley, 171; The State v. Harman, 3 Harrington, 567; Ward v. The People, 3 Hill, 395; The State v. Freeman, 1 Speers, 57.

The officer who had a prisoner in charge told him that he had better tell him all about the matter, and if he would, he would not appear against him, and that the prisoner had better turn State's evidence, whereupon the prisoner made a full confession to the officer; held, that the confession so obtained could not be given in evidence against the prisoner, and that the proper time of objection was before the officer had given his testimony and not during the instruction of the jury. Cauley v. The State, 12 Missouri, 462; Lambeth v. The State, 1 Cushman, 322; The Commonwealth v. Taylor, 5 Cushing, 605.

A confession, made under representation of the infamy which would attend the concealment, made in great agitation, but without threats or promises, is admissible. State v. Crank, 2 Bailey, 66. On the trial of an indictment to exclude confessions of guilt of the accused on the ground of their not having been voluntarily made, there must appear to have been held out some fear of personal injury, or hope of personal benefit of a temporal nature, unless the collateral inducement be so strong as to make it reasonable to believe that it might have produced an untrue statement as a confession. State v. Grant, 22 Maine, 171; The People v. Rankin, 2 Wheeler's C. C. 467; People v. Johnson, Ibid. 378; State v. Aaron, 1 Southard, 231.

A confession obtained from a defendant, either by the flattery of hope, or by the impressions of fear, however slightly the emotion may be implied, is not admissible. Stephens v. The State, 11 Georgia, 225; The State v. Harman, 3 Harrington, 567; The State v. Phelps, 11 Vermont, 116; The Comm. v. Knapp, 9 Pick. 496; The State v. Grant, 22 Maine, 171.

When a confession is obtained by a promise to put an end to a prosecution, it is held that such confession is inadmissible. Boyd v. The State, 2 Humphreys, 39; Bryant v. The State, 9 Ibid. 635. As to inducements to confess, see The Commonwealth v. Morey, 1 Gray, 461; Smith v. The Commonwealth, 10 Grattan, 734; Jim v. The State, 15 Georgia, 535; Wyatt v. The State, 25 Alabama, 9; Spears v. Ohio, 2 Ohio (N. S.), 583; Austin v. The State, 14 Arkansas, 556; The People v. Burns, 2 Parker C. R. 34; The State v. Patrick, 3 Jones' Law N. C. 443; The State v. Gossett, 9 Richardson's Law, 428; The People v. Thoms, 3 Parker C. R. 256; Fife v. The Commonwealth, 5 Casey, 429; Simon v. The State, 5 Florida, 285; Rafe v. The State, 20 Georgia, 60; The State v.

76, the prisoner was told by the constable that whatever she told him would be used against her at the trial; and Maule, J., referring to R. v. Drew, rejected the evidence; and the same learned judge pursued the same course in R. v. Harris, id. 106. All the cases, however, are reviewed in R. v. Baldry, *ubi suprà*, where the constable had said to the prisoner, after telling him the charge, "that he must not say anything to criminate himself; what he did say would be taken down, and used as evidence against him." Lord Campbell, C. J., at the trial received the evidence, but reserved the point for the consideration of the Court of Criminal Appeal, on the authority of the above cases. All the judges (Pollock, C. B., Parke, B., Erle and Williams, JJ., and Campbell, C. J.) were of opinion that the *statement was admissible. [*40] Pollock, C. B., said, "A simple caution to the accused to tell the truth, if he says anything, has been decided not to be sufficient to prevent the statement being given in evidence; yet, even in that case, the person charged might have understood the caution as meaning that he could not tell the truth without confessing his guilt. It has been decided that that would not prevent the statement being given in evidence by Littledale, J., in R. v. Court, 7 C. & P. 486: 32 E. C. L. R.; and by Rolfe, B., in a case at Gloucester, R. v. Holmes, 1 Car. & K. 248: 47 E. C. L. R.; but where the admonition to speak the truth has been coupled with any expression importing that it would be better for him to do so, it has been held that the confession was not receivable; the objectionable words being, 'that it would be better to speak the truth,' because they import that it would be better for him to say something. This was decided in R. v. Garner, 1 Den. C. C. 329. The true distinction between the present case and a case of that kind is, that here it is left to the prisoner as a perfect matter of indifference whether he should open his mouth or not. With regard to the cases of R. v. Drew and R. v. Morton, with the greatest respect for my brother Coleridge, I do not approve of the decision in the former, or the arguments used to support it in the latter. I think the statement in R. v. Drew ought not to have been rejected. With every veneration for the opinion of my brother Maule, I cannot agree with his view of the subject." Parke, B., said, "I have reflected on R. v. Drew and R. v. Morton, and I have never been able to make out that any benefit was held out to the prisoner by the cautions employed in those cases." And Lord Campbell, C. J., said, "With regard to the decisions of my brother Maule, and my brother Coleridge, with the greatest respect for them, I disagree with their conclusions."

The case of R. v. Court, above referred to, was this: the prisoner was taken before a magistrate on a charge of forgery; the prosecutor said, in the hearing of the prisoner, that he considered the prisoner as the tool of one G., and the magistrate then told the prisoner to be sure and tell the truth; upon which the prisoner made a statement. It was held by Littledale, J., that evidence of this statement was admissible. In R. v. Holmes (*supra*), the prisoner was before a magistrate on the charge of rape, and the magistrate said, "Be sure you say nothing but the truth, or it will be taken against you, and may be given in evidence against you at your trial." Evidence of the statement then made by the prisoner was held by Rolfe, B., to be admissible. In R. v. Garner (*supra*), the surgeon told the girl, in the presence of her master and mistress (which, as we shall see presently, is the same thing as if the words had been used by the master or mistress themselves), that it was better for her to speak the

Kitty, 12 Louisiana, 805; Franklin v. The State, 2 Alabama, 9; Hamilton v. The State. 3 Indiana, 552; Dick v. The State, 30 Mississippi, 593; Smith v. The State, 10 Indiana, 106; Rutherford v. The Commonwealth, 2 Metcalfe (Ky.) 387; The State v. Freeman, 12 Indiana, 100; The Commonwealth v. Howe, 2 Allen, 153; The People v. Smith, 15 California, 408.

If the confession is not so connected with the threat or promise as to be a consequence of it, it is to be regarded as voluntary, and of course admissible. The State v. Potter, 18 Conn. 166.

truth; evidence of the statement thereupon made was unanimously held by the Court of Criminal Appeal to be inadmissible. As the principles laid down in R. v. Baldry will, doubtless, now be considered conclusive, it is not considered necessary to refer at any greater length to a large class of previous cases which are of a similar character, and which are not altogether uniform; they will all be found in the elaborate argument of the learned counsel for the prisoner in R. v. Baldry.

In R. v. Sleeman, 1 Dears. C. C. 249, the prisoner, a maidservant, was taken into custody on a charge of setting fire to her master's premises. She desired to change her dress, and was permitted to do so, being given, for that purpose, into the charge [*41] of her *master's daughter. While she was changing her clothes, her master's daughter said to her, "I am very sorry for you; you ought to have known better; tell me the truth, whether you did it or no." The prisoner said, "I am innocent." The master's daughter replied, "Don't run your soul into more sin; tell the truth." The prisoner then made a full confession. The evidence was admitted; and the Court of Criminal Appeal, on a case reserved, held that there was no inducement or threat, and affirmed the conviction. In R. v. Upchurch, 1 Moo. C. C. 465, the prisoner, a servant girl, aged thirteen, was indicted for attempting to set fire to her master's house. After the attempt was discovered, her mistress said to her, "Mary, my girl, if you are guilty, do confess; it will perhaps save your neck; you will have to go to prison; if W. H. C. (a person whom the prisoner had charged) is found clear, the guilt will fall on you." She made no answer. The mistress then said, "Pray tell me if you did it." The prisoner then confessed. The evidence was admitted, and the point reserved; but the judges thought that it ought not to have been received. In R. v. Hearn, 1 Car. & M. 109: 41 E. C. L. R., a servant was charged with attempting to set fire to her master's house. It was proved that the furniture in two bedrooms was on fire, and a spoon and other articles were found in the sucker of the pump. The master told the prisoner, that if she did not tell the truth about the things found in the pump, he would send for the constable to take her, but he said nothing to her respecting the fire. Coltman, J., held that this was such an inducement to confess as would render inadmissible any statement that the prisoner made respecting the fire, as the whole was to be considered as one transaction.

Whether the inducement must have reference to the charge.] Upon this point there are but few authorities. In R. v. Sexton, Chetw. Burn, tit. Confession, the prisoner said, "If you will give me a glass of gin, I will tell you all about it," and two glasses of gin were given him. He then made a confession, which Best, J., refused to admit. This decision has been repeatedly doubted. See Deacon Dig. Cr. Law, 424; Joy on Confessions, 17; 2 Russ. Cr. 827. In R. v. Lloyd, 6 C. & P. 393: 25 E. C. L. R., a man and his wife were in prison in separate rooms, on a charge of stealing and receiving, and the constable said to the man, "If you will tell where the property is, you shall see your wife;" Patteson, J., held that a confession made afterwards was admissible. The report of R. v. Green, 6 C. & P. 655: 25 E. C. L. R., which is sometimes cited on this point, seems too obscure to be relied on for any purpose whatever.

It is to be remarked that if it it is necessary that the inducement should have reference to the charge against the prisoner, it is quite unnecessary to discuss, as was done in great length in R. v. Gilham, 1 Moo. C. C. 186, whether the inducement must be of a temporal nature. There the chaplain of the gaol had had repeated interviews with the prisoner, and had strongly impressed upon him the religious duty of confession; coupling these exhortations with an expression of belief that the

prisoner was a guilty man, as indeed the prisoner himself in general terms admitted. The gaoler had also conversed with the prisoner on the subject, and had held, in briefer terms, similar language. The prisoner at length, after being cautioned that what he said would be used in evidence against him, made a full confession to the gaoler, and afterwards to the mayor. Both confessions *were received by Gar- [*42] row, B., the question of their admissibility being reserved for the opinion of the judges. The judges, without stating any reasons, held that the confessions (both according to the report) were properly received; and it is said in 2 Russ. Cr. p. 852, that the ground of this decision was that there were no temporal hopes of benefit or forgiveness held out; and that such hopes, if referrible merely to a future state of existence, are not within the principle on which the rule for excluding confessions obtained by improper influence is founded. Two other points were taken by the counsel for the prosecution; namely, that neither the chaplain nor the gaoler were persons in authority, within the meaning of the rule which excludes confessions; and that there had been ample caution given to render the confessions admissible, even if what had previously taken place were open to objection. But there is no indication of the opinion of the court on either of these points.

In R. v. Wild, 1 Moo. C. C. 452, which is frequently quoted on this subject, a variety of confessions which had been made by the prisoner, were received in evidence, and some of these, at least, are open to more than one objection. As it is said in the report that the confession was considered by a majority of the judges to be admissible, not saying which, and no grounds of the decision are given, no conclusion can be drawn from it. In R. v. Nute, Chetw. Burn, tit. Confession, S. C., 2 Russ. Cr. 832, the question, whether inducements not of a temporal nature coming from a person in authority are sufficient to exclude a confession, seems to have been considered by the judges, and by some, at least, to have been resolved in favor of their admissibility of confessions made under such circumstances.

On the whole the authorities seem to be in favor of the proposition that the inducement must be of a temporal nature. Whether or no it must have reference to the charge has scarcely been fully discussed. It is certainly possible to conceive cases in which a much stronger inducement might be held out to a prisoner than one having reference to an escape from a charge not involving any very serious consequences.

Inducement must be held out by a person in authority.] In R. v. Spencer, 7 C. & P. 776: 32 E. C. L. R., Parke, B., stated that there was a difference of opinion among the judges, whether a confession made to a person who has no authority, after an inducement held out by that person, can be given in evidence; and the learned judge intended, had the evidence been pressed, to have received it; and to have reserved the point. But on the last-mentioned case being cited in R. v. Taylor, 8 C. & P. 733: 34 E. C. L. R., Patteson J., said, "It is the opinion of the judges, that evidence of any confession is receivable, unless there has been some inducement held out by some person in authority." And in R. v. Moore, 2 Den. C. C. 526, Parke, B., in delivering a carefully considered judgment of the Court of Criminal Appeal, said that, if the inducement was not held out by a person in authority, it was clearly admissible. This question may, therefore, be considered as settled.(1)

(1) When a magistrate, on the examination of a prisoner accused of robbing an individual of a watch on the previous night, and on whom the watch was found, told him "that unless he could account for the manner in which he became possessed of the watch, he should be obliged to commit him to be tried for stealing it:" it was held that this did not amount to such a threat as would prevent

Who is a person in authority.] The decisions are numerous and undoubted that the prosecutor, or the person who in the ordinary course of things will become so, [*43] the constable in charge of the *prisoner, and any person having judicial authority over the prisoner, are persons in authority within the meaning of the rule. The rule also extends to the master or mistress of the prisoner, but only where the offence concerns the master or mistress. This was denied in R. v. Moore, *supra*, where the prisoner was charged with killing or concealing the birth of her infant child, and had made a confession to her mistress after an inducement, which was held admissible. The previous cases were there discussed by Parke, B., and shown to be in conformity with that decision. In R. v. Luckhurst, 1 Dears. C. C. 245, the owner of a mare was held to be a person from whom a threat coming would exclude the confession of a prisoner that he had had connection with the mare. In R. v. Kingston, 4 C. & P. 387 : 19 E. C. L. R., Park, J., after conferring with Littledale, J , held that an inducement held out by a surgeon was sufficient to exclude a confession. This appears to be the only decision on this point. In R. v. Garner, 2 C. & K. 920 : 61 E. C. L. R., the inducement was held out by the surgeon, and the confession was made to him, but the master and mistress were present, and, as will be seen presently, that is the same as if the inducement had been held out by them. The case of R. v. Gilham, 1 Moo. C. C. 86, is no authority, as has sometimes been stated, that the chaplain of a gaol is a person in authority within the meaning of this rule ; see that case fully stated, *ante*, p. 40. In R. v. Sleeman, 1 Dears. C. C. 248, *ante*, p. 39, it was stated that the daughter of the master of the house who had the maidservant in her custody for a temporary purpose, was not a person in authority. *Sed qu.*, the point was not necessary to the decision, as it was held that there was no inducement.

Inasmuch as in cases of felony any person may, upon reasonable suspicion, apprehend the suspected party, it follows that a person in no way connected with the charge may put himself in the position of a person in authority. Thus in R v. Parratt, 4 C. & P. 570 : 19 E. C. L. R., the prisoner, a sailor, was charged with robbing one of the crew of the ship to which he belonged. The master said, "If you do not tell me who your partner was, I will commit you to prison;" and the prisoner thereupon confessed. Alderson, B., held the confession inadmissible. Parke, B., refer

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the introduction of the subsequent confession of the accused, especially as the magistrate repeatedly warned him not to commit himself by any confession. The State v. Cowan, 7 Iredell, 239.

It is no ground for the exclusion of a confession as evidence against a prisoner, that it was made to an officer who had the prisoner in custody, provided that it was not drawn out by improper advantages taken of the situation in which the prisoner was standing. Commonwealth v. Mosler, 4 Barr, 264 ; The State v. Kirby, 1 Strobhart, 378.

The competency of confessions cannot be questioned because they were made while the party was in legal imprisonment. Stephen v. The State, 11 Georgia, 225 ; The State v. Jefferson, 6 Iredell, 305 ; The People v. McMahan, 2 Parker's Crim. Rep. 663.

The single fact that a prisoner was in custody when his confessions were made, whether to the officer or to third persons, will not exclude the evidence of his declarations, in the absence of any promises, inducements, or threats. The People v. Rogers, 4 Smith, 9; Cobb v. The State, 27 Georgia, 648.

A party cannot be compelled to give evidence against himself, and this protection holds as well against a threat of violence by private individuals as to force exercised by government officers to procure a confession of guilt; and evidence thus procured cannot be admitted against the accused. Jordan v. The State, 32 Mississippi, 382.

When, after due warning of all the consequences and sufficient time allowed for reflection, a prisoner makes a confession of his guilt to a private person having nothing to do with the prisoner or prosecutor, although he may have influence and ability to aid him, such confession is evidence. The State v. Kirby, 1 Strobhart, 155.

A mere observation to the accused by the person who had her in custody "that in the long run, it would be better for her to tell the truth about the matter and not any lies," was held not enough to exclude a confession made afterwards in a conversation with a third person. Hawkins v. The State, 7 Missouri, 190 ; The State v. Vaigneur, 5 Richardson, 391 ; Deathridge v. The State, 1 Sneed, 75 ; Jane v. The Commonwealth, 2 Metcalfe (Ky.) 30.

ring to this case in R. v. Moore, 2 Den. C. C. 526, puts it on the ground that the master had threatened to take part in the prosecution for the felony. See 2 Russ. Cr. 840 (*n*).

It is the same thing whether the inducement be held out by a person in authority or by another in his presence. R. v. Luckhurst, 1 Dears. C. C. 245. And it appears from this case, from R. v. Laugher, 2 C. & K. 225: 61 E. C. L. R., and R. v. Garner, Id. 920, that, even if the person in authority be silent, he will be presumed to acquiesce in the inducement.

Where there were three prisoners in custody on the same charge, and one said to another, "Well, John, you had better tell Mr. Walker (the prosecutor) the truth," and the prisoner addressed thereupon made a confession: evidence of this confession was received, and its admissibility reserved for the consideration of the Court of Criminal Appeal: that court affirmed the conviction. No counsel appeared, and no reasons were given; but probably it was thought that though what is said in the presence of a person in authority may generally be considered as said with his sanction, yet that this did not apply to what was said by one prisoner to another; as it could *hardly be imagined that what was thus said was sanctioned by the per- [*44] son in authority. R. v. Parker, 9 W. R. 699.

Inducement by offer of pardon from the crown.] The mere knowledge by a prisoner of a handbill, by which a government reward and a promise of pardon are held out to any accomplice, does not furnish sufficient grounds for rejecting the confession of a prisoner. But where it was shown that the prisoner had asked to see any handbill that might appear, and one was accordingly shown him, in which a promise of pardon was held out to an accomplice, upon which the prisoner said he saw no reason why he should suffer for the crime of another, and that, as government had offered a free pardon to any one of the parties concerned who had not struck the blow, he would tell all about the matter, and accordingly did so, Cresswell, J., held the confession inadmissible, as it was sufficiently clear that the prisoner was influenced by the offer of pardon. R. v. Boswell, 6 Car. & M. 584. In R. v. Blackburn, 6 Cox Cr. Ca. 334, a statement made by the prisoner in a room, in which a large printed handbill, containing an offer of reward and pardon, was hanging up, was rejected by Talfourd, J., after consulting with Williams, J., the prisoner appearing to have the notion that he would be admitted as witness for the crown. In R. v. Dingley, 1 C. & K. 637: 47 E. C. L. R., the prisoner asked the chaplain of the gaol if any offer of pardon had been made; the chaplain said there had, but added that, if the prisoner made a statement he hoped he would understand that he (the chaplain) could offer him no inducement, as it must be his own free and voluntary act. The prisoner afterwards signed a confession before a justice, in which he distinctly stated that no person had made any promise, or held out any inducement to him to confess anything. Pollock, C. B., held that the confession was admissible.

Inducement held out with reference to a different charge.] An inducement held out to a prisoner with reference to one charge will not exclude a confession of another offence, of which the prisoner was not suspected at the time the inducement was held out. The prisoner had been in the custody of several constables, one after another; it was suggested on his behalf, that one of them had improperly induced him to confess, and this constable was called and stated that whilst the prisoner was in his custody on another charge, and when he was not suspected of the offence for which he was then on his trial, he had made a statement in which he confessed himself guilty of a second charge. It was submitted, that if a promise was held out to him, it was

immaterial what the charge was. Littledale, J., said, "I think not. If he was taken up on a particular charge, I think that the promise could only operate on his mind as to the charge on which he was taken up. A promise as to one charge will not affect him as to another charge." The confession was admitted. R. v. Warner, Glouc. Spr. Ass. 1832, 2 Russ. by Greaves, 845. But where a threat was held out to a prisoner without the nature of the charge being stated, but subsequently the nature of the charge was stated, and thereupon a confession was made, it was held to be inadmissible. R. v. Luckhurst, 1 Dears. C. C. R. 245.

[*45] *Inducement—where held to have ceased.*] Although a confession *made under the influence of a promise or threat is inadmissible, there are yet many cases in which it has been held that, notwithstanding such threat or promise may have been made use of, the confession is to be received, if it has been made under such circumstances as to create a reasonable presumption that the threat or promise had no influence, or had ceased to have any influence upon the mind of the party.

Thus, if the impression that a confession is likely to benefit him has been removed from the mind of a prisoner, what he says will be evidence against him, although he has been advised to confess. Where the prisoner, on being taken into custody, had been told by a person who came to assist the constable, that it would be better for him to confess, but, on his being examined before the committing magistrate on the following day, he was frequently cautioned by the magistrate to say nothing against himself, a confession under these circumstances was held by Mr. Justice Bayley to be clearly admissible. R v. Lingate, 1815; Phill. Ev. 431, 8th ed. So where it appeared that a constable told a prisoner he might do himself some good by confessing, and the prisoner afterwards asked the magistrate if it would be any benefit to him to confess, on which the magistrate said, he would not say it would; the prisoner having afterwards, on his way to prison, made a confession to another constable, and, again in prison, to another magistrate; the judges unanimously held that the confessions were admissible in evidence, on the ground that the magistrate's answer was sufficient to efface any expectation which the constable might have raised. R. v. Rosier, East. T. 1821; 1 Phill. Ev. 431, 8th ed., 411, 9th ed. A prisoner charged with murder was visited by a magistrate, who told him that, if he was not the man who struck the fatal blow, he would use all his endeavors and influence to prevent any ill consequences from falling on him, if he would disclose what he knew of the murder. The magistrate wrote to the secretary of state, who returned an answer, that mercy could not be extended to the prisoner; which answer was communicated to the prisoner, who afterwards sent for the coroner, and desired to make a statement to him. The coroner cautioned him, and added that no hopes or promise of pardon could be held out to him. Littledale, J., ruled that a confession subsequently made by the prisoner to the coroner was admissible; for that the caution given by the latter must be taken to have completely put an end to all the hopes that had been held out. R. v. Clewes, 4 C. & P. 224: 19 E. C. L. R.; see also R. v. Howes, 6 C. & P. 404: 25 E. C. L. R. A girl charged with poisoning was told by her mistress, that if she did not tell all about it that night, the constable would be sent for next morning to take her to S. (meaning before the magistrate there); upon which the prisoner made a statement. The next morning a constable was sent for, who took the prisoner into custody, and on the way to the magistrate, without any inducement from the constable, she confessed to him. Bosanquet, J., said, "I think this statement receivable. The inducement was, that if she confessed that night the constable would not be sent for, and she would not be taken before the magistrates. Now she must have known when she made this statement, that the constable was

taking her to the magistrates. The inducement therefore was at an end." R. v. Richards, 5 C. & P. 318 : 24 E. C. L. R.

Inducement—where held not to have ceased.] It is said by Mr. Justice Buller that there must be very strong evidence of an explicit *warning not to rely [*46] on any expected favor, and that it ought most clearly to appear, that the prisoner thoroughly understood such warning, before his subsequent confession can be given in evidence. 2 East, P. C. 658. In the following case the warning was not considered sufficient. A confession having been improperly obtained, by giving the prisoner two glasses of gin, the officer to whom it had been made read it over to the prisoner before a magistrate, who told the prisoner that the offence imputed to him affected his life, and that a confession might do him harm. The prisoner said, that what had been read to him was the truth, and signed the papers. Best, J., considered the second confession, as well as the first, inadmissible; and said, that had the magistrate known that the officer had given the prisoner gin, he would, no doubt, have told the prisoner, that what he had already said could not be given in evidence against him; and that it was for him to consider whether he would make a second confession. If the prisoner had been told this, what he afterwards said would have been evidence against him; but for want of this information he might think that he could not make his case worse than he had already made it, and under this impression might sign the confession before the magistrate. R. v. Sexton, Chetw. Burn. Just. tit. Confession, *ante*, p. 41. So where the committing magistrate told the prisoner, that if he would make a confession, he would do all he could for him, and no confession was then made, but, after his committal, the prisoner made a statement to the turnkey, who held out no inducement and gave no caution, Parke, J., said he thought the evidence ought not to be received after what the committing magistrate had said to the prisoner, more especially as the turnkey had not given any caution. R. v. Cooper, 5 C. & P. 525 : 24 E. C. L. R.(1)

(1) Moore v. The Commonwealth, 2 Leigh, 701. The presumption is that the influence of the threats or promises continues. State v. Guild, 5 Halst. 163; Case of Bownhas et al., 4 Rogers' Rec. 136; Case of Stage et al., 5 Id. 177; Case of Milligan et al., 6 Id. 69.

On the trial of an indictment for larceny it appeared that the owner of the goods, on the prisoner's expressing contrition for the offence, promised not to prosecute him; but the officer whom they soon met told them the matter could not be settled, and immediately arrested the prisoner. *Held*, that the prisoner's confessions, made afterwards, were admissible in evidence against him, notwithstanding the previous promise of the owner. Ward v. The People, 3 Hill, 395.

Confessions made by a prisoner after threats and promises have ceased to operate, are admissible in evidence. Peters v. The State, 4 Smedes & Marsh. 31. But the presumption is that the threats and promises continued to operate until the contrary appears. Ibid.; The State v. Roberts, 1 Dev. 259.

When threats have been made to the defendant and subsequently, without being previously cautioned, he makes confessions, they are not admissible. Peters v. The State, 4 Smedes & Marshall, 31: Van Buren v. The State, 24 Mississippi, 572. The presumption is that the influence of the threats continues and such presumption must be overcome. Ibid.; Commonwealth v. Knapp, 10 Pick. 477; The State v. Roberts, 1 Dev. 259; The State v. Gould, 5 Halst. 163; Commonwealth v. Harman, 4 Barr, 269; Whaly v. The State, 11 Georgia, 123; Commonwealth v. Taylor, 5 Cushing, 505: Conley v. The State. 12 Missouri. 462; The State v. Nash, 12 Louisiana, 895; The State v. Fisher, 6 Jones' Law, 478; Simon v. The State, 36 Mississippi, 636.

Facts, the knowledge of which is derived from an inadmissible confession, may themselves be given in evidence. Commonwealth v. Knapp, 9 Pick. 496; The State v. Crank, 2 Bailey, 67; Jackson's Case, 1 Rogers' Rec. 28; Case of Stage et al., 5 Ibid. 177.

When a confession in itself inadmissible leads to the ascertainment of a fact admissible and material in the case, so much of such confession as relates *strictly* to the fact may be received. The State v. Vaigneur. 5 Richardson, 391.

Upon a trial for murder so much of the prisoner's confession as led to the discovery of the remains of the person killed, is admissible in evidence, although his confession was made by persuasion and in the hope of immunity. The State v. Motley, 7 Richardson. 327.

When property is stolen. and the prisoner shortly afterwards points out the place where it is concealed, he is bound to explain his knowledge and reconcile it with his innocence. Hudson v. The State, 9 Yerger, 408.

A prisoner had made a confession to one of the prosecutors in a charge of larceny, which, it was admitted, could not be received in evidence, on account of what had passed between the prisoner and a constable who had her in charge. In the afternoon of the same day another of the prosecutors went to the prisoner's house and entered into conversation with her about the stolen property, when she repeated the confession she had made in the morning, but no promise or menace was on this occasion held out to her. Taunton, J., said that the second confession was not receivable, it being impossible to say, that it was not induced by the promise which the constable made to the prisoner in the morning. R. v. Meynell, 2 Lewin, C. C. 122.

The prisoner, who was indicted for murder, worked at a colliery, and some suspicion having fallen upon him, the overlooker charged him with the murder. The prisoner denied having been near the place. Presently the overlooker called his attention to certain statements made by his wife and sister, which were inconsistent with his own, and added, that there was no doubt he would be found guilty; it would be better for him if he would confess. A constable then came in, and said to the overlooker, in a tone loud enough for the prisoner to hear, "Robert, do not make him any promises." The prisoner then made a confession. Patteson, J., on the evidence being tendered, said, "That will not do. The constable ought to have done something to remove the impression from the prisoner's mind." It was then further proved that the overlooker, in about ten minutes after the above confession, delivered the prisoner to another constable, and that, when the latter received the [*47] prisoner, the overlooker *told him (but not in the prisoner's hearing) that the prisoner had confessed. The constable took the prisoner to his house, and there said, "I believe Sherington has murdered a man in a brutal manner." The wife and brother of the prisoner were there, and they said to the prisoner, "What made thee go near the cabin?" The prisoner in answer made a statement similar in effect to the one he had made before. The constable used neither promise nor threat to induce the prisoner to say anything, but did not caution him, and it was not more than five minutes after he received the prisoner into his charge, that the prisoner made the statement. The constable was not aware that the overlooker had held out any inducement, and the overlooker was not present when the statement was made. Patteson, J., rejected the second confession, saying, "There ought to be strong evidence to show that the impression, under which the first confession was made, was afterwards removed, before the second confession can be received. I am of opinion in this case, that the prisoner must be considered to have made the second confession under the same influence as he made the first; the interval of time being too short to allow of the supposition that it was the result of reflection and voluntary determination." R. v. Sherington, 2 Lewin, C. C. 123. A female servant being suspected of stealing money, her mistress, on a Monday, told her that she would forgive her if she told the truth. On the Tuesday, she was taken before a magistrate, and, no one appearing against her, was discharged. On the Wednesday, being again apprehended, the superintendent of police went with her mistress to the Bridewell, and told her, in the presence of her mistress, that she "was not bound to say anything unless she liked; and that if she had anything to say, her mistress would hear her," but (not knowing that her mistress had promised to forgive her) he did not tell her, that if she made a statement, it might be given in evidence against her. The prisoner then made a statement. Patteson, J., held that this statement was not receivable in evidence, as the promise of the mistress must be considered as still operating on the prisoner's mind at the time of the statement; but that if the mis-

tress had not been then present, it might have been otherwise. R. v. Hewitt, 1 Car. & M. 534 : 41 E. C. L. R.

Confessions obtained by artifice, or deception, admissible.] Where a confession has been obtained by artifice or deception, but without the use of promises or threats, it is admissible. Thus it has been held, that it is no objection that the confession was made under a mistaken supposition that some of the prisoner's accomplices were in custody, and even though some artifice has been used to draw him into that supposition. R. v. Burley, East. T. 1818; Phill. Ev. 427, 8th ed., 406, 9th ed. Where a prisoner asked the turnkey if he would put a letter into the post, and, on receiving a promise that he would do so, gave him the letter, which was detained by the turnkey and given in evidence as a confession at the trial, Garrow, B., received the evidence. R. v. Derrington, 2 C. & P. 418 : 12 E. C. L. R. So where a person took an oath that he would not mention what the prisoner told him : R. v. Shaw, 6 C. & P. 373 : 25 E. C. L. R.; and where a witness promised that what the prisoner said should go no further. R. v. Thomas, 7 C. & P. 345 : 32 E. C. L. R. It appeared that one of the prisoners had made a statement to a constable in whose custody he was, but that he was drunk at the time; and it was imputed that the constable had *given him liquor to cause him to be so. On its being objected that what a [*48] prisoner said under such circumstances was not receivable in evidence, Coleridge, J., said, "I am of opinion that a statement made by a prisoner while he was drunk is not therefore inadmissible; it must either be obtained by hope or fear. This is a matter of observation for me, upon the weight that ought to attach to this statement when it is considered by the jury." R. v. Spilsbury, 7 C. & P. 187 : 32 E. C. L. R.

Confessions obtained by questioning admissible.] A confession is admissible in evidence where it has been elicited by questions put by a person in authority :(1) R. v. Thornton, 1 Moo. C. C. 27, where the questions were put by the police constable to a boy fourteen years of age, and the prisoner was also treated with considerable harshness. Nor does it appear that it makes any difference that the questions put assumes the guilt of the prisoner. Ibid. Phill. Ev. 9th ed. In R. v. Kerr, 8 C. & P. 176 : 34 E. C. L. R., Park, J., seemed to think that it might not be in some cases improper for a policeman to interrogate a prisoner, but the practice is reprobated by most of the judges; and in one case where it appeared that the constable was in the practice of interrogating prisoners in his custody, Patteson, J., threatened to cause him to be dismissed from his office. R. v. Hill, Liverpool Spring Assizes, 1838, MS.

The wisest course for policemen and others to adopt is to say nothing to the prisoner, either by way of advice, caution, or interrogation.

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(1) It is no objection that confessions are made in answer to leading questions. Carrol v. The State, 23 Alabama, 28; The State v. Kirby, 1 Strobhart, 378.

The evidence drawn out upon examination by a committing magistrate of a prisoner under oath as to the subject-matter of his offence is, *it seems*, incompetent. Commonwealth v. Harman, 4 Barr, 269. In that case, however, the magistrate had said to the prisoner, "If you do not tell the truth I will commit you," which was held to be an improper threat, sufficient to exclude the confession, and one subsequently made to the constable. Ibid. C. J. Gibson, however, says, "The administering of an oath by the magistrate under such circumstances, was a gross outrage upon the accused; any information drawn by it or subsequently given on its basis, is inadmissible." Ibid.; The State v. Broughton, 7 Iredell, 96; The People v. McMahon, 1 Smith, 384.

It is no objection that the confession was under oath. The People v. Hendrickson, 1 Parker's Crim. Rep. 406.

The statements of a prisoner, made under oath before a coroner's jury, before it was known that a murder had been committed, and before such prisoner had been charged with the crime, are admissible in evidence against him on trial for the murder. Hendrickson v. The People, 6 Selden, 13.

Confessions obtained in the course of legal proceedings.] There is much contradiction in the older cases on the point whether confessions made in the course of legal proceedings, not having reference to the charge or the prosecution of which they are sought to be used, are admissible. But the subject was fully considered in R. v. Scott, 25 L. J., M. C., 128: 7 Cox, Cr. Ca. 164; and the distinction pointed out. That was a case in which the prisoner had been examined in the Court of Bankruptcy, touching his trade, dealings, and estate, under the provisions of the 12 & 13 Vict. c. 106, s. 117; and this examination was given in evidence on a criminal charge against the bankrupt of mutilating his trade books. The question whether such evidence was admissible was argued before the Court of Criminal Appeal, and it was admitted on all hands, that, in ordinary cases, what is stated by a person in a lawful examination may be used in evidence against him. The main contention was, that inasmuch as by the act it was compulsory upon the bankrupt to answer the questions put to him, whether they tended to criminate him or no, he ought not to be criminally prejudiced by such answers, otherwise the fundamental maxim, "*nemo tenetur seipsum accusare*," would be violated. In this view Coleridge, J., concurred; but all the other judges, Lord Campbell, C. J., Willes, J., Alderson and Bramwell, BB., thought that the evidence was admissible, and that the maxim relied on had been overruled by the legislature. Now where it is made compulsory to answer questions under all circumstances, it is usual for the legislature to insert a clause declaring that the evidence so given shall not be made use of in any criminal proceedings.

[*49] *Declarations accompanying the delivery of stolen property—whether *admissible*.] Declarations accompanying an act done have in one case been admitted in evidence. The prisoner was tried for stealing a guinea and two promissory notes. The prosecutor was proceeding to state an inadmissible confession, when Chambre, J., stopped him, but permitted him to prove that the prisoner brought to him a guinea and a 5*l.* Reading Bank note, *which he gave up to the prosecutor as the guinea and one of the notes that had been stolen from him.* The learned judge told the jury, that notwithstanding the previous inducement to confess, they might receive the prisoner's description of the note, accompanying the act of delivering it up, as evidence that it was the stolen note. A majority of the judges (seven) held the conviction right. Lawrence and Le Blanc, JJ., were of a contrary opinion, and Le Blanc said that the production of the money by the prisoner was alone admissible, and not that he said it *was one of the notes stolen.* R. v. Griffin, Russ. & Ry. 151. And see R. v. Jones, Russ. & Ry. 152, where the statement of the prisoner, on producing some money out of his pocket, that it was all he had left of it, was held inadmissible, the prosecutor having held out inducements to confess. Speaking of declarations accompanying an act, Mr. Phillipps observes, "it may be thought that the only ground upon which such declarations can be received is, that they are explanatory of the act of delivery, and not a narrative of a past transaction." Phil. Ev. 432, 8th ed. It certainly does not appear how a statement of the mode in which property was obtained is explanatory of the act of delivery.

Evidence only against the parties making them.] It is quite settled, generally, that a confession is only evidence against the party making it, and cannot be used against others.(1) With respect to conspiracy, there is some obscurity on this subject, which will be found discussed in the chapter relating to that offence, *post.* But

(1) Morrison v. The State, 5 Ohio, 539; Lowe v. Boteler, 4 Har. & McH. 346. Therefore, on an indictment against A. for concealing a horse thief, it is not competent to give evidence of what the alleged horse thief has confessed in the presence of A. to establish the fact that a horse was stolen.

a difficulty occurs where a confession by one prisoner is given in evidence, which implicates the other prisoners by name, as to the propriety of suffering those names to be mentioned to the jury. Several cases are collected in 1 Lewin, C. C. 107, which show that Littledale, J., Alderson, B., and Denman, C. J., considered that the whole of the confession, whether verbal or written, ought to be presented to the jury, not omitting the names; Parke, B., thought otherwise. See R. v. Fletcher, 4 C. & P. 250: 19 E. C. L. R.; and R. v. Clewes, Id. 221, where Littledale, J., says that he had formed his opinion after much consideration.

The confession of the principal is not admissible in evidence to prove his guilt, upon an indictment against the accessory. One Turner was indicted for receiving sixty sovereigns, &c., by one Sarah Rich, then lately before feloniously stolen. To establish the larceny by Rich, the counsel for the prosecution proposed to prove a confession by her, made before a magistrate in the presence of the prisoner, in which she stated various facts, implicating herself and others, as well as the prisoner. Patteson, J., refused to receive as evidence anything which was said by Sarah Rich respecting the prisoner, but admitted what she had said respecting herself. The prisoner was convicted. Having afterwards learned that a case had occurred before Mr. Baron Wood, at York, where two persons were indicted together, one for stealing and the other for receiving, in which the principal pleaded guilty, and the receiver not guilty, and that Mr. Baron Wood refused to allow the plea of guilty, to establish the fact *of the stealing by the principal, as against the receiver, Patteson, [*50] J., thought it proper to refer to the judges the question, "Whether he was right in admitting the confession of Sarah Rich in the present case?" All the judges having met (except Lord Lyndhurst, C. B., and Taunton, J.), they were unanimously of opinion, that Sarah Rich's confession was no evidence against the prisoner, and the conviction was held wrong. R. v. Turner, Moody, C. C. 347. In R. v. Cox, 1 F. & F. 90, Crowder, J., admitted, on the trial of the receiver, the confession of the thief made in the receiver's presence as evidence of the fact of stealing. *Sed qu.*

By agents.] An admission by an agent is never evidence in criminal, as it is sometimes in civil cases, in the sense in which an admission by a party himself is evidence. An admission by the party himself is in all cases the best evidence which can be produced, and supersedes the necessity of all further proof; and in civil cases the rule is carried still further, for the admission of an agent made in the course of his employment and in accordance with his duty, is as binding upon the principal as an admission made by himself. But this has never been extended to criminal cases. Where a party is charged with the commission of an offence through the instrumentality of an agent, then it becomes necessary to prove the *acts* of the agent; and, in some cases, as where the agent is dead, the agent's admission is the best evidence of those acts which can be produced.(1) Thus, on the impeachment of

Ibid.; unless it be first established that they were partners in the guilty design. American Fire Co. v. The United States, 2 Peters, 364; Snyder v. Laframhois, 1 Bre. 269; Commonwealth v. Eberle et al., 3 Serg. & R. 9; Wilhur v. Strickland, 1 Rawle, 458; Reitenback v. Reitenback, Id. 362. The court will not inquire into the credibility of the evidence which proves the conspiracy. Commonwealth v. Crowninshield, 10 Pick. 497. What is asserted in the presence of a party and not contradicted by him is evidence. Batturs v. Sellers et al., 5 Har. & Johns. 117; Hendrickson v. Miller, 4 Rep. Const. Ct. 300; Commonwealth v. Call, 21 Pick. 515.

Testimony delivered in another cause, to which the plaintiff was a party, cannot be given in evidence against him as a tacit confession of the facts sworn to, though it he shown that he heard the testimony and expressed no dissent; and this notwithstanding the testimony was given by a witness called on his side. Sheridan v. Smith et al., 2 Hill, 538.

When a presentment for adultery is joint, the admission of one party is not evidence against the other. Frost v. the Commonwealth, 9 B. Monroe, 362. And see Hunter v. The Commonwealth, 7 Grattan, 641; Malone v. The State, 8 Georgia, 408.

(1) The American Fire Co. v. The United States, 2 Peters, 364; United States v. Morrow, 4 Wash. C. C. Rep. 733.

Lord Melville by the House of Lords, it was decided that a receipt given in the regular and official form by Mr. Douglas, who was proved to have been appointed by Lord Melville to be his attorney to transact the business of his office as treasurer of the navy, and to receive all necessary sums of money, and to give receipts for the same, *and who was dead*, was admissible in evidence against Lord Melville, to establish the single fact, that a person appointed by him as his paymaster did receive from the exchequer a certain sum of money in the ordinary course of business. 29 How. St. Tr. 746. Had, however, Mr. Douglas been alive at the time, there can be no doubt that he must have been called; and that he might have been called to prove the receipt of the money would probably not have been questioned. This case does not, therefore, as sometimes appears to have been thought, in any way touch upon the rules that the admission of an agent *does not* bind his principal in criminal cases, but merely shows that, where the acts of the agent have to be proved, those acts may be proved in the usual way.

Admissions by the prosecutor.] It would seem doubtful whether in any case a prosecutor in an indictment is a party to the inquiry in such a sense as that an admission by him could be received in evidence to prove facts for the defence. Of course this does not refer to the admission of facts which would go to his reputation for credibility as a witness in the case; these may always and under all circumstances be proved by the admission of the witness himself. But any other fact necessary to the defence would have to be proved by the best available evidence, independently of any admission by the prosecutor. The Queen's Case, 2 Brod. & Bing. 297: 6 E. C. L. R., is sometimes quoted as bearing on this point. There the question asked of [*51] the judges, in an abstract form, was, whether the admission of an *agent of the prosecutor that he had offered a bribe to a witness who was *not* called could be given in evidence by the prisoner, for the purpose of discrediting generally those witnesses who were called; and the judges answered that it could not. No question of *admission* or *agency* was discussed, but the judges grounded their opinion on this, that no inference against the general credibility of the witnesses could be drawn from the evidence tendered, and that it was not, therefore, relevant to the issue.

The whole of a confession must be taken together.] In criminal, as well as in civil cases, the whole of an admission made by a party is to be given in evidence.(1)

(1) Unless its improbability renders it necessary that the defendant should prove what he asserts in avoidance of a conceded fact. Newman v. Bradley, 1 Dall. 340; Farrel v. McClea. Id. 392. The jury may believe part and disbelieve part. Fox v. Lambson, 3 Halst. 275; Bank of Washington v. Barrington, 2 Penn. 27; Young v. The State, 2 Yerg. 292; Kelsey v. Bush, 2 Hill, 441. Yet such facts must be distinct and relate to different matters of fact. Fox v. Lambson, 2 Halst. 275; see Hicks' Case, 1 Rogers' Rec. 66; The People v. Weeks, 3 Wheeler's C. C. 533.

The rule does not exclude a confession where only part of what the defendant said has been overheard. State v. Covington, 2 Bailey, 569. If a prisoner in speaking of the testimony of one who had testified against him, says, that "what he said was true so far as he went, but he did not say all or enough;" this is not admissible as a confession, nor does it warrant proof to the jury of what the witness did swear to. Finn v. The Commonwealth, 5 Rand. 701.

A party whose admissions or confessions are resorted to as evidence against him, has in general a right to insist that the whole shall be taken together, but the part culled out by him should relate to the point or fact inquired into on the other side. Kelsey v. Bush, 2 Hill, 440.

When the declarations of the defendant are given in evidence, the jury ought to take the whole into consideration, and may reject those in his favor, and believe those operating against him. Green v. The State, 13 Missouri, 382; Brown's Case, 9 Leigh, 633; Bower v. The State, 5 Missouri, 364.

When the prisoner's declarations have been adduced in evidence by the State, it is his right to have the entire conversation laid before the jury; yet it is not true that the declaration so adduced in evidence must be taken as true, if there was no other evidence in the case incompatible with it. Corbett v. The State, 31 Alabama, 329.

It is error to refuse to admit all that was said by a prisoner when a part of the conversation has

The rule is thus laid down by Abbott, C. J., in the Queen's Case, 2 Brod. & Bing. 297; 6 E. C. L. R. If, on the part of the prosecution, a confession or admission of the defendant, made in the course of a conversation with the witness, be brought forward, the defendant has a right to lay before the court the whole of what was said in that conversation; not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the matter introduced on the previous examination, provided only that it relates to the subject-matter of the suit; because it would not be just to take part of a conversation as evidence against a party, without giving to the party at the same time the benefit of the entire residue of what he said on the same occasion. "There is no doubt," says Mr. Justice Bosanquet, "that, if a prosecutor uses the declaration of a prisoner, he must take the whole of it together, and cannot select one part and leave another; and if there be either no other evidence in the case, or no other evidence incompatible with it, the declaration so adduced in evidence must be taken as true. But if, after the whole of the statement of the prisoner is given in evidence, the prosecutor is in a situation to contradict any part of it, he is at liberty to do so, and then the statement of the prisoner, and the whole of the other evidence must be left to the jury, for their consideration, precisely as in any other case where one part of the evidence is contradictory to another." R. v. Jones, 2 C. & P. 629; 12 E. C. L. R. Where a prisoner was indicted for larceny, and, in addition to evidence of the possession of the goods, the counsel for the prosecution put in the prisoner's statement before the magistrate, in which he asserted that he had bought the goods, Garrow, B., is reported to have directed an acquittal, saying, that if a prosecutor used a prisoner's statement, he must take the whole of it together. But there is not the least doubt that a jury may believe that part which charges the prisoner, and reject that which is in his favor, if they see sufficient grounds for so doing. Thus where, in addition to evidence of the stolen goods being found in the possession of the prisoner, the prosecutor put in the prisoner's examination, which merely stated that the "cloth was honestly bought and paid for," Mr. Justice J. Park told the jury, "If you believe that the prisoner really bought and paid for this cloth, as he says he did, you ought to acquit him; but if, from his selling it so very soon after it was lost, at the distance of eight miles, you feel satisfied that the statement of his buying it is all false, you will find him guilty." R. v. Higgins, 3 C. & P. 603; 14 E. C. L. R. So where a prisoner, charged with murder, stated in his confession that he was present at the murder, which was committed by another person, and that he took no part in it, *Littledale, J., left the confession to the jury, saying, [*52] "It must be taken all together, and it is evidence for the prisoner as well as against him; still the jury may, if they think proper, believe one part of it and disbelieve another." R. v. Clewes, 4 C. & P. 225: 19 E. C. L. R. See also R. v. Steptoe, 4 C. & P. 397, S. P. In a trial for murder, the counsel for the prosecution said he would treat the statements of the prisoners before the magistrates as their defence, and show by evidence that they were not consistent with truth: R. v. Greenacre, 8 C. & P. 36: 34 E. C. L. R., and this course is frequently adopted in practice.

been introduced as a confession. Long v. The State, 22 Georgia, 40; The People v. Navis, 3 California, 106.

Where the oral admissions of a party are resorted to as evidence against him, the rule, as now established, permits the court and jury to believe that part of an admission which charges the party who makes it, and to disbelieve that part which discharges, when the latter is improbable on its face or discredited by other testimony. Roberts v. Gee, 15 Barbour, 449.

The defendant is entitled to have the whole of his statement made at the same time; but the jury may believe part and disbelieve part. The State v. Mahon, 32 Vermont, 241; The People v. Wyman, 15 California, 70.

Confessions of matters void in point of law, or false in fact.] An admission on the part of a prisoner is not conclusive, and if it afterwards appear in evidence that the fact was otherwise, the admission will be of no weight.(1) Thus, upon an indictment for bigamy, where the prisoner had admitted the first marriage, and it appeared at the trial that such marriage was void, for want of consent of the guardian of the woman, the prisoner was acquited. 3 Stark. Ev. 1187, 1st ed. So on an indictment for setting fire to a ship, with intent to injure two part-owners, it was held that the prosecutor could not make use of an admission by the prisoner that these persons were owners, if it appeared that the requisites of the shipping acts had not been complied with. R. v. Philp, 1 Moody, C. C. 271.

Confessions inferred from silence or demeanor.] Besides the proof of direct confessions, the conduct or demeanor of a prisoner on being charged with the crime, or upon allusions being made to it, is frequently given in evidence against him. Thus, although neither the evidence nor the declaration of a wife is admissible against the husband on a criminal charge, yet observations made by her to him upon the subject of the offence, to which he gives no answer or an evasive reply, are receivable in evidence as an implied admission on his part. R. v. Smithers, 5 C. & P. 332 : 24 E. C. L. R.; R. v. Bartlett, 7 C. & P. 832 : 32 E. C. L. R. So evidence of a prisoner's demeanor on a former occasion is admissible to prove guilty knowledge. R. v. Tatershall, and R. v. Phillips, *post*, p. 89. Mr. Phillipps, after remarking that a confession may in some cases be collected or inferred from the conduct and demeanor of a prisoner, on hearing a statement affecting himself, adds, "As such statements frequently contain much hearsay and other objectionable evidence, and as the demeanor of a person upon hearing a criminal charge against himself is liable to great misconstruction, evidence of this description ought to be regarded with much caution." 1 Ph. & Arn. 405.

A deposition of a witness, or the examination of another prisoner taken before the committing magistrate, is not admissible in evidence merely because the party affected by it was present, and might have had an opportunity of cross-examining or commenting on the evidence; neither can any inference be drawn, as in other cases, from his silence. R. v. Appleby, 3 Stark. N. P. 33 : 3 E. C. L. R ; Melen v. Andrews, M. & M. 336 : 22 E. C. L. R.; R v. Turner, 1 Moody, C. C. 347; R. v. Swinnerton, 1 Car. & M., 41 E. C. L. R.; *post*, p. 61.(2)

Confessions taken down in writing.] If the confession is taken down in writing and signed by the prisoner, or its truth acknowledged by parol, or if it be written by him, then it is put in as an ordinary document and read by the officer of the court. [*53] R. v. Swatkins, *4 C. & P. 550 : 19 E. C. L. R. But if it be taken down by a person who is present when the confession is made, and is not signed or acknowledged by the prisoner, the document is not itself evidence, but may be used by the person who made it to refresh his memory. 4 C. & P. 550, note *b*. According to general principles, if the confession were contained in a document, which was in

(1) The State v. Welsh, 7 Porter, 463; Alton v. Gelmonton, 2 N. Hamp. 521.

(2) Letters addressed to a party and found in his possession, are not evidence against him of the matters therein stated, unless the contents have been adopted or sanctioned by some reply or statement or act done on his part, and shown by other proof. Commonwealth v. Eastman, 1 Cushing, 189.

The possession by a prisoner of an unanswered letter will not authorize it to be given in evidence against him. People v. Green, 1 Parker's Crim. Rep. 11; see The State v. Arthur, 2 Dev. 217.

The declarations of a third person in the presence of the party but in a judicial proceeding are not admissible against him. Brainard v. Buck, 25 Vermont, 573; Curr v. Hilton, 1 Curtis C. C. 390.

existence and admissible in evidence, parol evidence could not be given of it. See R. v. Gay, 7 C. P. 230 : 32 E. C. L. R. ; *suprà*, p. 34.(1)

The mode of introducing confessions.] For the purpose of introducing a confession, it is unnecessary, in general, to negative any promise or inducement, unless there is good reason to suspect that something of the kind has taken place. In a trial for murder, it was proposed to give in evidence a statement of the prisoner, made in prison, to a coroner for whom the prisoner had sent. It, however, appeared that previous to this time, Mr. Clifton, a magistrate, had had an interview with the prisoner, and it was suggested on behalf of the prisoner, that he might have told the prisoner that it would be better to confess, and that therefore the counsel for the prosecution were bound to call him. Littledale, J., "As something might have passed between the prisoner and Mr. Clifton respecting the confession, it would be fair in the prosecutors to call him, but I will not compel them to do so. However, if they will not call him, the prisoner may do so if he chooses." R. v. Clewes, 4 C. & P. 221 : 19 E. C. L. R. So where a prisoner being in the custody of two constables on a charge of arson, one B. went into the room, and the prisoner immediately asked him to go into another room, as he wished to speak to him, and they went into another room, when the prisoner made a statement; it was urged that the constables ought to be called to prove that they had done nothing to induce the prisoner to confess, and R. v. Swatkins, *post*, was relied upon. Taunton, J., "A confession is presumed to be voluntary unless the contrary is shown, and as no threat or promise is proved to have been made by the constables, it is not to be presumed." Having consulted Littledale, J., his lordship added, "We do not think, according to the usual practice, that we ought to exclude the evidence, because a constable may have induced the prisoner to make the statement, otherwise he must in all cases call the magistrates and constables before whom or in whose custody the prisoner has been." R. v. Williams, Glouc. Spr. Ass. 1832, 2 Russ. by Greaves, 870.

But if there be any probable ground to suspect that an officer, in whose custody a prisoner has previously been, has been guilty of collusion in obtaining a confession, such supicion ought to be removed in the first instance by the prosecutor calling such officer. Upon an indictment for arson, it appeared that a constable, who was called to prove a confession, went into a room in an inn, where he found the prisoner in the custody of another constable, and as soon as he went into the room the prisoner said he wished to speak to him, and motioned the other constable to leave the room, which he did, and left them alone. The prisoner immediately made a statement. The witness had not cautioned the prisoner at all, and nothing had been said of what had passed between the constable and the prisoner before the witness entered the room. It was contended that the other constable must be called to show that he had used no inducement to make the prisoner confess. Patteson, J., "I am inclined to think the constable ought to be called. This is a peculiar *case, and can [*54] never be cited as an authority, except in cases where a man being in the custody of one person, another who has nothing to do with the case comes in, and the prisoner motions the first to go away. I think, as the witness did not caution the prisoner, it would be unsafe to receive the statement. It would lead to collusion between constables." R. v. Swatkins, 4 C. & P. 548 : 19 E. C. L. R. In order to induce

(1) If the examination of the prisoner was not reduced to writing before the committing magistrate, parol evidence may be given of it. The State v. Parish, Busbee Law N. C. 239.

Parol proof of the confession of a prisoner is admissible unless the defendant can prove the existence of a confession reduced to writing and signed by the prisoner. The State v. Johnson, 5 Harrington, 507.

the court to call another officer in whose custody the prisoner has been, it must appear either that some inducement has been used by, or some express reference made to such officer. A prisoner, when before the committing magistrate, having been duly cautioned, made a confession, in which he alluded to a confession which he had previously made to Williams, a constable. It was submitted that Williams ought to be called to prove that he had not used any inducement. Littledale, J., "Although I do not think it necessary that a constable in whose custody a prisoner has been, should be called in every case, yet, as in this case there is a reference to the constable, I think he ought to be called." Williams was then called, and proved he did not use any undue means to obtain a confession; but he had received the prisoner from Marsh, another constable, and the prisoner had made some statement to Marsh. It was then urged that Marsh should be called. Littledale, J., "I do not think it is necessary that a constable should be called, unless it appear that some promise was given or some express reference was made to the constable. There was a distinct reference made to Williams, and, therefore, I thought he must be called, but there is no reference to Marsh. It does not appear either that any confession was made to Marsh. It only appears that a statement was made that might either be a confession, a denial, or an exculpation." R. v. Warner, Glouc. Spr. Ass. 1832, 2 Russ. by Greaves, 871.

If evidence of a confession be received, and it afterwards appear from other evidence that an inducement was held out, which, had it been known at the time, would have rendered the evidence inadmissible, the proper course for the judge to take is to strike the evidence of confession out of his notes, and to tell the jury to pay no attention to it. R. v. Garner, 1 Den. C. C. 329.

[*55] *EXAMINATION OF THE PRISONER.

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Statute 11 *&* 12 *Vict. c.* 42.] The foregoing pages relate only to the confessions and admissions made by persons charged with offences to third persons, and not to those made to magistrates during the examinations directed to be taken by statute.(1) Those examinations, formerly taken under the 1 & 2 P. & M. c. 13, 2 & 3 P. & M. c. 10, and 7 Geo. 4, c. 64, are now governed by the 11 & 12 Vict. c. 42.

That statute, after pointing out the mode in which the depositions are to be taken, enacts by s. 18, "That after the examination of all the witnesses on the part of the prosecution as aforesaid shall have been completed, the justice of the peace or one of the justices, by or before whom such examination shall have been so completed, as aforesaid, shall, without requiring the attendance of the witnesses, read or cause to be read to the accused the depositions taken against him, and shall say to him these

(1) As to examinations under the statute, see The People v. Restell, 3 Hill, 289.

words, or words to the like effect, 'Having heard the evidence, do you wish to say anything in answer to the charge? You are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing and may be given in evidence against you upon your trial;' and whatever the prisoner shall then say in answer thereto shall be taken down in writing and read over to him, and shall be signed by the said justice or justices, and kept with the depositions of the witnesses, and shall be transmitted with them as hereinafter mentioned; and afterwards upon the trial of the said accused person the same may, if necessary, be given in evidence against him without further proof thereof, unless it shall be proved that the justice or justices purporting to sign the same did not in fact sign the same: provided always that the said justice or justices, before such accused person shall make any statement, shall state to him and give him clearly to understand that he has nothing to hope from any promise of favor and nothing to fear from any threat which may have been holden out to him to induce him to make any admission or confession of his guilt, but that whatever he shall then say may be given in evidence against him upon his trial, notwithstanding such promise or threat; provided, *nevertheless, that [*56] nothing herein enacted or contained shall prevent the prosecutor in any case from giving in evidence any admission or confession or other statement of the person accused or charged made at any time which by law would be admissible as evidence against such person."

Mode of taking examinations—the caution.] The 28th section of the above statute declares that the forms given in the schedule are to be deemed good, valid, and sufficient in law; and the form in the schedule does not contain the second caution mentioned in s. 18. It has, therefore, been held that, if the first caution has been given, the statement of the prisoner is admissible without any further question. R. v. Bond, 1 Den. C. C. 517; S. C. 19 L. J. M. C. 138; R. v. Sansome, 1 Den. C. C. 145; S. C. 25 L. J. M. C. 143. It has been suggested that the second caution was intended to be used where there has been a previous promise or threat made to the prisoner. Per Alderson, B., in R. v. Bond, *ubi suprà;* and Erle, J., in R. v. Sansome, intimated that it would be prudent in justices always to give the prisoner the second caution, as being the only course which would preclude all possibility of question as to the admissibility of his statement; for as it was not yet decided whether that caution was absolutely requisite when a previous inducement or threat had been held out, and the justice could never be certain whether such previous threat or inducement had or had not been held out, a perplexing question might arise as to the sufficiency of the first caution to remove the effect on the prisoner's mind of such threat or inducement, should it afterwards appear in fact that either had been held out.(1)

Mode of taking examinations—must not be upon oath.] The examination of a prisoner must not be taken upon oath: if it be so, it will not be receivable in evidence. This was frequently so held before the 11 and 12 Vict. c. 42 was passed; R. v. Smith, 1 Stark. N. P. 242: 2 E. C. L. R.; R. v. Rivers, 7 C. & P. 177: 32 E. C. L. R.; R. v. Pikesley, 9 C. & P. 124: 38 E. C. L. R. This of course does not apply to a confession made on oath by the prisoner when giving testimony upon another inquiry.

(1) People v. Smith, 1 Wheeler's C. C. 54. The prisoner is not bound to answer, but if he submits to answer, and answers falsely, the prosecutor may disprove it, and it will be taken strongly against the prisoner. Case of Goldsby et al., 1 Rogers' Rec. 81.

Statements made by the prisoner not returned under the statute.] There is considerable confusion as to the admissibility of statements made by the prisoner before the examining magistrate, which are either not returned at all in the depositions, or which, being returned, are found to want one or more of the formalities required to make them available under the statutes from time to time in force on this subject. It seems, however, clear that if no examination was taken in writing, then the evidence was always considered admissible. But this must be distinctly shown. Thus where the witness stated that no examination was taken down in writing, Parke, J., said, "As all things are to be presumed to be rightly done, I must have the magistrate's clerk called to prove that no examination of the prisoner was taken in writing; and unless you can clearly show that the magistrate's clerk did not do his duty, I will not receive the evidence." R. v. Packer, Glouc. Spr Ass. 1829; 2 Russ. Cr. 876; R. v. Phillips, Worc. Sum. Ass. 1831. Where the only evidence against the prisoner was his examination before the magistrate, which was not taken in writing, [*57] either by the magistrate or by any *other person, but was proved by the *vivâ voce* testimony of two witnesses who were present, all the judges (except Gould, J.) were of opinion that this evidence was well received. R. v. Huet, 2 Leach, 821.(1)

So it has been held that remarks on statements made by a prisoner after the commencement of the investigation before the magistrate, and whilst the witnesses are giving their testimony, are receivable in evidence, although the prisoner's examination is afterwards taken in writing. Thus where one of two prisoners was committed before the other was apprehended, and the depositions against that prisoner were read over before the magistrate to the other prisoner, and after they were read the prisoner went across the room to a witness, who was called, and said something to him so loud that it might have been heard by the magistrate if he had been attending, and the magistrate proved the examination of the prisoner before himself, and that the statement to the witness was not contained in it, Parke, J., held, that what the prisoner had said to the witness might be given in evidence. R. v. Johnson, Glouc. Spr. Ass. 1829; 2 Russ. on Crimes, by Greaves, 879. So where a man and woman were brought before the magistrate on a charge of burglary, and, in the course of the examination of a witness, a glove was produced, which had been found on the man with part of the stolen property in it; on which the man said, "She gave me the glove, but she knew nothing of the robbery;" the depositions having been put in, and the clerk to the magistrates having proved them, and there being no such statements in the depositions or the examination of the prisoner, Erskine, J., held that what the man said might be proved by parol evidence. R. v. Hooper, Glouc. Sum. Ass. 1842, Id. And it was said by Best, C. J., that his opinion was, that upon clear and satisfactory evidence, it was admissible to prove something said by the prisoner beyond what was taken down by the committing magistrate. Rowland v. Ashby, Ry. & Moo. 232: 21 E. C. L. R. So it has been ruled by Parke, J., that an *incidental observation* made by a prisoner *in the course of his examination* before a magistrate, but which does not form a part of the judicial inquiry, so as to make it the duty of the magistrate to take it down in writing, and which was not so taken down, may be given in evidence against the prisoner. R. v. Moore, Matthew's Dig. Cr. Law, 157; R. v. Spilsbury, 7 C. & P. 187: 32 E. C. L. R.; S. P., per Coleridge, J. But where it ought to have been taken down in writing, and it was not, Littledale, J., ruled that it was inadmissible. R. v. Maloney, Matthew's Dig. Cr. Law, 157. However, where on the examination of a prisoner, on a charge

(1) McKenna's Case, 5 Rogers' Rec. 4; State v. Irwin, 1 Hayw. 112; Collins' Case, 4 Rogers' Rec. 139.

of stealing sheep, what was said as to the stealing of certain sheep, the property of one person, was taken down in writing by the magistrate, but not what was said as to other sheep, the property of another person; on a question reserved for the opinion of the judges, whether any confession, as to the latter offence, could be supplied by parol evidence; and whether, as the magistrate had taken down in writing everything he heard, and intended to take down all that was said to him, and believed he did so, parol evidence could be given of anything else that had been addressed to him; the judges present were all of opinion that the evidence was admissible. R. v. Harris, 1 Moody, C. C. 343. Mr. Phillipps remarks on this case, that it is not an authority for the position that parol evidence is admissible of a statement made by a prisoner, which has not been taken down in his examination, on the ground that the parol testimony there *received related to another offence distinct from that [*58] mentioned in the examination. 2 Phill. on Ev. 64, 9th ed. See, however, Mr. Greaves' observations, *contra*, 2 Russ. on Crimes, 878. In R. v. Lewis, 6 C. & P. 162: 25 E. C. L. R., where R. v. Harris was cited, Gurney, B, said it was very dangerous to admit such evidence, and thought it ought not to be done in the case before him. So where the magistrates' clerk in taking down the examinations of three prisoners had left a blank whenever any one had mentioned the name of either of the other prisoners, Patteson, J., refused to allow the blanks to be supplied by the parol evidence of the clerk, observing that the rule ought not to be extended. R. v. Morse, 8 C. & P. 605: 34 E. C. L. R. In R. v. Weller, 2 C. & K. 223: 61 E. C. L. R. Platt, B., refused to receive evidence of something that was said by the prisoner before the magistrate, in the course of the examination of the witnesses, but which did not appear in the depositions. In R v. Watson, 3 C. & K. 111, on the other hand, where the prisoner made a statement under similar circumstances which was written down in the depositions, but not signed by the prisoner, Patteson, J., held that it was not evidence *per se*, but that any one who heard the prisoner make it might give evidence of it. In R. v. Stripp, 25, L. J., M. C., 109, the prisoner was brought before a magistrate on a charge of stealing a cash-box; no evidence was given, the policeman asking for a remand, but the prisoner made a statement. This statement was repeated by the policeman at the second examination, and was embodied in his deposition. Evidence of this statement was also given by the policeman at the trial, and the question was reserved, whether or no it was properly received, the prisoner not having been previously cautioned. The judges held that it was; Jarvis, C. J., saying, "It is scarcely necessary to observe that the caution and warning prescribed by the statute is intended to apply to the final proceeding only, when, after all the witnesses have been examined, the prisoner is asked whether he has anything to say in answer to the charge. This provision of the statute, however, does not exclude any declaration or voluntary statement made by the party accused before, during, or after the inquiry."

Upon the whole it seems perfectly clear that what is said by a prisoner at any time during the preliminary inquiry before a magistrate previous to the final examination is evidence, which must be proved in the usual way by a person who heard it, or by a memorandum acknowledged by the prisoner. As to the statement made at the final examination, when the prisoner is called upon, if it is returned in a form which is available under the statute, that return is the only evidence of it, exclusive of all parol testimony. If from some defect or informality this return is not available, then what is said by the prisoner on this occasion may be proved in the usual way. There is, perhaps, no direct authority for the last proposition, but it seems to be an inference from the two most recent cases. A confession made under circum-

stances which do not bring it within the statute stands as a confession at common law. See the concluding words of s. 18.

It was remarked by Platt, B., in R. v. Weller, 2 C. & K. 223 : 61 E. C. L. R., that any observation made by the prisoner in the course of the examination, which was material, ought to be taken down. This is useful, because the memorandum, though not evidence in itself, may be used by the witness to refresh his memory at the trial. R. v. Watson, 3 C. & K. 111.

[*59] *It seems to be the duty of the magistrate who presides at the examination, to advise the prisoner not to make any statement before the evidence is concluded and the caution is administered. R. v. Watson, *ubi suprà*.

The prisoner is not to be precluded from showing, if he can, that omissions have been made to his prejudice, for the examination has been used against him as an admission, and admissions must be taken as they were made, the whole together, not in pieces, nor with partial omissions. Even the prisoner's signature ought not to stop him from proving, if he can, such omissions. 2 Phill. Ev. 85, 9th ed.

Mode of taking examinations—signature.] The examination of a prisoner, when reduced into writing, ought to be read over to him, and tendered to him for his signature.(1) But whether signed or not by him, it is still evidence against him, nothing being said in s. 18 of the 11 & 12 Vict. c. 42, about signature by the prisoner, and the statement being expressly made evidence *without further proof*, if read over to the prisoner and signed by the magistrate. In the schedule (N) it is said, "Get him (the prisoner) to sign it, *if he will.*" At common law, as has already been said, if a statement were made by a prisoner and reduced into writing, the memorandum could only be evidence if signed by the prisoner, or its truth acknowledged by parol; nor do the statutes previous to the last seem to contain anything which dispenses with the proof, which would be necessary in ordinary cases, that the truth of the written memorandum was thus recognized by the prisoner. All the cases before the statute seem reconcilable on this principle. Thus in R. v. Lambe, 2 Leach, 552, where the examination of a prisoner was taken in writing, and afterwards read over to him, upon which he observed, "It is all true enough," but upon the clerk's requesting him to sign it, he said, "No, I would rather decline that," nor was it signed, either by him or by the magistrate; a majority of the judges were of opinion, that the written examination was rightly received. So where the solicitor for the prosecution, at the request of the magistrate, made minutes of what the prisoner said before the magistrate, and those minutes were read over to the prisoner, who said, "It is all true," but afterwards, on the minutes being again read, objected to some parts of them, and refused to sign them, it was held that they might be read in evidence against the prisoner. R. v. Thomas, 2 Leach, 637. But where the examination of a prisoner, confessing his guilt, was put into writing, and he was desired to sign it, which he refused to do, although he admitted his guilt, Wilson, J., refused to receive it, saying, that it was competent to a prisoner, under such circumstances, to retract what he had said, and to say that it was false. R. v. Bennet, 2 Leach, 553 (*n*). This retractation would not render the confession itself, but only the written memorandum of it, inadmissible. And where an examination was offered in evidence, and the clerk of the magistrate stated that he took it down from the mouth of the prisoner, and that it was afterwards read over to him, and he was told that he might sign it or not as he pleased, upon which he refused to sign it; Wood,

(1) Pennsylvania v. Stoops, Addis. 383 ; People v. Johnson, 1 Wheeler's C. C. 150 ; see Commonwealth v. Boyer, 2 Wheeler's C. C. 150 ; People v. Robinson, 1 Wheeler's C. C. 240.

B., was of opinion that the document could not be read. In R. v. Lambe, the prisoner, when the examination was read over to him, said that it was true, and here, if the prisoner had said so, the case might have been different. R. v. Telicote, 2 Stark. *N. P. 484; and see R. v. Jones, 2 Russ. 658. A statement made [*60] before a magistrate having been taken down in writing, and read over to a prisoner, he was asked to sign it. He inquired whether he was bound to sign it or not, and upon being told that he was not, he said he had rather not sign it. Littledale, J., was clearly of opinion, both upon the cases and on principle, that the written memorandum of the statement was not admissible. R. v. Sykes, Shrewsbury Spr. Ass. 1830; 2 Russ. on Crimes, by Greaves, 882. So where the examination of a prisoner having been taken down in writing before a magistrate, he was neither asked to sign it, nor was it read over to him, Littledale, J., refused to allow the document to be read in evidence. R v. Wilson, Shrewsbury Spr. Ass. 1830, Id. Where, therefore, before the 11 & 12 Viet. c. 42, the prisoner refused to sign the memorandum of his statement, or to acknowledge its truth, it was necessary to prove the statement by a witness who heard it. See 2 Phill. Ev. 81, 9th ed.

Examinations informal—used to refresh the memory of witness.] It has already appeared that if the examination of a prisoner has been taken down in writing, but not in such a manner as that the writing itself is admissible under the statute, parol evidence of what the prisoner said is admissible; and in such case the writing may be referred to by the witness who took down the examination, in order to refresh his memory. Where a person had been examined before the lords of the council, and a witness took minutes of his examination, which were neither read over to him after they were taken, nor signed by him; it was held that although they could not be admitted in evidence as a judicial examination, yet the witness might be allowed to refresh his memory with them, and having looked at them, to state what he believed was the substance of what the prisoner confessed in the course of his examination. R. v. Layer, 16 How. St. Tr. 215. So where an examination taken at several times, was reduced into writing by the magistrate, and on its being completed, was read over to the prisoner, but he declined to sign it, acknowledging at the same time that it contained what he had stated, although he afterwards said that there were many inaccuracies in it, it was held that this might be admitted as a memorandum to refresh the memory of the magistrate, who gave parol evidence of the prisoner's statement. R. v. Jones, 2 Russ. 658 (*n*). So in R. v. Telicote, *ante*, p. 59, supposing the written document was inadmissible, yet the clerk of the magistrate, who was called as a witness, might have proved what he heard the prisoner say on his examination, and have refreshed his memory by means of the examination which he had written down at the time. 2 Russ. 658; see 4 C. &. P. 550 (*n*). And see R. v. Dewhurst, and R. v. Watson, 2 C. & K. 111: 61 E. C. L. R. So where, on a charge of felony, the examination of the prisoner was reduced into writing by the magistrates' clerk, but nothing appeared on the face of the paper to show that it was an examination taken on a charge of any felony, or that the magistrates who signed it were then acting as magistrates; Patteson, J., permitted the clerk to the magistrates to be called, and to refresh his memory from this paper. R. v. Tarrant, 6 C. & P. 182: 25 E. C. L. R.; and see R. v. Pressley, Id. 183, R. v. Bell, 5 C. & P. 162: 24 E. C. L. R.; and R. v. Watson, 3 C. & K. 111.

Mode of proof.] If the examination has been taken in conformity *with [*61] the provision of the statute, it proves itself, *ante*, p. 55. But should there be altera-

tions or erasures, the clerk to the magistrates, or some person who was present at the time, should be called to explain them. Where, upon an indictment for murder, it was proposed to prove the prisoner's examination before the coroner by evidence of the handwriting of the latter, and by calling a person who was present at the examination, it appearing that there were certain interlineations in the examination, Lord Lyndhurst said, that he thought the clerk who had taken down the examination ought to be called, and the evidence was withdrawn. R. v. Brogan, Lanc. Sum. Ass. 1834, MS.

Evidence against the prisoner only.] In R. v. Haines, 1 F. & F. 86, Crowder, J., refused to allow the prisoner's statement which had not been put in evidence by the counsel for the prosecution to be put in on behalf of the prisoner. And it is evidence only against the prisoner who makes it. If two prisoners be taken before the magistrate on a charge, a statement made by the first prisoner cannot be given in evidence against a second prisoner, because when before the magistrate the second prisoner is only called upon to answer, if he pleases, the depositions which have been given on oath against him, and not what the other prisoner may have said on his examination. R. v. Swinnerton, 1 C. & M. 593: 41 E. C. L. R.; per Patteson, J. As to the examination being put in by the direction of the court, see *post*, tit. Practice.

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Depositions—when admissible.] The question of the admissibility in evidence in criminal cases of what are usually called *depositions* is one by no means free from difficulty. It is not within the scope of this work to enter at length into the discussion of this question, but it is necessary to point out the rules which have been generally acknowledged, the difficulties which have arisen, and the opinions which have been expressed in reference to this subject.(1)

It is a well-known rule of evidence, and one which is treated as generally applicable both to civil and criminal cases, that what a witness has once stated on oath in a judicial proceeding may, if that witness cannot possibly be produced again, be given in evidence, provided the inquiry be substantially the same on both occasions, and

(1) There is no authority at common law for taking depositions in criminal cases out of court without the consent of the defendant. The People v. Restell, 3 Hill, 289.
Depositions in perpetual remembrance, taken before an indictment is found, are not admissible on the trial of the indictment. Commonwealth v. Ricketson, 5 Metcalf, 412.

between the same parties. This applies not only to evidence taken at different stages of the same inquiry, but to successive inquiries into the same matter; as, for instance, to a new trial granted in a case of misdemeanor.

It is also a well-known rule of evidence that upon any point material to the issue a witness may be contradicted or discredited by showing that he has on a previous occasion made statements at variance with that made by him at the trial. This includes all previous statements of the witness, whether on oath or not, and whether in a judicial proceeding or not.

Now it is obvious that a totally different class of considerations will apply to the proof of the previous statements according as they are used as evidence in chief, or to discredit the witness only. It is absolutely necessary, therefore, in considering how such previous statements are to be proved, never to lose sight of the purpose for *which they are being used; and it is from not doing so that much of the [*63] confusion on this point of the law of evidence has arisen.

In criminal cases it is generally with respect to the preliminary inquiry before magistrates on charges of felony and misdemeanor that this question assumes its greatest importance; when, therefore, in what follows, we speak of *depositions*, it will be understood that *depositions* so taken are alone referred to.

Depositions when used to contradict a witness—how proved.] The following rules relating to this question were laid down by the judges after the passing of the Prisoner's Counsel Act, 6 & 7 Will. 4, c. 114 (see 7 C. & P. 676).

1. That where a witness for the crown has made a deposition before a magistrate, he cannot, upon his cross-examination by the prisoner's counsel, be asked whether he did or did not in his deposition make such or such a statement, until the deposition itself has been read, in order to manifest whether such statement is or is not contained therein, and that such deposition must be read as part of the evidence of the cross-examining counsel.

2. That after such deposition has been read, the prisoner's counsel may proceed in his cross-examination of the witness as to any supposed contradiction or variance between the testimony of the witness in court and his former deposition; after which the counsel for the prosecution may re-examine, and, after the prisoner's counsel has addressed the jury, will be entitled to reply. And in case the counsel for the prisoner comments upon any supposed variances or contradiction without having read the deposition, the court may direct it to be read, and the counsel for the prosecution will be entitled to reply upon it.

3. That the witness cannot in cross-examination be compelled to answer whether he did or did not make such and such a statement before the magistrate until after his deposition has been read, and it appears that it contains no mention of such a statement. In that case the counsel for the prisoner may proceed with his cross-examination; and if the witness admits such statements to have been made, he may comment upon such admission or upon the effect of it upon the other part of his testimony; or, if the witness denies that he made such a statement, the counsel for the prisoner may then, if such statement be material to the matter in issue, call witnesses to prove that he made such statement. But in either event the reading of the deposition is the prisoner's evidence, and the counsel for the prosecution will be entitled to reply.

The effect of these rules is that the depositions returned by the magistrates before whom the preliminary inquiry took place must, if anything said upon that inquiry is to be used for the purpose of discrediting a witness, be first put in evidence; but

these rules expressly recognize that what appears upon the depositions is not in any way conclusive as to what passed on that occasion, which, after the depositions have been once read, may be proved by the witness's admission, or, if it be material to the issue, by other witnesses who were present. This appears to be the view taken by Erle, J., in R. v. Curtis, 2 C. & K. 763 : 61 E. C. L. R.

What is the precise object of the above rules does not exactly appear ; it seems to [*64] be partly to refresh the witness's memory by *hearing his depositions read over, and partly to insure in as many cases as possible a right to reply on the part of the crown. As to the practice in cross-examining witnesses on their depositions, see *post*, tit. Examination of Witnesses.

It has been suggested that there is a difference between *adding* to and *varying* depositions : per Alderson, B., in R. v. Coveney, 7 C. & P. 668 : 32 E. C. L. R. ; and there can be no doubt that, as a general principle, you may add to, but not vary written evidence. The question is whether that principle is applicable to the case now under consideration. At common law the return of the magistrate would not be even *admissible* to contradict a witness, any more than a judge's notes in a civil case ; but ever since the statute of the 1 & 2 P. & M. c. 13, this return has been considered as admissible ; but on the general principles of evidence, this would not exclude additions which were not variations.

Depositions when used as substantive evidence—how proved.] When depositions taken before the magistrate are used to supply the testimony of an absent witness, there is then considerable authority for saying that the return of the magistrate is the best and only evidence as to what was said before him. That it is the best evidence has always been acknowledged, and was laid down by Lord Mansfield in R. v. Fearshire, 1 Lea. 202 ; and that it is the only evidence has also generally been acknowledged and was so said by Mr. Justice Holroyd in R. v. Thornton, 2 Ph. & Arm. Ev. 140 (*n*).

As already pointed out, there is a difference between adding to and varying written evidence, and it has been sometimes urged that even where a deposition is used as substantive evidence, it might be added to, though not varied. But it must be recollected that, under the statute 11 & 12 Vict. c. 42, s. 17, *infra*, if the magistrates do their duty, the return of the depositions will be both *exclusive* and *inclusive ;* and though it cannot be denied that, on general principles of law, a deposition may be added to, there are very sound reasons why an exception should be made in this particular case ; for there might be very great danger in trusting to the oral repetition of testimony, which, under all circumstances, must be less satisfactory than that ordinarily given.

These considerations do not apply with equal force to depositions produced for the purpose of contradicting or lessening the credit of a witness. For, in the first place, many matters which do not appear material to the charge at the preliminary inquiry, and which, therefore, would not be returned, may become exceedingly important for the purpose of testing the truth of the testimony of a witness ; and, moreover, the witness being himself then and there present, his own memory and conscience can be searched as to what was really said before the magistrate.

The result suggested is, that to discredit a witness the depositions may be added to, but not varied ; but, when they are used as substantive evidence, the return of the justices is final and conclusive. There is still one difficult question which is not unlikely to arise, and which has not yet been discussed ; *i. e.*, whether, if no deposition be returned by the magistrate, or one which from some informality cannot be

used, whether in any case other evidence ought to be received of what was said by the witness. It will scarcely be denied that, on general principles, all the usual evidence would be let in in such a case, but it is unnecessary to repeat the arguments which go *to show that, as substantive evidence, nothing should be received [*65] which is not returned by the magistrate.

Depositions when admissible as substantive evidence.] Depositions are admissible as substantive evidence at common law, should the witness be either dead: Hale, P. C. 305; R. v. Westbur, Lea. C. C. 12; R. v. Bromwich, 1 Lea. 180; Salk. 281; B. N. P. 242;(1) or be in such a state as never to be likely to be able to attend the

(1) So the evidence given by a witness, since dead, on a former trial, is competent. Wilber v. Selden, 6 Cow. 162; Johnston v. The State, 2 Yerg. 58; Watson v. Lisbon Bridge, 14 Maine, 201; State v. De Witt, 2 Hill, S. C. Rep. 282; Keecher v. Hamilton, 3 Dana, 38; Kelly's Exr. v. Connell's Adm., 3 Dana, 533; Robson v. Doe, 2 Blackf. 308. In Virginia it has been held inadmissible in criminal cases. Finn v. The Commonwealth, 4 Rand. 501.

In a criminal case the public prosecutor will not be allowed to use the testimony given by a witness at a former trial of the same indictment, though he be absent from the State. The People v. Newman, 5 Hill, 295.

So the evidence is admissible where the witness has become unable to speak from paralysis. Rogers v. Raborg, 2 Gill & Johns. 54. But it is not enough that he has forgotten. Drayton v. Well, 1 Nott & McC. 409. Nor that he has become interested. Chess v. Chess, 17 Serg. & R. 409; Irwin v. Reed et al., 4 Yeates, 512. Nor that he has been convicted of an infamous crime. Le Baron v. Crombie, 14 Mass. 234. Nor it seems that he is not to be found. Wilbur v. Selden, 6 Cow. 162; Arderry v. The Commonwealth, 3 J. J. Marsh. 185. *Contra*, Magill v. Canffman, 4 Serg. & R. 319; Rogers v. Raborg, 3 Gill & Johns. 54; Pettibone v. Derringer, 4 Wash. C. C. Rep. 215; Reed v. Bertrandt, Ibid. 538.

The very words of the witness must be sworn to. United States v. Wood, 3 Wash. C. C. Rep. 440; Wilbur v. Selden, 6 Cow. 162; Ballenger v. Barnes, 3 Devereux, 460; Bowie v. O'Neal et al., 5 Har. & Johns. 266. But *contra*, Caton et al. v. Lennox et al., 5 Rand. 31; Cornell v. Green, 10 Serg & R. 14. The whole examination must be given. Wolf v. Wyeth, 11 Serg. & R. 149. See the following cases as to notes of counsel: Lightner v. Wilie, 4 Serg. & R. 203; Watson v. Gilday, 11 Ibid. 337; Chess v. Chess, 17 Ibid. 409; Miles v. O'Hara, 4 Binn. 110; Foster v. Shaw, 7 Serg. & R. 156. The *postea* of the former trial must be produced. Beales v. Guernsey, 8 Johns. 446. It is error to prove what a deceased witness testified to upon a former trial between the same parties, without proving the fact of such trial by the record; but the error is cured if such record proof be produced before the close of the evidence. Weart v. Hongland, Adm., 2 Zabriskie, 517.

When a witness, who has once testified upon the trial of a case, has deceased, his testimony may be used upon a subsequent trial of the same case, provided the substance of what is testified, both in chief and on cross-examination, can be proved in the very words used by him. Marsh v. Jones, 21 Vermont, 378.

It is not enough that the former trial was upon the same general subject; the point in issue must be the same. Melvin v. Whiting, 7 Pick. 79. So evidence of what a deceased witness swore on a question of bail, is inadmissible on the trial of the cause. Jackson et al. v. Winchester, 4 Dall. 206. See Jessup v. Cook, 1 Halst. 434.

Where a person is offered as a witness to prove the testimony of a deceased witness on a former trial of the same cause, he cannot be permitted to testify, if he state that he can give only the substance of such testimony, but not the language of the witness. Warren v. Nicholls, 6 Metcalf, 261.

Where, in the trial of a cause, it is necessary and proper to prove what a deceased witness swore on a former trial between the same parties, where the issue and matter in controversy is the same, it is sufficient for a living witness, who is called to testify, to prove that the deceased witness swore to certain *facts*, and he need not prove the precise words employed by such deceased witness. Garratt v. Johnson, 11 Gill & Johns. 173.

Where the merits were tried on a former suit, but the verdict was against the plaintiff, solely on the ground of his incapacity to recover for want of interest in the note sued upon, the evidence given by witnesses then examined is admissible, if they are out of the State. Hacker v. Jamison, 2 Watts & Serg. 438. The absence of a witness from the State, so far as it affects the admissibility of secondary evidence, has the same effect as his death. Alter v. Borghaus, 8 Watts, 77.

If a witness be out of the State, notes of his testimony, proved to have been correctly taken upon a former trial of the cause, may be read in evidence. But if it appear that the witness absented himself from that trial before he was fully examined, his testimony given cannot be read in evidence. Noble v. McClintock, 6 Watts & Serg. 58.

A party is not entitled to the benefit of the testimony of a witness who dies *after* he has been examined and testified, and *before* the opposite party has had an opportunity to avail himself of a cross-examination. Kissam v. Forrest, 25 Wend. 651.

The testimony of a witness since deceased, on a former trial, taken down in writing and sworn to, though not from recollection, may be given in evidence. Van Buren v. Cockburn, 14 Barbour, 118; Riggins v. Brown, 12 Georgia, 271; Walker v. Walker, 14 Ibid. 242.

In a criminal case the prosecutor will not be permitted to use the testimony given by a witness at a previous trial, although he be absent from the State. The People v. Newman, 5 Hill, 295.

The deposition of a witness taken before the examining court, cannot be used against a prisoner

assizes: R. v. Hogg, 6 C. & P. 176: 25 E. C. L. R.; R. v. Wilshaw, Carr. &. M. 145: 41 E. C. L R.; or if the witness be kept away by the practices of the prisoner: R. v. Gutteridge, 9 C. & P. 471: 38 E. C. L. R. The admissibility of depositions is now governed by the 11 & 12 Vict. c. 42, s. 17, which provides that in all cases where any person shall appear or be brought before any justice or justices of the peace, charged with any indictable offence, whether committed in England or Wales, or upon the high seas, or on land beyond the sea, or whether such person appear voluntarily upon summons, or have been apprehended, with or without warrant, or be in custody for the same or any other offence, such justice or justices, before he or they shall commit such accused person to prison for trial, or before he or they shall admit him to bail, shall, in the presence of such accused person, who shall be at liberty to put questions to any witness produced against him, take the statement on oath or affirmation of those who shall know the facts and circumstances of the case, and shall put the same into writing; and such depositions shall be read over to and signed respectively by the witnesses who shall have been so examined, and shall be signed also by the justice or justices taking the same; and the justice or justices before whom any such witness shall appear to be examined as aforesaid, shall, before such witness is examined, administer to such witness the usual oath or affirmation, which such justice or justices shall have full power and authority to do; and if, upon the trial of the person so accused as first aforesaid, it shall be proved by the oath or affirmation of any credible witness that any person whose deposition shall have been taken as aforesaid is dead, or so ill as not to be able to travel, and if it also be proved that such deposition was taken in the presence of the person so accused, and that he, or his counsel or attorney, had a full opportunity of cross-examining the witnesses, then, if such deposition purport to be signed by the justice by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same.

None of the previous statutes (1 & 2 P. & M. c. 13; 2 & 3 P. & M. c. 10; 7 Geo. 4, c. 64) contained any directions as to *when* the depositions should be considered admissible. It will be observed that only two cases are mentioned in this statute, "where the witness is dead, or so ill as not to be able to travel." It is not said in

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on trial for murder, it being proved that the witness is beyond the jurisdiction of the court, unless it is also proved that such absence was caused by the defendant. The State v. Houser, 26 Missouri, 431.

When a witness for the prisoner is absent from the State at the time of the second trial, it is not competent for the prisoner to show what the witness swore to at the first trial. Brogy v. The Commonwealth, 10 Grattan, 722.

The notes of counsel of a deceased witness on a former trial between the same parties, are evidence when proved to be correct in substance, although the counsel does not recollect the testimony independent of his notes. Rhine v. Robinson, 3 Casey, 30; Jones v. Ward, 3 Jones's Law, 24; Ashe v. De Rosset, 5 Ibid. 299; Crawford v. Loper, 25 Barbour, 449; Wright v. Stowe, 4 Jones's Law, 516; Summers v. The State, 5 Ohio, 325. *Contra*, Yancey v. Stone, 9 Richardson's Equity, 429.

The exact words of a deceased witness need not be proved. It is sufficient if the substance of all he said on the examination and cross-examination in relation to the subject-matter in controversy be shown. Kendrick v. The State, 10 Humphrey, 479; Sharp v. The State, 15 Alabama, 749; Davis v. The State, 17 Ibid. 354; The State v. Hooker, 17 Vermont, 658.

When the evidence of a deceased witness is offered, the substance of his whole testimony must be proved; if any parts of it are irrelevant the court may reject them. Mayer v. Doe, 22 Alabama, 699; Emery v. Fowler, 33 Maine, 326.

It is sufficient if a witness can give the substance of the evidence of a deceased witness at a former trial, although not in the same words. Rivereau v St. Ament, 3 Iowa, 118.

As to the deposition of deceased witnesses before the examining magistrate, The State v. Valentine, 7 Iredell, 225.

Proof of what a deceased witness testified before the committing magistrate is admissible, though not reduced to writing. The State v. Hooker, 17 Vermont, 658; Davis v. The State, 17 Alabama, 354.

The deposition of a deceased witness is not admissible, unless the prisoner was present. The State v. Campbell, 1 Richardson, 124; Collier v The State, 8 English, 676.

Depositions cannot be used in criminal trials. Dorninger v. The State, 7 Smedes & Marshall, 475.

the statute that the deposition would be admissible if the witness were kept out of the way by the procurement of the prisoner, a case well established at common law. However, in R. v. Scaife, 2 Den. C. C. 28 f, S. C. 17 Q. B. 208, where the prisoner was indicted, together with Thomas Rooke and John Smith, for larceny, evidence was given that by the procurement of Smith one of the witnesses for the prosecution had been kept out of the way, and her deposition was tendered; the evidence was admitted to be receivable as against Smith, but it was *said that it was no evi- [*66] dence against Scaife and Rooke. The case came before the Court of Queen's Bench, and it was held that the learned judge ought to have told the jury that the evidence applied to the case of Smith only, and not to that of either of the other prisoners. Incidentally, therefore, the admissibility of the depositions, as against a prisoner who has himself procured the absence of a witness, is recognized by this case.

There does not appear to be any criminal case in which the depositions have been admitted on the ground of the witness being insane, either before or since the statute. In civil inquiries this has been considered a good ground of admission. R. v. Griswell, 3 Term Rep. 720; and it is said in R. v. Marshall, Carr. & M. 147 : 41 E. C. L. R., that Coleman, J., thought it a good ground in criminal cases also. It is not a sufficient ground of admission that the witness cannot be produced on account of his absence in a foreign country. R. v. Austen, 25 L. J. M. C. 48.

As to when a witness will be considered so ill as not to be able to travel, the following cases have been decided: Where the physician stated that the witness could not speak or hear from paralysis, and that if brought to court he would not be able to give evidence, yet that he might be brought there without danger to life, though he, as his physician, would not permit the prisoner to roam abroad if he knew it, it was held by the Court of Criminal Appeal that the deposition was rightly received. R. v. Cockburn, Dear. & B. C. C. 203. In R. v. Walker, 1 F. & F. 534, where it was proposed to put in evidence the deposition of a woman who had been recently confined, Willes, J., is reported to have said, "Illness from a confinement is an ordinary state, and not such an illness as is contemplated by the statute. I have considered the question with my brother Crowder. If you find it necessary for your case to put in the deposition, I have made up my mind to reserve the question for the opinion of the judges. It is one of importance; I have considered it; and my brother Crowder and myself are agreed upon it." But it became unnecessary to reserve the point. Where a witness came to the assizes, but returned home by the advice of a medical man, who deposed that it would have been dangerous for the witness to remain, Parke, B., held that the witness was "unable to travel," within the meaning of this section, and allowed his depositions to be read. R. v. Wicker, 18 Jur. 252.

There is nothing in the words of the statute which renders it necessary that the inability of the witness to attend at the trial should be permanent; it may, therefore, be implied that it need not be so. Before the statute, it seems to have been doubted whether a merely temporary illness was a sufficient ground for admitting the deposition. 2 Stark. Ev. 383, 3d ed.; R. v. Savage, 5 C. & P. 143 : 24 E. C. L. R. And there can be no doubt that a judge would now exercise his discretion and decide whether, in the interests of justice, it were better to read the deposition or to adjourn the trial in order to obtain the oral testimony of the witness.

Condition of absent witness—how proved.] Of course a surgeon's certificate, however authentic in itself, is no legal evidence of the state of the witness. His condition must be proved, on oath, to the satisfaction of the judge who tries the case, whose province it is to decide this preliminary question of fact. It appears to be the *established practice that, in the case of a witness being alleged to be ill, the [*67]

surgeon, if he be attended by one, must be called to prove his condition. In R. v. Riley, 3 C. & K. 316, Patteson, J., laid it down, that where a witness is ill, his deposition would not be received in evidence under this statute, unless the surgeon attended at the trial, to prove that the witness was unable to travel. And he also stated that where a witness was permanently disabled, and was not attended by a surgeon, other evidence that the witness was unable to travel was receivable. In that case, it appears that the witness was attended by a surgeon, who was not called; but another person proved that he saw the witness in bed on the 18th March, when he seemed ill; the commission-day was the 21st, and the trial took place on the 23d; it was held that the proof was insufficient to render the deposition admissible. In R. v. Phillips, 1 F. & F. 105, the attorney for the prosecution was put into the box to prove that the witness was unable to attend, and stated that the witness's residence was twenty-three miles off, and that he had seen him that morning in bed, with his head shaved. Erle, J., said, "The evidence, no doubt, is as strong as it can be, short of that of a medical man, but the case may be easily imagined of a person extremely unwilling to appear as a witness, and so well feigning himself to be ill as to deceive any one but a medical man;" and the evidence was rejected.

Depositions to be admissible, must be taken in proper form.] To render a deposition of any kind admissible in evidence in any case, it must be proved to have been formally taken. Independently of the statute which regulates the taking of depositions before justices of the peace, 11 & 12 Vict. c. 42, s. 17, *supra*, they must appear to have been taken on oath, and that the party against whom they are tendered had an opportunity of examining the witnesses who made them. Attorney-General v. Davison, McClel. & Y. 169; R. v. Woodcock, 1 Lea. 500; R. v. Dingler, 2 Lea. 561. Now, not only these, but all the other requirements of the statute must be proved, by the party tendering the evidence, to have been complied with; though the usual presumptions in favor of the proceedings having been regular, will be made, if the depositions are in form correct.

Mode of taking depositions—caption.] The title or caption of the deposition need state no more than it is the deposition of the witness, and the particular charge before the magistrate to which the deposition had reference. Where, therefore, upon the trial of a prisoner for unlawfully obtaining a promissory note by false pretences, the deposition of the prosecutrix, proved to have been regularly taken before the committing magistrate, stated, by way of caption, that it had been taken "in the presence and hearing of Harriet Langridge (the prisoner), late of, &c., wife of John Langridge, of the same place, laborer, who is now charged before me this day for obtaining money and other valuable security for money from M. R. (the prosecutrix), then and there being the money of, &c.;" it was held, that such caption charged an offence against the prisoner with sufficient distinctness, and that the deposition had been properly received in evidence at the trial, after due proof of the absence of the prosecutrix from illness. R. v. Langridge, 1 Den. C. C. R. 448; S. C. 18 L. J. M. C. 198. One caption at the head of the body of the depositions taken in the case is [*68] sufficient, and the particular deposition sought to *be given in evidence need not have a separate caption. R. v. Johnson, 2 C. & K. 355: 61 E C. L. R. So where the depositions had one caption, which mentioned the names of all the witnesses, and at the end had one jurat, which also contained the names of all the witnesses, and to which was the signature of the magistrate, and each witness signed his own deposition, Williams, J., was of opinion that they were correctly taken. R.

v. Young, 3 C. & K. 106. A deposition without a caption is inadmissible, though otherwise formally taken. R. v. Newton, 1 F. & F. 641.

Mode of taking depositions—opportunity of cross-examination.] The prisoner must have an opportunity of cross-examining the witness. Where the prisoner was not present during the examination, until a certain part of the deposition, marked with a cross, at which period he was introduced and heard the remaining part of the examination, and when it was concluded the whole was read over to him, Chambre, J., refused to admit that part of the depositions previous to the mark, which had not been heard by the prisoner. R. v. Forbes, Holt, 599 (*n*). But a different rule was acted upon in the following case: The prisoner was indicted for murder, and the deposition of the deceased was offered in evidence. It appeared that a charge of assault having been preferred against the prisoner, the deposition of the deceased had been taken *on that charge.* The prisoner was not present when the examination commenced, but was brought into the room before the three last lines were taken down. The oath was again administered to the deceased, in the prisoner's presence, and the whole of what had been written down was read over to him. The deceased was then asked, in the presence of the prisoner, whether what had been written was true, and he said it was perfectly correct. The magistrates then, in the presence of the prisoner, proceeded to examine the deceased further, and the three last lines were added to the deposition. The prisoner was asked whether he chose to put any questions to the deceased, but did not do so. An objection was taken that the prisoner had not been present. The deposition, however, was admitted, and by a majority of the judges held rightly admitted. R. v. Smith, Russ. & Ry. 339; 2 Stark. N. P. 208 S. C.: 3 E. C. L. R. In R. v. Beeston, Dears. C. C. 405, Alderson, B., stated that he still thought he was right in the objection which, as counsel for the prisoner, he took to the admissibility of the deposition in R. v. Smith, upon the ground that "the prisoner had not a sufficient opportunity of cross-examination; that he had no opportunity of hearing the witness give his answers and seeing his manner of answering, and that so much of the evidence as had been taken in the prisoner's absence was inadmissible." And Platt, B., in R. v. Johnson, 2 C. & K. 394: 61 E. C. L. R., reprobated the practice of taking depositions in the absence of the prisoner, and then supplying the omission by reading them over to the prisoner, and asking him if he would like to put any questions to the witnesses.

Mode of taking depositions—should be fully taken and returned.] By the 11 & 12 Vict. c. 42, it is expressly enacted that the justice "shall, in the presence of such accused person, who shall be at liberty to put questions to any witness produced against him, take the statement, on oath or affirmation, of those who shall know the facts and circumstances of the cases, and shall put the same into writing, and such depositions shall be read over and *signed respectively by the witnesses who [*69] shall have been so examined, and shall be signed also by the justice or justices taking the same." The observations of Parke, B., in R. v. Thomas, 7 C. & P. 718: 32 E. C. L. R., are still pertinent. He said, "Magistrates are required by law to put down the evidence of witnesses, or so much thereof as shall be material. They have hitherto, in many cases, confined themselves to what they deemed material, but in future it will be desirable that they should be extremely careful in preparing depositions, and should make a full statement of all the witnesses say upon the matter in question, as the experience we have already had of the operation of the Prisoner's Counsel Bill has shown us how much time is occupied in endeavoring to establish contra-

dictions between the testimony of the witnesses and their depositions, in the omission of minute circumstances in their statements made before the magistrates, as well as in other particulars." Where there was an omission in the depositions of a conversation which was sworn to at the trial, and which the witness said he had told to the magistrate, Lord Denman, C. J., thought the complaint of the prisoner's counsel, that such omission was unfair to the prisoner, was well founded, and that the magistrate ought to have returned all that took place before him with respect to the charge, as the object of the legislature in granting prisoners the use of the depositions was to enable them to know what they have to answer on their trial. R. v. Grady, 7 C. & P. 650: 32 E. C. L. R. The same learned judge expressed an opinion that, although in a case of felony, the committing magistrate need not bind over all the witnesses who have been examined before him in support of the charge, but only those whose evidence is material to the charge, it was very desirable that all which had been given in evidence before the magistrate should be transmitted to the judge. R. v. Smith, 2 C. & K. 207: 61 E. C. L. R. So also in cases where the prisoner calls witnesses before the magistrate in answer to the charge, they should be heard and their evidence taken down; and, if the prisoner be committed for trial, the depositions of his witnesses should be transmitted to the judge, together with the depositions in support of the charge. Anon. 2 C. & K. 854. If the prisoner or his counsel cross-examine the witnesses when before the magistrate, the answers of the witnesses to the cross-examination ought to be taken down by the magistrate and returned to the judge. R. v. Potter, 7 C. & P. 650: 32 E. C. L. R. Nothing should be returned as a deposition against the prisoner, unless the prisoner had an opportunity of cross-examining the person making the deposition. Per Lord Denman, C. J., R. v. Arnold, 8 C. & P. 621. But where a witness has undergone several examinations, it seems proper to return them all, although those only would be admissible in evidence against the prisoner which were taken in his presence. Thus, where a witness for the prosecution had made three statements at three different examinations, all of which were taken down by the magistrate, but the only deposition returned was the last taken after the prisoner was apprehended, and on the day he was committed, Alderson, B., said that every one of the depositions ought to have been returned, as it is of the last importance that the judge should have every deposition that has been made, that he may see whether or not the witnesses have at different times varied their statements, and if they have, to what extent they have done so. Magistrates ought to return to the judge all the depositions that have been made at *all the examinations* that have [*70] taken place respecting *the offence which is to be the subject of a trial. R. v. Simon, 6 C. & P. 540: 25 E. C. L. R.; and whether for the prosecution or on the part of the prisoner. Per Vaughan, J., R. v. Fuller, 7 C. & P. 269: 32 E. C. L. R.

Wilde, C. J., was of opinion that where a person of weak intellect was examined, the magistrate's clerk should take down in the depositions the questions put by the magistrate and the answers given by the witness as to the witness's capacity to take an oath. R. v. Painter, 2 C. & K. 319: 61 E. C. L. R.

Mode of taking depositions—signature.] The depositions are, by the 11 & 12 Vict. c. 42, s. 17, directed to be signed by the witnesses and the magistrates before whom they are taken. It seems that the signature of one magistrate is sufficient (see the latter words of the section, *supra*, p. 65). No proof is necessary of the signature either of the magistrate or the witness. Where, before the passing of the 11 & 12 Vict. c. 42, a prisoner was charged with forging the acceptance to a bill of exchange of one Winter, who had died previous to the trial, the magistrate's clerk proved

Winter's examination to have been duly taken in the prisoner's presence, and that he was cross-examined by his attorney; on the prosecutor tendering the examination in evidence, it was discovered that, although the examination itself was duly signed by the magistrates, the cross-examination, which had been taken on a subsequent day, was not subscribed by them. The examinations, however, of two witnesses, called by the prisoner, and taken at the same time, were pinned up along with the cross-examination, and the last sheet of the whole was signed by the magistrates. Alderson, B. (after consulting Parke, B.), said, that if the clerk could state that the sheets were all pinned together at the time the magistrate signed the last sheet, he thought he could not reject the examination of Winter in evidence, but must receive the whole in evidence. The clerk having no recollection of the subject, one of the magistrates, who happened to be in court, was called. He said that when he signed the depositions they were lying on the table, but he could not state they were pinned together. Alderson, B., thereupon rejected both the examination and cross-examination. R. v. France, 2 Moo. & R. 207. "It is the magistrate's duty to take care that the deposition of every witness is signed at the time when it is taken." Per Lord Denman, C. J., Reg. v. The Lord Mayor of London, 1 Car. H. & A. 46.

Depositions for what purposes available.] If the deposition be admissible at all, it is admissible for all the purposes for which ordinary evidence is admissible, and may be used either for or against the prisoner. It may be used before the grand jury in the same way as before the petty jury. R. v. Clements, 2 Den. C. C. 251; S. C. 20 L. J. M. C. 193.

Depositions admissible on trial of what offences.] The only cases which have actually occurred on this subject are those in which the inquiry before the magistrate has been into an injury done to the witness, which, from subsequent circumstances, has resolved itself into a more serious charge. The question has then arisen, whether, if the witness be unable to attend at the trial, his deposition is admissible as having been given upon a different charge from that then made. All the cases, before the late statute, were in favor of the *admissibility of the deposition, under such [*71] circumstances. In R. v. Smith, Russ. & Ry. 339, the prisoner was indicted for the murder of one Charles Stewart. The prisoner had been taken before a magistrate upon a charge of assault upon the deceased, and also of robbing a manufactory, where the deceased was employed as night-watchman. At the trial the deposition of the deceased, taken upon this inquiry, was offered in evidence, and received by Richards, C. B. The matter was referred to the opinion of the judges, who held, by a majority of ten to one, that the deposition was rightly received in evidence. Four of the judges, however, stated that they should have doubted but for the case of R. v. Radbourne, 1 Lea. 458, which is to the same effect. It seems to have been thought that the 11 & 12 Vict. c. 42, s. 17, made some difference in this respect, and the deposition was rejected once or twice under similar circumstances; but in R. v. Beeston, Dears. C. C. 405, the subject was fully considered: there the prisoner was charged before the magistrate with feloniously wounding J. A., with intent to do him grievous bodily harm. J. A. subsequently died of the wound, and on the trial of the prisoner for the murder, the deposition of J. A., taken at the above inquiry, was offered in evidence, and received by Crompton, J. The point was reserved and fully argued before the Court of Criminal Appeal, where it was unanimously held that the deposition in this case would have been admissible at common law, and that there was nothing in the statute by which the common law rule on the subject was affected. An

opinion is expressed that the true guide in each case is not any technical distinction between the charge on which the deposition is taken and that on which the prisoner is ultimately tried, but whether the prisoner appears to have had a full opportunity of cross-examination on all points material to one charge as well as to the other.

Prisoners entitled to copies of the depositions taken before a magistrate.] By the Prisoner's Counsel Act, 6 & 7 Wm. 4, c. 114, s. 3, "All persons who, after the passing of this act, shall be held to bail or committed to prison, for any offence against the law, shall be entitled to require and have, on demand from the person who shall have the lawful custody thereof, and who is hereby required to deliver the same, copies of the examinations of the witnesses respectively, upon whose depositions they have been so held to bail or committed to prison, on payment of a reasonable sum for the same, not exceeding three halfpence for each folio of ninety words; provided always, that if such demand shall not be made before the day appointed for the commencement of the assizes or sessions at which the trial of the person on whose behalf such demand shall be made is to take place, such person shall not be entitled to have any copy of such examination of witnesses, unless the judge or other person to preside at such trial shall be of opinion that such copy may be made and delivered without delay or inconvenience to such trial; but it shall nevertheless be competent for such judge or other person so to preside at such trial, if he shall think fit, to postpone such trial on account of such copy of the examination of witnesses not having been previously had by the party charged."

By s. 4, "All persons under trial shall be entitled, at the time of their trial, to inspect, without fee or reward, all depositions (or copies thereof) which have been taken against them, and returned into the court before which such trial shall be had."

[*72] *It has been held by Littledale, J., and Parke, B., that a prisoner is not entitled, under the above statute, to a copy of his own statement, returned by the committing magistrate, along with the depositions of the witnesses. R. v. Aylett, 8 C. & P. 669: 34 E. C. L. R. This decision is in conformity with the strict letter of the act, but it may be doubted whether it accords with the intention of the legislature. Where the case for the prosecution, as on the trial of Greenacre for murder, depends chiefly on contradictions of the prisoner's statement before the magistrate, it seems only reasonable that his counsel should be furnished with a copy of such statement. In the reporter's note to the above case, it is suggested that, at all events, according to the principles laid down by Littledale and Coleridge, JJ., in R. v. Greenacre, 8 C. & P. 32, and *post*, p. 74, the judges being in possession of the depositions may direct their officer, if they think it will conduce to the ends of justice, to furnish a copy of the statement on application by the prisoner or his counsel.

The statute does not apply to the case of prisoners committed for re-examination, but only to those who have been fully committed for trial. Reg. v. The Lord Mayor of London, 5 Q. B. 555: 48 E. C. L. R.; S. C. 13 L. J. M. C. 67. Where, therefore, a prisoner had been committed to gaol until he should give sufficient sureties for keeping the peace and for appearing at the sessions, to do as the court should order, it was held, on a rule for mandamus to justices to furnish copies of the depositions taken against him, that he was not entitled to them. Ex parte Humphreys, 17 L. J. M. C. 189.

Depositions taken before a coroner.] It is enacted by the 7 Geo. 4, c. 64, s. 4, E., which repeals (as before stated) the 1 & 2 P. & M. c. 13, and by the 9 Geo. 4, c.

54, I., "That every coroner, upon any inquisition before him taken, whereby any person shall be indicted for manslaughter or murder, or as an accessory to murder before the fact, shall put in writing the evidence given to the jury before him, or as much thereof as shall be material, and shall have authority to bind by recognizance all such persons as know or declare anything material touching the said manslaughter or murder, or the said offence of being accessory to murder, to appear at the next court of oyer and terminer, or gaol delivery, or superior criminal court of a county palatine, or great sessions, at which the trial is to be, then and there to prosecute or give evidence against the party charged; and every such coroner shall certify and subscribe the same evidence and all such recognizances, and also the inquisition before him taken, and shall deliver the same to the proper officer of the court in which the trial is to be, before or at the opening of the court."

The 11 & 12 Vict. c. 42, s. 54, repeals so much of the 7 Geo. 4, c. 64, as relates to "the taking of bail in cases of felony, and to the taking of examinations and informations against persons charged with felonies and misdemeanors, and binding persons by recognizance to prosecute or give evidence." But as this act is said by its preamble to be intended to consolidate and amend the statutes relating to the duties of *justices of the peace*, it is not generally considered that the 7 Geo. 4, c. 64, is, as regards coroners, thereby affected.

What has already been said with respect to the admissibility of depositions taken before justices before the 11 & 12 Vict. c. 42, is, for the most part, applicable to depositions taken before coroners. In one respect, however, an important distinction has been taken *between depositions before a magistrate and those taken be- [*73] fore the coroner; the latter, as it is alleged, being admissible, although the prisoner was not present when they were taken. This is stated in a book of reputation, B. N. P. 242, on the authority of two cases, R. v. Bromwich, 1 Lev. 180, and Thatcher v. Waller, T. Jones, 53; see also 6 How. St. Tr. 776; 12 Id. 851; 13 Id. 591; but it is observed by Mr. Starkie, 2 Evid. 278, 2d ed., that in neither of these cases was the question considered upon plain and broad principles. It was also said by Mr. Justice Buller, in R. v. Eriswell, 3 T. R. 707, that depositions taken before the coroner, in the absence of the prisoner, are admissible. It has been observed, however, that his lordship did not, as it seems, intend to make a distinction between these depositions and those taken before a magistrate, but referred to R. v. Radbourne, 1 Leach, 512, as an authority, in which case the depositions were in fact taken *in the presence* of the prisoner. Lord Kenyon also in the same case, although he coincided in opinion with Buller, J., appears to have considered that depositions before a magistrate and before a coroner were on the same footing. 2 Stark. Ev. 278, 2d ed. The reasons given in support of the distinction are, that the coroner's inquest is a transaction of notoriety, to which every one has access: 2 T. R. 722; and that as the coroner is an officer appointed on behalf of the public to make inquiry into matters within his jurisdiction, the law will presume the depositions before him to have been duly and impartially taken. B. N. P. 242. Hotham, B., is stated to have received depositions taken before the coroner, though it was objected that the defendant had not been present. R. v. Purefoy, Peak. Ev. 68, 4th ed. Mr. Phillipps observes, that the authorities appear to be in favor of such evidence being admitted, but that they are not very satisfactory. Phill. Ev. 570, 8th ed. And a writer of high reputation has stated that the distinction between these depositions and those taken before a magistrate, is not warranted by the legislature, and that as it is unfounded in principle, it may, when the question arises, be a matter of very grave and serious consideration whether it ought to be supported. 2 Stark. Ev. 278,

2d ed. This opinion has been adopted by another text-writer of eminence. 2 Russ. 661. Mr. Phillipps also remarks, that as far as the judicial nature of the inquiry is important, it appears to be as regular for the coroner to take the depositions in the absence of the prisoner, as it is for a justice to take the evidence in his presence. But although an inquiry by the coroner, in the absence of the prisoner, be a judicial proceeding, and required by the duty of his office, yet there seems no satisfactory reason why it should not be confined to its proper objects, or why the depositions should be received under circumstances which render every other kind of depositions taken judicially inadmissible, except by express statutory provision. Phill. Ev. 570, 8th ed. And he adds (2d vol., p. 75, 9th ed.), "And it seems an unreasonable and anomalous proposition to hold, that on a trial for murder, upon the coroner's inquest, a deposition taken before him, in the absence of the prisoner, is receivable in evidence; but that, if the trial takes place on a bill of indictment, a deposition so taken before a magistrate is not receivable. The same principle which excludes in the one case ought, if it is just and sound, to exclude also in the other." See R. v. Wall, 2 Russ. by Greaves, 893, and Taylor on Evidence, 414, 2d ed.

[*74] *Although the 7 Geo. 4, c. 64, s. 4, does not require the depositions of witnesses taken before a coroner to be signed, it is desirable that they should not only be so signed, but read over to the witnesses before signature. See per Gurney, B., R. v. Plummer, 1 Car. & K. 608: 47 E. C. L. R.

The judges have power, by their general authority as a court of justice, to order a copy of depositions taken before a coroner to be given to a prisoner indicted for the murder of the party concerning whose death the inquisition took place, although the case is not one in which the coroner could have been compelled to return them under the 7 Geo. 4, c. 64, s. 4. R. v. Greenacre, 8 C. & P. 32: 34 E. C. L. R.

Depositions in India, by consent, &c.] By the 13 Geo. 3, c. 63, in cases of indictments or informations in the King's Bench, for misdemeanors or offences committed in India, that court may award a mandamus to the judges of the Supreme Court, &c., who are to hold a court for the examination of witnesses, and receiving other proofs concerning the matters in such indictment or information; and the examination publicly taken in court shall be reduced to writing, and shall be returned to the Court of King's Bench, in the manner directed by the act, and shall be there allowed and read, and deemed as good evidence as if the witness had been present. Sec. 40. The provisions of this section are extended by 6 & 7 Vict. c. 98, s. 4, to all indictments or informations in the Queen's Bench for misdemeanors or offences committed against the acts passed for the suppression of the slave trade in any places out of the United Kingdom, and within any British colony, settlement, plantation, or territory.

Depositions with regard to prosecutions for offences committed abroad by persons employed in the public service, are regulated by statute 42 Geo. 3, c. 85.

Depositions are sometimes taken by consent in prosecutions for misdemeanors when the witness is about to leave the country. R. v. Morphew, 2 M. & S. 602; Anon. 2 Chitty, 199. But if the trial comes on before the departure of the witness, or after his return, the depositions cannot be read. Tidd. 362; 2 Phill. Ev. 94, 9th ed.; see R. v. Douglas, 13 Q. B. 42: 66 E. C. L. R.

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Nature of the issue raised in criminal cases.] THE condition in which criminal pleading now stands is somewhat peculiar. Indeed, so far as the prisoner is concerned, the pleadings are almost entirely useless, neither serving to inform him what the crime is for which he is about to be tried, nor as a record of the past, in case he should ever be put to the plea of *autrefois acquit* or *convict*. It is not the province of this work to discuss questions of criminal pleading, but, as a work on evidence, it is necessary that it should point out what evidence is necessary and what evidence is admissible upon a criminal indictment traversed by a plea of not guilty. And in order to do this it is necessary first to point out what is the issue raised in such a case.(1)

According to Lord Hale (2 Hale, P. C. 169), an indictment should be "a plain, brief, and certain narrative of an offence committed by any person, and of those

(1) The rule confining the evidence strictly to the point in issue is now rigidly applied in criminal cases. Dyson v. The State, 26 Mississippi, 362.

All facts upon which any reasonable presumption or inference can be founded, as to the truth or falsity of the issue, are admissible in evidence. Richardson v. Royalton & Woodstock Turnpike Co., 6 Verm. 496; Davis v. Calvert, 5 Gill & Johns. 269.

A. and B., when riding in a gig, were robbed at the same time: A. of his money and B. of his watch, and violence used towards both. There was an indictment for robbing A. and another for robbing B. Littledale, J., held, on the trial of the first indictment, that evidence might be given of the loss of B.'s watch, and that it was found on one of the prisoners, but that evidence could not be given of any violence offered to B. by the robbers. Rooney's Case, 7 C. & P. 517, a. Evidence of a distinct substantive offence cannot be admitted in support of another offence; *a fortiori* cannot evidence of an intention to commit another offence be received. Kinchelow v. The State, 5 Humph. 9.

Although evidence of one offence is not admissible for the purpose of proving the charge of another, yet it may be so connected with the proof of a relevant and material fact, that its introduction cannot be avoided. The Commonwealth v. Call, 21 Pick. 515.

Where a person was indicted as accessory before the fact to the crime of murder, and it appeared that the inducement to the murder was the exertions of the deceased to ascertain the perpetrators of a former murder, it was held competent to show the guilt of the prisoner as to the former murder, for the purpose of showing a motive for his conduct respecting the murder in question. Dunn v. The State, 2 Pike, 229.

necessary circumstances that concur to ascertain the fact and its nature." Every one, however, knows the narrow rules of construction, which rendered the adoption of this liberal canon, even in Lord Hale's time, impossible (2 Hale, P. C. 193); rules [*76] which, by making it extremely difficult to draw indictments *correctly, rendered the criminal law to a great extent nugatory; but such appeared to be the cruel severity of those laws, especially when contrasted with the mild manner in which, for the most part, criminal justice has in this country been administered, that men were only too glad, without much regard either to reason or logic, thus to nullify their effect, and *in favorum vitæ*, as it was called, to adopt the strangest rules for construing criminal indictments. But when the severity of the criminal code was relaxed, and men's eyes were no longer blinded by feelings of humanity, they saw at once the glaring nature of these fallacies, and they commenced a removal of them, at first warily, but eventually by a statute which, though of great practical value, yet by its somewhat vague and confused provisions, leaves the law, to say the least, in a very unscientific state (1)

Statutes relating to form of indictment.] The statute alluded to is the 14 & 15 Vict. c. 100, which, by sect. 9, provides that "if, upon the trial of any person charged with any felony or misdemeanor, it shall appear to the jury, upon the evidence, that the defendant did not complete the offence charged, but that he was guilty only of an attempt to commit the same, such person shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanor charged in the said indictment; and no person so tried as herein lastly mentioned shall be liable to be afterwards prosecuted for an attempt to commit the felony or misdemeanor for which he was so tried."

By sect. 10, after reciting that by 7 Will. 4 and 1 Vict. c. 85, it is enacted that, on the trial of any person for any of the offences mentioned in that act, or for any felony whatever where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit the accused of the felony, and to find him guilty of assault, and that great difficulties have arisen in the construction of that enactment, that enactment is repealed. By sect. 11, "if, upon the trial of any person upon any indictment for robbery, it shall appear to the jury, upon the evidence, that the defendant did not commit the crime of robbery, but that he did commit an assault, with intent to rob, the defendant shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict, that the defendant is guilty of an assault, with intent to rob, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for feloniously assaulting, with intent to rob; and no person so tried as is herein lastly mentioned, shall be liable to be afterwards prosecuted for an assault, with intent to commit the robbery for which he was so tried." This section is now repealed, but is re-enacted *verbatim* by the 24 & 25 Vict. c. 96, s 41.

Sect. 12 enacts, that "if, upon the trial of any person for any misdemeanor, it shall appear that the facts given in evidence amount in law to a felony, such person

(1) A failure to prove an unnecessary averment cannot vitiate an indictment good without the averment. United States v. Vickery, 1 Har. & Johns. 427.

shall not by reason thereof be entitled to be acquitted of such misdemeanor; and no person tried of such misdemeanor shall be liable to be afterwards prosecuted for felony on the same facts, unless the court before which such trial may be had *shall [*77] think fit, in its discretion, to discharge the jury from giving any verdict upon such trial, and to direct such person to be indicted for felony; in which case such person may be dealt with in all respects as if he had not been put upon his trial for such misdemeanor."

By the 24 & 25 Vict. c. 96, s. 72, replacing the 14 & 15 Vict. c. 100, s. 13, "If, upon the trial of any person indicted for embezzlement, or fraudulent application or disposition, it shall be proved that he took the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict, that such person is not guilty of embezzlement, or fraudulent application or disposition, but is guilty of simple larceny, or of larceny as a clerk, servant, or person employed for the purpose, or in the capacity of a clerk or servant, or as a person employed in the public service, or in the police, as the case may be, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such larceny; and if, upon the trial of any person indicted for larceny, it shall be proved that he took the property in question in any such manner as to amount in law to embezzlement, or fraudulent application or disposition, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict, that such person is not guilty of larceny, but is guilty of embezzlement, or fraudulent application or disposition, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such embezzlement, or fraudulent application or disposition; and no person so tried for embezzlement, or fraudulent application or disposition, or larceny, as aforesaid, shall be liable to be afterwards prosecuted for larceny, fraudulent application or disposition, or embezzlement, upon the same facts."

By the 14 & 15 Vict. c. 100, s. 14, "If, upon the trial of two or more persons indicted for jointly receiving any property, it shall be proved that one or more of such persons separately received any part of such property, it shall be lawful for the jury to convict upon such indictment such of the said persons as shall be proved to have received any part of such property." This section is repealed, but is re-enacted *verbatim* by the 24 & 25 Vict. c. 96, s 94.

Other statutes relating to the form of indictments, which affect the issues raised by them, are the 24 & 25 Vict. c. 94 (11 & 12 Vict. c. 46, s. 4), by which it is enacted that, an accessory before the fact to any felony may be *indicted* in all respects as if he were a principal felon; the 9 Geo. 4, c. 31, s. 14, by which a woman indicted for the murder of her infant child may be found guilty of endeavoring to conceal its birth; and the 24 & 25 Vict. c. 96, s. 88 (7 & 8 Geo. 4, c. 29, s. 53), by which a person indicted for obtaining property by false pretences shall not be acquitted, if the facts show that he was guilty of larceny.

Divisible averments.] There is one rule of liberal construction applied to criminal indictments which does not depend on recent legislation, and which stands in somewhat curious contrast to the general body of rules adopted in former times. It is generally known as the rule of divisibility of averments, and may be stated thus: that if in the indictment an offence is stated which includes within it an offence of minor extent and gravity of the same class, then the prisoner may be *con- [*78] victed on that indictment of the minor offence, though the evidence fail as to the

major. Thus, upon an indictment for *petit treason*, if the killing with malice was proved, but not with such circumstances as to render the offence petit treason, the prisoner might still have been found guilty of wilful murder upon that indictment. R. v. Swan, Foster, 104. So upon an indictment for *murder*, the prisoner may be convicted of manslaughter. Gilb Ev. 262; R. v. Macalley, 9 Rep. 67 (*b*); Co. Litt. 282 (*a*). And where a man was indicted on the statute of 1 Jac. 1, for stabbing, *contra formam statuti*, it was held, that the jury might acquit him upon the statute and find him guilty of manslaughter at common law. R. v. Harwood, Style, 86; 2 Hale, P. C. 302. Where a man is indicted for burglary and larceny, the jury may find him guilty of the simple felony, and acquit him of the burglary.(1) 2 Hale, P. C. 302. So where the indictment was for a burglary and larceny, and the jury found the prisoner guilty of stealing to the amount of 40*s.* in a dwelling-house (12 Ann. c. 7, repealed by 7 & 8 Geo. 4, c. 27), the judges were of opinion that by this verdict the prisoners were ousted of their clergy, the indictment containing every charge that was required by the statute. R. v. Withal, 1 Leach. 89; 2 East, P. C. 515, stated *post;* R. v. Compton, 3 C. & P. 418: 14 E. C. L. R. So on an indictment for stealing in a dwelling-house, persons therein being put in fear, the prisoner may be convicted of the simple larceny. R. v. Etherington, 2 Leach, 671; 2 East, P. C. 635. Again, if a man be indicted for robbery, he may be found guilty of the larceny, and not guilty of the robbery. 2 Hale, P. C. 302. And in all cases of larceny, where, by statute, circumstances of aggravation subject the offender to a higher punishment, on failure in the proof of those circumstances, the prisoner may be convicted of the simple larceny. Thus, on an indictment for horse-stealing, under a statute the prisoner may be found guilty of a simple larceny. R. v. Beaney, Russ. & Ry. 416. But where, upon an indictment for robbery from the person, a *special verdict* was found, stating facts which, in judgment of law, did not amount to a taking from the person, but showed a larceny of the party's goods; yet, as the only doubt referred to the court by the jury was, whether the prisoners were or were not guilty of the felony or robbery charged against them in the indictment, the judges thought that judgment, as for larceny, could not be given upon that indictment, but remanded the prisoner to be tried upon another indictment. R. v. Frances, 2 East, P. C. 784. In R. v. Jennings, 1 Dear. & B. C. C. 447, the indictment charged that the prisoner, whilst the servant of A., stole the money of A. It appeared that the prisoner was not the servant of A., but the servant of B., and that the money which he stole was the money of B., but in the possession of A., as the agent of B.; the prisoner was convicted, and the court held the conviction good, saying that the allegation in the indictment as to the prisoner's being a servant might be rejected as surplusage.(2)

(1) State v. Grisham, 1 Hayw. 12.

(2) On an indictment for an assault, with intent to murder, there may be a conviction of an assault simply. State v. Coy, 2 Atk. 181; Stewart v. State, 5 Ohio, 242. But on an indictment for murder there cannot be a conviction of an assault, with intent to murder, nor *vice versa*. Commonwealth v. Roby, 12 Pick. 496. (But see Cooper's Case, 15 Mass. 187, where, on an indictment for a rape, the prisoner was convicted of an assault, with intent, &c.) Nor of petit larceny, on an indictment for horse stealing. State v. Spurgin, 1 McCord. 252. Nor upon an indictment for stealing can there be a conviction for receiving, &c. Russ v. The State, 1 Black, 391; see The State v. Shepard, 7 Conn. 54; State v. Taylor, 2 Bailey, 49. A defendant cannot be convicted of an inferior degree of the same offence charged in the indictment, unless the lesser offence is included in the allegations of the indictment. The State v. Shoemaker, 7 Miss. 177. Under an indictment for assault and battery, with intent to kill, the defendant may be convicted of a simple assault and battery. The State v. Stedman, 7 Post. 495. Under an indictment with intent to commit murder or mayhem, the defendant cannot be convicted of an assault, with intent to commit a bodily injury. Carpenter v. The People, 4 Scan. 197. Under an indictment for procuring an abortion of a quick child, which is a felony by statute, the prisoner may be convicted of a misdemeanor, if the child were not quick. The People v. Jackson, 3 Hill, 92. So on an indictment for rape, one may be found guilty of incest. The Commonwealth v. Goodhue, 2 Metc. 193. So on an indictment for manslaughter, one may be found guilty

In misdemeanors, as well as in felonies, the averments of the offence are divisible. Thus in an information for a libel, it was stated that the defendants *composed, printed, and published* the libel; the proof extended only to the publication; but Lord Ellenborough held this to be sufficient. R. v. Hunt, 2 Camp. 584. So where an indictment charges that the defendant *did, and caused to be done* a certain act, as *forged and caused to be forged*, it is sufficient to prove either one or the other. Per Lord Mansfield, R. v. Middlehurst, *1 Burr. 400; per Lord Ellenborough, R. v. Hunt, 2 [*79] Campb. 585. Upon an indictment for obtaining money under false pretences, it is not necessary to prove the whole of the pretence charged; proof of part of the pretence, and that the money was obtained by such part, is sufficient. R. v. Hill, Russ. & Ry. 190. So upon an indictment for perjury, it is sufficient if any one of the assignments of perjury be proved. R. v. Rhodes, 2 Raym. 886. So on an indictment for conspiring to prevent workmen from continuing to work, it is sufficient to prove a conspiracy to prevent one workman from working. R. v. Bykerdike, 1 M. & Rob. 179.

With regard to the extent of the property as to which the offence has been committed, the averments in the indictment are divisible. Whatever quantity of articles may be stated in an indictment for larceny to have been stolen, the prisoner may be convicted if any one of those articles be proved to have been feloniously taken away by him.(1) Where the prisoner was indicted under the 7 Geo. 3, c. 50, for that he, being a postboy and rider employed in the business of the post-office, feloniously stole and took from a letter a bank post bill, a bill of exchange for 100*l.*, a bill of exchange for 40*l.*, and a promissory note for 20*l.*, and it was not proved that the letter contained a bill of exchange for 100*l.*; the prisoner being convicted, it was held by the judges, that the statement in the indictment not being descriptive of the letter, but of the offence, the conviction was right. R. v. Ellins, Russ. & Ry. 188. In the same manner upon an indictment for extortion, alleging that the defendant extorted twenty shillings, it is sufficient to prove that he extorted one shilling. Per Holt, J., 1 Lord Raym. 149. So upon an indictment on the 9 Ann. c. 14, s. 5, for winning more than 10*l.* at one sitting, Lord Ellenborough held, that the defendant might be convicted of winning a less sum than that stated in the indictment, though it would have been otherwise if the prosecutor had averred that the defendant had won bills of exchange of a specified amount. R. v. Hill, 1 Stark. N. P. 359: 2 E. C. L. R. Where in an indictment for embezzling it was averred that the prisoner had embezzled divers, to wit, two bank notes for 1*l.* each, and one bank note for 2*l.*, and the evidence was, that he had embezzled one pound note only, this was held sufficient. R. v. Carson, Russ. & Ry. 303.

So where a party is charged with having committed the offence in two capacities, it would seem that proof of his employment in either is sufficient. Where a party was indicted in the first and third counts, as a "person employed in sorting and charging letters in the post-office," and it appeared that he was only a sorter and not a charger of letters, the judges were inclined to think that he might have been convicted on these counts by a special finding, that he was a sorter only. R. v. Shaw, 2 East, P. C. 580; see *post*, tit. Post-office.

So an indictment charging several persons with an offence, any one of them may be convicted. But they cannot be found guilty separately of separate parts of the charge. Where A. and B. were indicted under the statute of Anne for stealing in a dwelling-house to the value of 6*l.* 10*s.*, and the jury found A. guilty as to part of the

of an assault and battery. The Commonwealth v. Drum, 19 Pick. 479; The Commonwealth v. Hope, 22 Pick. 1.

(1) Poindexter's Case, 6 Randolph, 668; The State v. Wood, 1 Rep. Const. Ct. 29.

articles of the value of 6*l.*, and B. guilty as to the residue, the judges held, that judgment could not be given against both; but that on a pardon or *nolle prosequi* as to B., it might be given against A R. v. Hempstead, Russ. & Ry. 344.

[*80] The same is the case when, as sometimes occurs, more than one *intent is laid in the indictment; in which case it is sufficient to prove any one that constitutes an offence. Thus on an indictment charging the defendant with having published a libel of and concerning certain magistrates, with intent to defame those magistrates, and also with a malicious intent to bring the administration of justice into contempt; Bayley, J., informed the jury, that if they were of opinion that the defendant had published the libel with *either* of those intentions, they ought to find him guilty. R. v. Evans, 3 Stark. N. P. 35: 3 E. C. L. R. So where the indictment charged the prisoner with having assaulted a female child, with intent to abuse and carnally to know her, and the jury found that the prisoner assaulted the child with intent to abuse her, but negatived the intention carnally to know her, Holroyd, J., held, that the averment of intention was divisible, and the prisoner received sentence of imprisonment for twelve months. R. v. Dawson, 3 Stark. N. P. 62. Where an intent is unnecessarily introduced in an indictment, it may be rejected. R. v. Jones, 2 B. & Ad. 611: 22 E. C. L. R.

Averments which need not be proved.] By a strange inconsistency it was necessary under the old law to aver with great particularity both *time* and *place;* but in no case except where the offence was limited in respect of time or place need it have been proved as laid. R. v. Townley, Fort. 8; R. v. Levy, 2 Stark. N. P. 458; R. v. Aylett, 1 T. R. 70. Whether, where value was not of the essence of the indictment it was ever necessary to aver it, is doubted by Hawkins (Hawk. P. C. Bk. 2, c. 25, s. 75), "for any other purpose than to aggravate the fine."

Now by the 14 & 15 Vict. c. 100, s. 24, "no indictment for any offence shall be held insufficient for want of the averment of any matter unnecessary to be proved . . . . nor for omitting to state the time at which the offence was committed in any case where time is not of the essence of the offence, nor for stating the time imperfectly, nor for stating the offence to have been committed on a day subsequent to the finding of the indictment, or on an impossible day, or a day that never happened . . . . nor for want of the statement of the value or price of any matter or thing, or the amount of damage, injury, or spoil in any case where the value or price, or the amount of damage, injury, or spoil is not of the essence of the offence."

Notwithstanding these provisions, indictments frequently contain averments of time, place, and value, although they be not, as the phrase is, of the essence of the offence. But the statement of them in no way restricts the proof which may be given under the indictment.

Amendment.] The nature and intent of powers of amendment will be considered under the head of Practice. It is only necessary to notice them here, because the practical effect of them is that many variances between the evidence and the offence charged in the indictment are passed over without notice; it not being considered worth while to take an objection which would only produce an amendment. But the result is frequently to remove the offence for which the accused is ultimately tried still further from that with which he is apparently charged.

[*81] *Effect of the above rules and provisions.*] It is evident that the *effect of the above rules and provisions is materially to affect the nature of the issues raised

by criminal pleadings. Frequently, indeed generally, a single count in an indictment traversed by a single plea of not guilty is capable of raising several issues more or less distinct from that which appears upon its face. No doubt the prosecutor will not be allowed to inquire into several felonies at the same time merely because they all fall within the words of the indictment; he will in general be put to his election upon which he will proceed. See *post*, tit. Practice. But what is meant is that there may be several issues arising out of the count, any one of which may be selected for inquiry. In considering, therefore, what evidence is proper to the issue in criminal cases, we must always bear in mind that we are to look for the issue not in the mere words of the indictment, but coupling those words with the rules and provisions which we have just explained.

SUBSTANCE OF THE ISSUE TO BE PROVED AS LAID.

Bearing in mind what has just been said as to what the issue in criminal cases really is, the substance of the issue must be proved as laid. What follows must, of course, be taken subject to the powers of amendment above referred to, and it must also be recollected that in certain offences descriptive averments need only be of the most general kind by the provisions of statutes, other than those general statutes already alluded to, which will be noticed under the several offences to which they relate. But if the latitude thus allowed should not be taken advantage of in drawing the indictment, or the court should refuse, or not have the power to amend, then the following decisions become important.(1)

The descriptive averments in an indictment are either of property, person, time, place, value, or mode of committing an offence. The decided cases in each of these averments will be given in their order.

Averments descriptive of property.] Most of the cases of variance in the allegation and proof of property have occurred with respect to animals. In a case where the prisoner was indicted for stealing four live tame turkeys, it appeared that he stole

(1) In general the affirmative of the issue is to be proved, but when the defendant is charged with an omission to do an act enjoined by law, such omission must be proved or some evidence given of it, although it involves the proof of a negative. Commonwealth v. James, 1 Pick. 375; Jackson v. Shaffer, 11 Johns. 513; Hartwell v. Root, 19 Johns. 345.

If the charge consist in a criminal neglect of duty, as the law presumes the affirmative, the burden of proof of the contrary is thrown on the other side. But in other cases, as where the negative does not admit of direct proof, or the facts lie more immediately within the knowledge of the defendant, he is put to his proof of the affirmative. Story, J., in United States v. Hayward, 2 Gall. 284.

On an indictment for selling liquor without license, it lies on the defendant to prove his license. Genning v. The State, 1 McCord, 573.

When the defence is that the prisoner was under the age of presumed capacity, the onus lies upon the prisoner; if the age can be ascertained by inspection, the court and jury must decide. The State v. Arnold, 13 Iredell, 184.

No general rule can be laid down respecting the comparative value of positive and negative testimony. Denham v. Holeman, 26 Georgia, 182.

If one witness of equal knowledge and credibility swears positively to a fact, and many swear negatively that they did not see or know the fact, the one witness swearing positively and not contradicted is to be believed in preference to the many. Johnson v. The State, 14 Georgia, 55; Coles v. Perry, 7 Texas, 109.

The testimony of a witness, having a full opportunity of knowing that a person did not strike a blow, is affirmative evidence and entitled to weight as such. Conghlin v. The People, 18 Illinois, 266.

When one witness swears that two men on horseback met, passed each other, and both wheeling had an angry conversation, and another witness swears that he saw the two men meet and pass each other, and that they did not wheel or converse together, and the judge charges that when one witness swears affirmatively and another negatively, the affirmative must prevail, such charge is inapplicable and erroneous. The State v. Gates, 20 Missouri, 400.

On the trial of an indictment for selling liquors without a license, the docket and minutes of the County Commissioners before their records are made up, are admissible in evidence for the prosecution, and if no license appear it is *prima facie* that he had no license. Commonwealth v. Kimball, 7 Metcalf, 304.

them alive in the county of Cambridge, killed them there, and carried them into Hertfordshire, where he was tried. The judges held that the word *live* in the description, could not be rejected as surplusage, and that as the prisoner had not the turkeys in a live state in Hertfordshire, the charge as laid was not proved, and that the conviction was wrong. And Holroyd, J., observed that an indictment for stealing a dead animal, should state that it was dead; for upon a general statement, that a party stole the animal, it is to be intended that he stole it alive. R. v. Edwards, Russ. & Ry. 497. On an indictment upon the 15 Geo. 2, c. 34, which mentioned both *cows* and *heifers*, it was held that a beast two years and a half old, which had never had a calf, was wrongly described as a cow. R. v. Cook, 2 East, P. C. 616; 1 Leach, 105. The prisoner being indicted under the 9 Geo. 1, c. 22 for killing "certain cattle, to wit, one *mare;*" the evidence was, that the animal was a colt, but of which sex did not appear; the prisoner being convicted, the judges, on a case reserved, were of opinion that the words, "a certain mare," though under a *videlicet*, were not surplusage, and that the animal proved to have been killed, being a *colt* [*82] generally without specifying the sex, was not sufficient to support a *charge of killing a *mare*. R. v. Chalkley, Russ. & Ry. 258. But where a statute mentions only the grown animal, the young is included, and it is no variance to describe the young animal as if it had been the grown animal. Thus, upon an indictment on the statute of 2 & 3 Ed. 6, which mentioned the words "horses, geldings, and mares," it was held, that foals and fillies were included in those words, and that evidence of stealing a mare filly, supported an indictment for stealing a mare. R. v. Welland, Russ. & Ry. 494. Probably every one of these cases would now be amended.(1)

Averments descriptive of person.] The name both christian and surname of all persons mentioned in the indictment must, unless amended, be proved as laid. But if the name be that by which a person is usually called or known it is sufficient.(2) The prisoner was tried for stealing the goods of Mary Johnson. The prosecutrix stated that her original name was Mary Davis, but that she had been called and

(1) An indictment for coining, alleged possession of a die made of iron and steel. In fact, it was made of zinc and antimony. The variance was held fatal. Dorsett's Case, 5 Rogers's Rec. 77. An allegation in an indictment, which is not impertinent or foreign to the cause must be proved; though a prosecution for the offence might be supported without such allegation. United States v. Porter, 3 Day's Cases, 283. The court will be more strict in requiring proof of the matters alleged in a criminal than in a civil case Ibid.

In larceny of a gray horse, proof that it was a gray gelding, the variance held fatal. Hooker v. The State, 4 Ohio, 350.

The acceptation of the name of property governs the description. Case of Reed et al., 2 Rogers's Rec. 168; Commonwealth v. Wentz, 1 Ashmead, 269.

A charge that defendant set up and kept a faro bank, at which *money* was bet, lost, and won, is not sustained by proof that *bank notes* were bet, lost, and won. Pryor v. The Commonwealth, 2 Dana, 298; see case of Stone et al., 3 Rogers's Rec. 3; State v. Cassel, 2 Har. & Gill. 407.

(2) Where the name alleged was *Harris*, the true name *Harrison*, though he was sometimes called by the former, it was held to be no variance. The State v. France, 1 Overton, 434. The law recognizes but one christian name. Franklin et al. v. Talmadge, 5 Johns. 84.

The courts will take judicial notice of the customary abbreviations of christian names. Stephen v. The State, 11 Georgia, 225.

When surnames with a prefix to them are ordinarily written with an abbreviation, the names thus written in an indictment are sufficient. The State v. Kean, 10 N. Hamp. 347.

The addition of junior and the use of a middle letter forms no part of the name. The People v. Cook, 14 Barbour, 259; McKay v. Speak, 8 Texas, 376; King v. Hutchins, 8 Foster, 561; Allen v. Taylor, 26 Vermont, 599; The State v. Mannery, 14 Texas, 402; The People v. Lockwood, 6 California, 205; Thompson v. Lee, 12 Illinois, 242; Erskine v. Davis, 25 Illinois, 251; The State v. Weare, 38 N. Hamp. 314.

Where the indictment charged that the defendant assaulted "Silas Melville" with intent to kill, and the proof was that his name was "Melvin," it was held a fatal variance The State v. Curran, 18 Missouri, 320. As to the rule of *idem sonans*, see Barnes v. The People, 18 Illinois, 52; Cruikshanks v. Comyns, 24 Illinois, 602; The State v. Havely, 21 Missouri, 498.

known by the name of Johnson for the last five years, and that she had not taken the name of Johnson for concealment or fraud; the judges were clearly of opinion that the time the prosecutrix had been known by the name of Johnson, warranted her being so called in the indictment, and that the conviction was right. R. v. Norton, Russ. & Ry. 510. So in a late case, where the prisoner was indicted for stealing the goods of *Richard* Pratt, and it appeared that his name was Richard *Jeremiah* Pratt, but he was equally well known by the name of *Richard* Pratt, it was ruled that the indictment was sustained. Anon. 6 C. & P. 408: 25 E. C. L. R.; see also R. v. Berriman, 5 C. & P. 601: 24 E. C. L. R. Where in an indictment a boy was called D., and he stated that his right name was D., but that most persons who knew him called him P., and that his mother had married two husbands, the first named P. and the second D., and that he was told by his mother that he was the son of the latter, and that she used always to call him D., Williams, J., after consulting Alderson, B , held that the evidence that the boy's mother had always called him D. must be taken to be conclusive as to his name, and that therefore he was rightly described in the indictment. R. v. Williams, 7 C. & P. 298: 32 E. C. L. R. Upon an indictment for the murder of a bastard child, described in the indictment as "George Lakeman Clark," it appeared it had been christened "George Lakeman," being the names of its reputed father; that it was called George Lakeman, and not by any other name known to the witness; and that the mother called it George Lakeman. There was no evidence that it had obtained, or was called by its mother's name of Clark. The judges held, that as this child had not obtained his mother's name by reputation, he was improperly called Clark in the indictment, and as there was nothing but the name to identify him in the indictment, the conviction could not be supported. R. v. Clark, Russ. & Ry. 358. When an unmarried woman was robbed, and after the offence committed, but before the bill was presented to the grand jury, she married, and the indictment described her by her maiden name, this was held to be sufficient. R. v. Turner, 1 Leach, 536. Although where there are father and son of the same name, and that name is stated without any addition, it shall be *primâ facie* intended to signify the father, Wilson v. Stubbs, Hob. 330; Sweeting v. Fowler, 1 Stark. 106: 2 E. C. L. R.; yet on an indictment containing the name without addition, it may be proved that either the father or son was the party intended. Thus *on an indictment for an assault upon Elizabeth Edwards, it appeared [*83] that there were two of that name, mother and daughter, and that in fact the assault had been made on the daughter; the defendant being convicted, the conviction was held good.(1) R. v. Peace, 3 B. & A. 580: 5 E. C. L. R. So where an indictment laid the property of a house in J. J., it was held by Parke, J., to be supported by proof of property in Joshua Jennings the younger. R. v. Hodgson, 1 Lew. C. C. 236, S. P. Per Bolland, B., R. v. Bland, Ibid.

An indictment is good, stating that the prisoner stole or received the goods of a person *to the jurors unknown;* but in case the owner of the goods be really known, an indictment alleging the goods to be the property of a person unknown, would be improper, and the prisoner must be discharged of that indictment, and tried upon a new one for stealing the goods of the owner by name. 2 Hale, P. C. 621. Where the property was laid on one count as belonging to certain persons named, and in

(1) Jackson v. Provost, 2 Caines, 165.
In an indictment for larceny, wherein the property charged to have been stolen was alleged to have been "the property of one Eusebius Emerson, of Addison," and the proof was, that there were in that town two men of that name, father and son, and that the property belonged to the son, who had usually written his name with *junior* attached to it; it was held that *junior* was no part of the name, and that the ownership as alleged in the indictment was sufficiently proved. State v. Grant, 22 Maine, 171.

another as belonging to persons unknown, and the prosecutor failed to prove the christian names of the persons mentioned in the first count, it was held by Richards, C. B., that he could not resort to the second count; and the prisoner was acquitted. R. v. Robinson, Holt, N. P. C. 595: 3 E. C. L. R. An indictment against the prisoner as accessory before the fact to a larceny, charged that *a certain person, to the jurors unknown*, feloniously stole, &c., and that the prisoner incited the said person unknown to commit the said felony. The grand jury had found the bill upon the evidence of one Charles Iles, who confessed that he had stolen the property, and it was proposed to call him to establish the guilt of the prisoner, but Le Blanc, J., interposed and directed an acquittal. He said he considered the indictment wrong, in stating that the property had been stolen by a person unknown, and asked how the witness, who was the principal felon, could be alleged to be unknown to the jurors when they had him before them, and his name was written on the back of the bill. R. v. Walker, 3 Campb. 264; see also R. v. Blick, 4 C. & P. 377: 19 E. C. L. R. But where an indictment stated that a certain person, to the jurors unknown, burglariously entered the house of H. W., and stole a silver cream jug, &c., which the prisoner feloniously received, and it appeared that amongst the records of the indictments returned by the same grand jury, there was one charging Henry Moreton as principal in the burglary, and the prisoner as accessory, in receiving the cream jug; that H. W.'s house had been entered only once, and that she had lost only one cream jug, and that she had preferred two indictments; it was held by the judges that the prisoner was properly convicted, the finding of the grand jury on the bill, imputing the principal felony to H. M., being no objection to the other indictment. R. v. Bush, Russ. & Ry. 372; see also R. v. Casper, Moo. C. C. 101.

Where, on an indictment upon the Black Act, for maliciously shooting A. Sandon, in the dwelling-house of *James* Brewer and *John* Sandy, it appearing in evidence that it was in the dwelling-house of *John* Brewer and *James* Sandy, the court said, that as the prosecutor had thought proper to state the names of the owners of the house where the fact was charged to have been committed, it was a fatal variance. The statute says, "who shall maliciously shoot at any person, in any dwelling-house or other place," and the prosecutor having averred that it was in the house of *James Brewer* and *John Sandy*, was bound to prove it as it was laid. R. v. Durore, 1 Leach, [*84] 352; 1 East, P. C. 45. So where the indictment *was for breaking, &c., the house of J. Davis, with intent to steal the goods of J. Wakelin, in the said house being, and there was no such person in the house, but J. W. was put by mistake for J. D., the prisoner was held entitled to an acquittal, and it was ruled that the words "J. W." could not be rejected as surplusage, since they were sensible and material; it being material to lay truly the property in the goods, without such words the description of the offence being incomplete. R. v. Jenks, 2 East, P. C. 514.

Before the extensive powers of amendment which now exist were conferred, a variance in names as laid and proved was got over by the rule of *idem sonans*, as it was called. Thus, where the name in the indictment was *John Whyneard*, and it appeared that the real name was *Winyard*, but that it was pronounced *Winnyard*, the variance was held to be immaterial. R. v. Foster, Russ. & Ry. 412. So, *Segrave* for *Seagrave:* Williams v. Ogle, 2 Str. 889; *Benedetto* for *Beniditto:* Abithol v. Beniditto, 2 Taunt. 401. But it would scarcely ever now be necessary to resort to this rule.

It has always been usual to treat the addition to the name of an indictment as surplusage. Thus the prisoner was indicted (before the 39 & 40 Geo. 3, c. 77, the Act of Union) for stealing the goods of James Hamilton, Esq., commonly called Earl of Clanbrassil, in the kingdom of Ireland; and it appeared that he was an Irish peer.

The judges were of opinion that "James Hamilton, Esq.," was a sufficient description of the person and degree of the prosecutor, and that the subsequent words, "commonly called Earl of Clanbrassil, in the kingdom of Ireland," might be rejected as surplusage. But they conceived that the more correct and perfect mode of describing the person of the prosecutor would have been "James Hamilton, Esq., Earl of Clanbrassil, in the kingdom of Ireland," and as that more perfect description appeared upon the face of the indictment, by considering the intervening words "commonly called," as surplusage, they thought that the indictment was good. R. v. Graham, 2 Leach, 547; 1 Stark C. P. 206. So where the prisoner was indicted for stealing the goods of A. W. Gother, *Esq.*, Burrough, J., held that the addition of esquire to the name of the person in whom the property is laid, is mere surplusage and immaterial. R. v. Ogilvie, 2 C. & P. 230: 12 E. C. L. R.

Where a person has a name of dignity, that is the proper name by which to describe him, for it is the name itself, and not an addition merely. R. v. Graham, *supra*, 2 Russ. 708 (*n*). It is usual to add the christian names to the name of dignity, but Parke, B., said, in R. v. Frost, 1 Dears. C. C. 427; S. C. 24 L. J. M. C. 61 (*post*), that the name of dignity alone was sufficient.

Where the only evidence of the christian name of the prosecutor was that of a witness who had seen him sign his name, it was held to be sufficient. R. v. Toole, Dears. & B. C. C. 194.

Here again the power of amendment would probably be freely exercised.

Averments descriptive of time] As has been said, in general, no time need be alleged in the indictment, or, if alleged, need not be proved. But if it be of the essence of the offence, as in burglary, or the non-surrender of a bankrupt at the time appointed, then it must, subject to the power of amendment, be strictly proved as laid.(1) R. v. Brown, M. & M. 160: 22 E. C. L. R.

**Averments descriptive of place.*] In some particular cases it is necessary [*85] to prove the parish or place named in the indictment.(2) Thus as in an indictment against a parish for not repairing a highway, the situation of the highway within the parish is a material averment, see 2 Stark. C. P. 693 (*n*), it must be proved as laid. So, if the statute upon which the indictment is framed, gives the penalty to the poor of the parish in which the offence was committed, the offence must be proved to have been committed in the parish stated in the indictment. 2 Russ. by Greaves, 800; R. v. Glossop, 4 B. & A. 616: 6 E. C. L. R.

So where the offence is in its nature local, the name of the parish or place must be correctly stated in the indictment, and proved as laid; as, for instance, on an indictment for stealing in the dwelling-house, &c., for burglary, for forcible entry, or the like.

Where an injury is partly local and partly transitory, and a precise local description is given, the local description becomes descriptive of the transitory injury, and should be proved as laid. 3 Stark. Ev. 1571, citing R. v. Cranage, Salk. 385; 2 Russ. 717. So where the name of a place is mentioned, not as matter of venue, but of local description, it should be proved as laid, although it need not have been

(1) State v. G. S., 1 Tyler, 295; State v. Haney, 1 Hawks. 460; Jacobs v. The Commonwealth, 5 Serg. & Rawle, 316; United States v. Stevens, 4 Wash. C. C. Rep. 547; Commonwealth v. Harrington, 3 Pick. 26. But in perjury charged to have been committed at the Circuit Court, held on the 19th of May, and the record shows the court to have been held on the 20th of May, the variance is fatal. United State v. McNeal, 1 Gallison, 387.

(2) As in an indictment for keeping a disorderly house. McDonald's Case, 3 Rogers's Rec. 128. So in burglary, Carney's Case, Id. 44. *Quære*, in bigamy where the first marriage alleged to be in the State is in fact out of it. Ewen's Case, 6 Id. 65.

stated. Thus where an indictment (under the repealed stat. 57 Geo. 3, c. 90) charged the defendant with being found armed, with intent to destroy game in a certain wood called the Old Walk, in the occupation of J. J., and it appeared in evidence that the wood had always been called the Long Walk, and never the Old Walk, the judges held the variance fatal. R. v. Owen, 1 Moo. C. C. 118.

Of course many such variances would now be got over by an exercise of the powers of amendment.

Averments descriptive of value.] There are many cases in which the allegation of value is material, either because the value is of the essence of the offence, as in an indictment against a bankrupt for concealing or embezzling part of his estate to the value of 10*l.*; or as enhancing the punishment, as in an indictment under the 24 & 25 Vict. c. 96, s. 60 (7 & 8 Geo. 4, c. 29, s. 12), for stealing in a dwelling-house to the amount of 5*l.* But any error in this respect can generally be got over either by amendment, or by the rule of divisible averments; *supra*, p. 77.

Averments descriptive of the mode of committing the offence.] The description of the mode of committing the offence must be proved as laid, if not amended. By the 14 & 15 Vict. c. 100, s. 4, it is no longer necessary to state the means of death in an indictment for murder or manslaughter, but if they are stated the averment cannot be treated as surplusage. But the substance only of such averments need be proved.(1) 1 East, P. C. 341; 2 Hale, P. C. 185; 1 Russ. 466. Thus where the prisoner was indicted for administering to one H. M. G., a single woman, divers large quantities of a certain drug called savin, with intent to procure the miscarriage of the said H. M. G; and it appeared that the prisoner had prepared the medicine by pouring boiling water over the leaves of a shrub, a process which the medical witness stated was an *infusion*, and not a *decoction*, Lawrence, J., overruled an objection taken on this ground. He said that infusion and decoction were *ejusdem generis*, and that the question was, whether the prisoner administered any matter or thing [*86] with intent to procure abortion. Anon, 3 *Campb. 74, and see *post*, tit. Malicious Injuries and Murder. Where an indictment charged that A. gave the mortal stroke, and that B. and C. were present aiding and abetting, if it appeared in evidence that B. was the person who gave the stroke, and that A. and C. were present aiding and abetting, they may all be found guilty of murder or manslaughter, at common law, as circumstances may vary the case. The identity of the person supposed to have given the stroke, is but a circumstance, and in this case a very immaterial one,—the stroke of one being, in consideration of law, the stroke of all. The person giving the stroke is no more than the hand or instrument by which the others strike. Foster, 351; 1 Hale, P. C. 437, 463; 2 Id. 344, 345.

EVIDENCE CONFINED TO THE ISSUE.

We have considered what evidence is necessary; we have now to consider what evidence is admissible as relevant to the issue. Bearing in mind all that has been

(1) An indictment which alleges that the defendant assaulted and robbed A., and being armed with a dangerous weapon, did strike and wound him, is not proved, as to the wounding, by evidence that the defendant made a slight scratch on A.'s face, by rupturing the cuticle only, without separating the whole skin; nor as to the striking, by evidence that the defendant put his arms about A.'s neck and threw him on the ground, and held him jammed down to the ground. Commonwealth v. Gallagher, 6 Metcalf, 565.

An indictment for an assault with a "basket knife," with intent to kill, is supported by evidence of an assault with a "basket iron." The kind of instrument in such case is immaterial if the nature of the injury calculated to be produced by each, be of the same description. State v. Darne, 11 N. Hamp. 271.

said as to the nature of the issue or issues raised by an ordinary criminal pleading, it may be laid down as a general rule, that in criminal, as in civil cases, the evidence shall be confined to the point in issue. In criminal proceedings it has been observed (2 Russ. by Greaves, 772), that the necessity is stronger, if possible, than in civil cases, of strictly enforcing this rule; for where a prisoner is charged with an offence it is of the utmost importance to him that the facts laid before the jury should consist exclusively of the transaction which forms the subject of the indictment, and matters relating thereto, which alone he can be expected to come prepared to answer. The importance of keeping evidence within certain prescribed bounds is, for somewhat different reasons, more important now than before the alterations in criminal pleading.

No objection that other offences are disclosed.] The notion that it is in itself an objection to the admission of evidence that it discloses other offences, especially where they are the subject of indictment, R. v. Smith, 2 C. & P. 633: 12 E. C. L. R., is now exploded. R. v. Salisbury, 5 C. & P. 155: 24 E. C. L. R.; R. v. Clewes, 4 C. & P. 221: 19 E. C. L. R.; R. v. Richardson, 2 F. & F. 343; and numerous other cases. If the evidence is admissible on general grounds, it cannot be resisted on this ground.(1)

What evidence is admissible as referrible to the point in issue.] Of course all evidence directly bearing on any offence which can be, and is, under the indictment before the jury, made the subject of inquiry, is admissible. So also, and almost equally as a matter of course, evidence may be given, not only of the actual guilty act itself, but of other acts so closely connected therewith, as to form part of one chain of facts, which could not be excluded without rendering the evidence unintelligible. Thus in a case cited by Lord Ellenborough, in R. v. Whiley, 2 Lea. 985, S. S., 1 New Rep. 92, where a man committed three burglaries in one night, and stole a shirt in one place and left it at another, and they were all so connected that the court heard the history of all three burglaries; and Lord Ellenborough remarked that "if crimes do so intermix, the court must go through the detail." So where the prisoner was charged with setting fire to a rick, evidence was allowed to be given that he had set fire to two other ricks, belonging to different persons, at the same time and place. Per *Gurney, B., R. v. Long, 6 C. & P. 179: 25 E. C. L. [*87] R. The prisoner, who had been in the employ of the prosecutrix, was indicted for stealing six shillings; the son of the prosecutrix suspecting the prisoner, had marked a quantity of money, and put it into the till, and the prisoner was watched by him; on the first examination of the till it contained 11*s.* 6*d.* The prosecutrix's son having received another shilling from a customer, put it into the till; and another person having paid a shilling to the prisoner, he was observed to go to the till, to put in his hand and to withdraw it clenched. He then left the counter, and was seen to raise his hand clenched to his waistcoat pocket. The prosecutrix was proceeding to prove other acts of the prisoner, in going to the till and taking money,

(1) On an indictment for a conspiracy in inveigling a young girl from her mother's house, and reciting the marriage ceremony between her and one of the defendants, a subsequent carrying her off, with force and threats, after she had been released on *habeas corpus*, was allowed to be given in evidence. Commonwealth v. Hevice et al., 2 Yeates, 144.

So on an indictment against a man for killing his wife, the prosecutor has been allowed to prove an adulterous intercourse between the prisoner and another woman, not to prove the *corpus delicti*, but to repel the presumption of innocence arising from the conjugal relation. The State v. Watkins, 9 Conn. 47.

when it was objected that this would be to prove several felonies. The objection being overruled, the prosecutrix's son proved that, upon each of the several inspections of the till, after the prisoner had opened it, he found a smaller sum than ought to have been there. The prisoner having been convicted, the Court of King's Bench, on an application for staying the judgment, were of opinion that it was in the discretion of the judge to confine the prosecutor to the proof of one felony, or to allow him to give evidence of other acts which were all part of one entire transaction. R. v. Ellis, 6 B & C. 145: 13 E. C. L. R.

In some cases the offence itself consists of a series of transactions, as on indictments for barratry, keeping a common bawdy-house, being a common utterer, conspiracy, and other cases. In all these cases, of course, evidence of any act is admissible which goes to make up the offence. In R. v. Wilman, Dears. C. C. 188, S. C. 22 L. J. M. C. 118, a case of false pretences, the evidence showed that the prisoner in July, 1850, called upon the prosecutrix and made false representations relative to a benefit club, but failed on this occasion to obtain any money. In August of the same year the prisoner again called relative to the club, and referred to the previous conversation. It was held, on a case reserved, that it was for the jury to say whether these conversations were so connected as to form one continuing representation; and that if so, they might connect them.

Sometimes evidence which would be otherwise inadmissible becomes so either as serving to identify the prisoner, or some article in his possession, as connected with the commission of the crime. Thus, in an indictment for arson, evidence has been admitted to show that property which had been taken out of the house at the time of the fire, was afterwards discovered in the prisoner's possession. R. v. Rickman, 2 East, P. C. 1035. So where upon an indictment for robbing A., there being another indictment against them for robbing B. of a watch, it appeared that A. and B. were travelling in a gig, when they were stopped and robbed. Littledale, J., held that evidence might be given that B. lost his watch at the same time and place that A. was robbed, but that evidence was not admissible of the violence that was offered to B. One question in the case was, whether the prisoners were at the place in question when A. was robbed, and as proof that they were, evidence was admissible that one of them had got something which was lost there at the time. R. v. Rooney, 7 C. & P. 517: 32 E. C. L. R. So upon an indictment for stabbing, in order to identify the instrument, evidence may be adduced of the shape of a wound given to another person by the prisoner at the same time, although such wound be the subject of another indictment. Per Gazelee, J., and Park, J., R. v. Fursey, 6 C. & P. 81: 25 E. C. L. R.

[*88] **Evidence to explain motives and intention.*] Had the matter stopped here there would have been little difficulty; but there are cases in which much greater latitude is permitted, and evidence is allowed to be given of the prisoner's conduct on other occasions, where it has no other connection with the charge under inquiry than that it tends to throw light on what were his motives and intention in doing the act complained of. This cannot be done merely with the view of inducing the jury to believe that because the prisoner has committed a crime on one occasion, he is likely to have committed a similar offence on another: R. v. Cole, 1 Phill. Ev. 477, 9th ed.; but only by way of anticipation of an obvious defence: see R. v. Richardson, *infra*, p. 94; such as that the prisoner did the act of which he was accused, but innocently and without any guilty knowledge; or that he did not do it, because no motive existed in him for the commission of such a crime. In both these cases it is

competent for the prosecutor to adduce evidence which, under other circumstances, would not be admissible; such as the conduct of the prisoner on other occasions, his admissions, and other surrounding circumstances, in order to show, as the case may require, either that his ignorance was extremely improbable, or that he had ample motives of advantage or revenge for the commission of the crime.(1)

There are three classes of offences in which, from the nature of the offence itself, the necessity for this species of evidence is so frequently necessary that they will be considered separately; these are conspiracy, uttering forged instruments and counterfeit coin, and receiving stolen goods. In these the act itself which is the subject of inquiry is almost always of an equivocal kind, and from which *malus animus* cannot, as in crimes of violence, be presumed; and almost the only evidence which could be adduced to show the guilt of the prisoner would be his conduct on other occasions. Though it must be acknowledged that in the two first of these the crown, being often directly interested, has succeeded in pushing the rules of evidence to their extremest severity against the prisoner.

Evidence to explain motives and intention—Conspiracy.] The evidence in conspiracy is wider than, perhaps, in any other case, other principles as well as that under discussion tending to give greater latitude in proving this offence. See tit. "Conspiracy," and *ante*, p. 87. Taken by themselves the acts of a conspiracy are rarely of an unequivocally guilty character, and they can only be properly estimated when connected with all the surrounding circumstances. Thus, on the trial of an

(1) Testimony of the prisoner's guilt, or participation in the commission of a crime, wholly unconnected with that for which he is put on his trial, cannot, as a general rule, be admitted. Dunn v. The State, 2 Arkansas, 229; Commonwealth v. Call, 21 Pick. 515.

Where it is shown that a crime has been committed, and the circumstances point to the accused as the perpetrator, facts tending to show a motive, although remote, are admissible in evidence. The jury, however, cannot be too cautious with respect to the importance they attach to this species of testimony. Baalam v. The State, 17 Alabama, 451; The State v. Ford, 3 Strohhart, 517.

In cases where the *scienter* or the *quo animo* constitutes a necessary part of the crime charged, as in cases of forgery, murder, and the like, testimony of such acts or declarations of the prisoner as tend to prove such knowledge or intent, is admissible, notwithstanding they may constitute in law a distinct crime. Dunn v. The State, 2 Arkansas, 229; Thorp v. The State, 15 Alabama, 749.

In a case of murder, evidence was offered that the accused, on the same day the deceased was killed, and shortly before the killing, shot a third person; it was held that the evidence was competent, though it went to prove a distinct felony, as it appeared to be connected with the crime charged, as parts of one entire transaction. Heath's Case, 1 Harrison, 507; Reynolds v. The State, 1 Kelly, 222. But not without such connection. Cole v. The Commonwealth, 5 Grattan, 696; Baker v. The State, 4 Arkansas, 56.

Evidence of the state of feeling existing between the prisoner and the accused, or of facts from which such state of feeling may be inferred, is competent on an indictment for murder. The State v. Zellers, 2 Halsted, 220; The People v. Hendrickson, 1 Parker's Crim. Rec. 406.

On the trial of a husband for the murder of his wife, the will of his father-in-law was admitted in evidence, to show that the expectations of property which he might have entertained, had been disappointed. Hendrickson v. the People, 1 Parker C. R. 406.

When a man was indicted for the murder of his wife, evidence that he had been for some time living in adultery with another woman, was admitted. The State v. Watkins, 9 Conn. 47.

It is never indispensable to a conviction that a motive for the commission of the crime should appear. The People v. Robinson, 1 Parker C. R. 644.

When aggravating matter is the immediate consequence of the offence for which the defendant is on trial, it may be shown; but if it is a distinct crime, not necessarily connected with that offence, it cannot be received. Baker v. The State, 4 Arkansas, 56.

In an action for a conspiracy to defraud A., by falsely representing B. to be a man of credit, evidence that such representations were made to others, in consequence of which such other persons made the same representations to A., is admissible. Gardner v. Preston, 2 Day's Cases, 205. To prove fraud against the defendant, a transaction between him and a third person, of a similar nature to the one in question, may be given in evidence. Snell et al. v. Moses et al., 1 Johns. 99. See also Rankin v. Blackwell, 2 Johns. Cas. 193. In an indictment for obtaining goods by false pretences, it is allowable to prove that the same pretences were used to another. Collin's Case, 4 Roger's Rec, 143. Where a party is charged with fraud in a particular transaction, evidence may be offered of similar previous fraudulent transactions between him and third persons; and wherever the intent or guilty knowledge of a party is material to the issue of a case, collateral facts tending to establish such intent or knowledge are proper evidence. Bottomley v. The United States, 1 Story, 135.

indictment against several persons for a conspiracy in unlawfully assembling for the purpose of exciting discontent or disaffection, as the material points for the consideration of the jury are the general character and intention of the assembly, and the particular case of the defendant as connected with that general character, it is relevant to prove, on the part of the prosecution, that bodies of men came from different parts of the country to attend the meeting, arranged and organized in the same manner and acting in concert. It is relevant also to show, that early on the day of the meeting, on a spot at some distance from the place of meeting (from which spot bodies of men came afterwards to the place of meeting), a great number of persons, so organized, had assembled, and had there conducted themselves in a riotous, disorderly, or seditious manner. R. v. Hunt, 3 B. & A. 573, 574 : 5 E. C. L. R Upon the same [*89] principle, on the trial *of a similar indictment, it is relevant to produce in evidence resolutions proposed by one of the defendants at a large assembly in another part of the country for the same professed object and purpose as were avowed at the meeting in question ; and also, that the defendant acted at both meetings as president or chairman ; for in a question of intention, it is most clearly relevant to show, against that individual, that at a similar meeting, held for an object professedly similar, such matters had passed under his immediate auspices. R. v. Hunt, 3 B. & A. 577 : 5 E. C. L. R.(1)

Evidence to explain motives and intention—Uttering forged instruments or counterfeit coin.] There is no case in which this kind of proof is more used than in indictments for uttering forged instruments or counterfeit coin, by far the most difficult point being to ascertain whether the prisoner did so innocently or with a guilty knowledge of what he was about. The following cases have been decided under this head.

The prisoner was charged with uttering a Bank of England note, knowing it to be forged ; evidence was offered for the prosecution, that the prisoner had uttered another note forged in the same manner, by the same hand, and with the same materials, three months preceding, and that two ten pound notes and thirteen one pound

(1) Commonwealth v. Crowninshield, 10 Pick. 497 ; American Fire Co. v. United States, 2 Peters, 364 ; Snyder v. Lafromboise, 1 Bree. 269 ; Commonwealth v. Eberle, 3 Serg. & Rawle, 9 ; Wilbur v. Strickland, 1 Rawle, 458; Reitenback v. Reitenback, Id. 362; Martin v. The Commonwealth, 2 Leigh, 745 ; Gardner v Preston, 2 Day's Cases, 205 ; Collins v. The Commonwealth, 3 Serg. and Rawle, 220 ; Ex parte Bollman & Swarowout, 4 Cranch, 75 ; Livermore v Herschell et al., 3 Pick. 33 ; Rogers v. Hall, 4 Watts, 359 ; Gibbs v. Nedy, 7 Watts, 305 ; Colt et al. v. Eves, 12 Conn. 243. Upon the trial of an indictment for conspiracy where evidence has been given which warrants the jury to consider whether the prisoner was engaged in the alleged conspiracy, and had combined with others for the same illegal purpose, any act done or declarations made by one of the party, in pursuance and promotion of the common object, are evidence against the rest ; but what one of the party may have said not in pursuance of the plot, cannot be received against the others. State v. Simons, 4 Strobhart, 266.

Where there is evidence of conspiracy, the declarations of any of the parties are evidence against the others. Cornelius v. The Commonwealth, 15 B. Monroe, 539 ; Johnson v. The State, 29 Alabama, 62 ; Browning v The State, 3 Mississippi, 656 ; Patton v. Ohio, 6 Ohio (N. S.), 467 ; Fonts v. The State, 7 Ihid. 471 ; Hightower v. The State, 22 Texas, 605 ; Clinton v. Estes, 20 Arkansas, 216 ; The State v. Ross, 29 Missouri, 32 ; The State v. Nash, 7 Clarke, 347 ; Draper v. The State, 22 Texas, 400 ; Rice v. The State, 7 Indiana, 332.

The declarations of one man cannot be given in evidence against another until it is proved that they were engaged in a common enterprise. Malone v. The State, 8 Georgia, 408 ; Commonwealth v. Eberle, 3 Serg. & R. 9 ; Gardner v. The People, 3 Scammon, 84 ; The State v. Loper, 4 Shepley, 293.

To make such declaration competent, it is sufficient that the conspiracy has been testified to by a witness who is competent ; the court will not decide on his credibility. Commonwealth v. Crowninshield, 10 Pick. 497 ; Hunter's Case, 7 Grattan, 641.

After the commission of the act is complete, declarations subsequently made by an accomplice are good evidence against himself only, unless made in the presence of his partners in the crime. Hunter's Case, 7 Grattan, 641.

When the conduct of several persons show them to have been joint conspirators, the declarations of one may be given in evidence against another. Glory v. The State, 8 English, 236.

notes of the same fabrication, had been found on the files of the company, on the back of which there was the prisoner's handwriting, but it did not appear when the company received them. This evidence was admitted, but the case was referred to the opinion of the judges, the majority of whom were of opinion that it was admissible, subject to observation, as to the weight of it, which would be more or less considerable, according to the number of the notes, the distance of the time at which they had been put off, and the situation of life of the prisoner, so as to make it more or less probable that so many notes could pass through his hands in the course of business. R. v. Ball, Russ. & Ry. 132; 1 Campb. 324, S. C. The prisoners were indicted for uttering bank notes, knowing them to be forged. The trial took place in April, and to prove their guilty knowledge, evidence was given that in February they had uttered, on three several occasions, forged bank notes to three different persons, and that on being asked at each place for their names and places of abode, they gave false names and addresses; and the court was of opinion that this evidence was admissible. Lord Ellenborough said, that it was competent for the court to receive evidence of other transactions, though they amounted to distinct offences, and of the demeanor of the prisoner on other occasions, from which it might fairly be inferred that the prisoner was conscious of his guilt, whilst he was doing the act charged upon him in the indictment. Heath, J., said, "The charge in this case puts in proof the *knowledge* of the person, and as that knowledge cannot be collected from the circumstances of the transaction itself, it must necessarily be collected from other facts and circumstances." R. v. Whiley, 2 Leach, 983; 1 New Rep. 92, S. C.

Not only is evidence of the act of passing other forged notes admissible to prove the prisoner's guilty knowledge, but proof of his general demeanor on a former occasion will be received for the same purpose. The prisoner was indicted for forging and knowingly uttering a bank note, and the question was, whether the prosecutor, in *order to show that the prisoner knew it to be forged, might give the con- [*90] duct of the prisoner in evidence, that is, whether from the conduct of the prisoner on one occasion, the jury might not infer his knowledge on another, and all the judges were of the opinion that such evidence ought to be received. R. v. Tattershall, cited by Lord Ellenborough, 2 Leach, 984.(1)

It is not necessary that the other forged notes should be of the same description and denomination as the note in question.(2) R. v. Harris, 7 C. & P. 429 : 32 E. C. L. R. The point was doubted in R. v. Millard, R. & R. 245; but R. v. Ball, 1 Moo. C. & C. 470, the prisoner was indicted for forging and uttering a note in the Polish language. In support of the *scienter* the prosecutor gave evidence of the particulars of a meeting at which the prisoner agreed with the prosecutor (who was an agent of the Austrian government, and had been sent over to endeavor to detect persons implicated in the forgeries of Austrian notes), to make him 1000 Austrian notes for fifty florins. This evidence was objected to on the part of the prisoner, as it was a transaction relative to notes of a different description from the notes in the indictment, besides which no Austrian notes were in fact made. Littledale, J., however, admitted the evidence, and the prisoner was found guilty, but judgment was respited, that the opinion of the judges might be taken, who held the evidence admis-

(1) Evidence of a prisoner's endeavors to engage a person to procure for him counterfeit money; of his declared intention to become acquainted with a counterfeiter, and to remove to a place near his residence, is admissible on a prosecution for passing a counterfeit note to prove the *scienter*. Commonwealth v. Finn, 5 Randolph, 701.

In treason, where defendant had enlisted under the enemy, proof was admitted that he had attempted to prevail on another to enlist, to show the *quo animo* Resp. v. Malin, 1 Dall. 33.

(2) See The People v. Lagrille, 1 Wheeler's C. C. 415.

sible. And the case of R. v. Foster, *infra*, p. 94, supports the same view; for the same principle would apply to indictments for uttering forged instruments as to indictments for uttering counterfeit coin.

Whether evidence is admissible of uttering other forged instruments where these are uttered subsequently to that with which the prisoner is charged seems to some extent doubtful. In one case the prosecutors offered to prove the uttering of another forged note five weeks after the uttering which was the subject of the indictment; but the court (Ellenborough, C. J., Thompson, C. B, and Lawrence, J.) held that the evidence was not admissible, unless the latter uttering was in some way connected with the principal case, or unless it could be shown that the notes were of the same manufacture. R. v. Taverner, Carr. Sup. 195, 1st ed., 4 C. & P. 413 (*n*): 19 E. C. L. R.; S. C. Where an indictment for uttering a bill with a forged acceptance, knowing it to be forged, it being proposed, for the purpose of proving the guilty knowledge, to give in evidence other forged bills of exchange precisely similar, with the same drawers' and acceptors' names, uttered by the prisoner about a month after the uttering of the bill mentioned in the indictment, Mr. Justice Gaselee, after consulting Alexander, C. B., was disposed to allow the evidence to be received, but said that he would reserve the point for the opinion of the judges, upon which the counsel for the prosecution declined to press the evidence. R. v. Smith, 4 C. & P. 411. See R. v. Foster, *infra*, p. 91.

But there no doubt would be some limits both as to time and circumstances beyond which evidence of uttering forged instruments on other occasions would not be permitted. What these limits are it is for the judge in his discretion to determine; they will probably be wider in forgery and coining than in some other cases, receiving stolen goods for instance. R. v. Green, 3 C. & K. 209; see also, per Lord Tenterden, C. J., in R. v. Whiley, 2 Lea, 983; S. C. 1 New Rep. 92.

The possession also of other forged notes by the prisoner is evidence of his guilty [*91] knowledge. The prisoner was indicted for uttering *a bill of exchange upon Sir James Esdaile & Co., knowing it to be forged. It was proved that, when he was apprehended, there were found in his pocket-book three other forged bills, drawn upon the same parties. On a case reserved, the judges were all of opinion, that these forged bills found upon the prisoner at his apprehension, were evidence of his guilty knowledge. R. v. Hough, Russ. & Ry. 121. In order, however, to render such evidence admissible, it must be first satisfactorily proved that the other notes were forged, and they ought to be produced. R. v. Millard, Russ. & Ry. 245; R. v. Cooke, 8 C. & P. 586: 34 E. C. L. R.; and see R. v. Forbes, 7 C. & P. 224: 32 E. C. L. R.; *post*, tit. Forgery. It would seem that presumptive evidence of forgery, as that the prisoner destroyed the note, ought to be received. Phil. Ev. 473 (*n*), 9th ed.

On the trial of indictments for uttering or putting off counterfeit coin, knowing it to be counterfeit, it is the practice, as in cases of forgery, to receive proof of more than one uttering, committed by the party about the same time, though only one uttering be charged in the indictment.(1) 1 Russ. 85; 2 Russ. 697. In R. v. Wiley (*see ante*, p. 89), it was stated by the counsel for the prisoner, in argument, that upon an indictment for uttering bad money, the proof is always exclusively confined to the particular uttering charged in the indictment. Upon this Thompson, B., observed,

(1) On an indictment for passing a counterfeit silver dollar, knowingly, evidence that defendant had counterfeited other dollars, was held not admissible. State v. Odel, 2 Const. Rep. 758. But on an indictment for counterfeiting money, evidence of possession of instruments of coining is admissible. State v. Antonio, Id. 776.

In prosecutions for having counterfeit notes in possession, proof that other counterfeits were found secreted in prisoner's house is admissible. Hess v. The State, 5 Ohio, 5.

"As to the cases put by the prisoner's counsel of uttering bad money, I by no means agree in their conclusion, that the prosecutor cannot give evidence of another uttering on the same day, to prove the guilty knowledge. Such other uttering cannot be punished, until it has become the subject of a distinct and separate charge; but it affords strong evidence of the knowledge of the prisoner that the money was bad. If a man utter a bad shilling, and fifty other bad shillings are found upon him, this would bring him within the description of a *common utterer;* but if the indictment do not contain that charge, yet these circumstances may be given in evidence on any other charge of uttering, to show that he uttered the money with a knowledge of its being bad." 2 Leach, 986. Also proof of the prisoner's conduct in such other utterings (as, for example, that he passed by different names) is for the same reason clearly admissible. See R. v. Tattershall, *ante*, p. 89; R. v. Phillips, 1 Lew C. C. 105. Such evidence, far from being foreign to the point in issue, is extremely material; for the head of the offence charged upon the prisoner is, that he did the act with knowledge, and it would seldom be possible to ascertain under what circumstances the uttering took place (whether with ignorance or with an intention to commit fraud), without inquiring into the demeanor of the prisoner in the course of other transactions. Phill. Ev. 473, 9th ed.

And the point is now finally settled that evidence of uttering counterfeit coin on other occasions than that charged is evidence to show guilty knowledge; and that utterings after that for which the indictment is laid may be given in evidence for this purpose, as well as those which take place before. Thus in R. v. Foster, 24 L. J. M. C. 134, the Court of Criminal Appeal held, that on an indictment for uttering a counterfeit crown piece knowing it to be counterfeit, proof that the prisoner, on a day subsequent to the day of such uttering, uttered a counterfeit shilling, was admissible to prove the guilty knowledge of the prisoner. "The uttering of a piece of bad silver," said the court, "although of a different denomination from that alleged in *the [*92] indictment, is so connected with the offence charged that the evidence of it was receivable." It is to be observed that this case also shows that the coins uttered need not be the same on each occasion. See as to the latitude to be allowed in this respect, *ante*, p. 90.(1)

Evidence to explain motives and intention—Receiving stolen goods.] With regard to the case of a receiver of stolen goods, it has been frequently held that as the question is one entirely of guilty knowledge, evidence of receiving other goods of a similar nature, stolen from the same prosecutor, may be given; even though indictments are pending for the other larcenies. But it appears that the other occasions on which the stolen property was received must not be so far removed in point of time as to form entirely different transactions. Where, upon an indictment for receiving, it appeared that the articles had been stolen, and had come into the possession of the prisoner at several distinct times, the judge, after compelling the prosecutor to elect upon which act of receiving he would proceed, told the jury, that they might take into their consideration the circumstances of the prisoner having the various articles of stolen property in her possession, and pledging, or otherwise disposing of them at various times, as an ingredient in coming to a determination, whether, when she received the articles

(1) The State v. Houston, 1 Bailey, 300; The State v. Hooper, 2 Bailey, 37; Martin v. The Commonwealth, 5 Leigh, 707. But the notes must be produced, or proved to be destroyed, or in the defendant's possession, and not produced on notice. The People v. Lagrille, 1 Wheeler's C. C. 415; Helm's Case, 1 Rogers's Rec. 46; Case of Smith et al., 4 Ibid. 166. So if the passing of the other note be at a remote period, it is not sufficient. Dougherty's Case, 3 Ibid. 148. But proof of the *scienter* is not admissible, before the principal charge is established. Jones's Case, 6 Ibid. 86.

for which the prosecutor elected to proceed, she knew them to have been stolen. R. v. Dunn, I Moody, C. C. 150. But where the prisoner being indicted in one count for stealing, in another for receiving knowing it to have been stolen, certain cloth, it was proved that the cloth was stolen in the night of the 2d and 3d March, and found in the possession of the prisoner on the 10th March; and it was sought further to give in evidence, in order to show guilty knowledge, that on his house being searched on 10th March, other cloth which had been stolen in the December previous from other parties, was found; the Court of Criminal Appeal held that such evidence was inadmissible. Alderson, B., in giving his judgment, said, "The mere possession of stolen property is evidence *primâ facie* not of receiving but of stealing; and to admit such evidence in the present case would be to allow a prosecutor, in order to make out that a prisoner had *received property*, with a guilty knowledge, which had been stolen in *March*, to show that the prisoner had in the *December* previous *stolen* some other property from another place and belonging to other persons. In other words, we are asked to say, that in order to show that the prisoner had committed one felony, the prosecutor may prove that he committed a totally different felony some time before; such evidence cannot be admissible." R. v. Oddy, 2 Den. C. C. R. 264, S. C. 20 L. J. M. C. 198. In R. v. Nicholls 1 F. & F. 5, the prisoner was indicted for receiving a quantity of lead knowing it to have been stolen. Cockburn, C. J., allowed evidence to be given that on several occasions, between the early part of January and the 11th of February, the prisoner, in company with another person, had sold lead stolen from the same place, and taken a share of the money.

Evidence to explain motives and intention—General cases.] Except with reference to the offences already alluded to, the question of how far evidence is admissible to explain motives and intention has not been very fully discussed. In R. v. Egerton, Russ. & Ry. 375, the prisoner was indicted for robbing the prosecutor of a coat by [*93] *threatening to accuse him of an unnatural crime. Evidence was admitted by Holroyd, J., that the prisoner had made another, but ineffectual, attempt to obtain a 1*l.* note from the prosecutor on the following day to that on which he obtained the coat; and it is said that this ruling was confirmed by the judges. In R. v. Voke, Russ. & Ry. 531, the prisoner was indicted for maliciously shooting at the prosecutor. Evidence was given that the prisoner fired at the prosecutor twice during the day. In the course of the trial it was objected that the prosecutor ought not to give evidence of two distinct felonies, but Mr. Justice Burrough held that it was admissible, on the ground that the counsel for the prisoner, by his cross-examination of the prosecutor, had endeavored to show that the gun might have gone off by accident; and the learned judge thought that the second firing was evidence to show that the first was wilful, and to remove the doubt, if any existed, in the minds of the jury. In R. v. Clewes, 4 C. & P. 221: 19 E. C. L. R., upon an indictment for the murder of one Hemmings, it was shown that great enmity existed between Parker, the rector of a parish, and his parishioners, and that the prisoner had used expressions of enmity against the rector, and had said he would give 50*l.* to have him shot; that the rector *was* shot by Hemmings, and that the prisoner and others who had employed him, fearing that they should be discovered, had themselves murdered Hemmings. Evidence of the malice of the prisoner against the rector was given without objection, and it was then proposed to show that Hemmings was the person by whom the rector was murdered; this was objected to, but Littledale, J., decided that it was admissible. In R. v. Mogg, 4 C. & P. 364, the prisoner was indicted for administering sulphuric acid to eight horses, with intent to kill them. Evidence that the prisoner

had frequently mixed sulphuric acid with the horses' corn was objected to, but Parke, J., held it was admissible, as showing whether the act was done with the intent charged in the indictment. In R. v. Winkworth, 4 C. & P. 444, prisoners came with a mob to the prosecutor's house, and one of the mob went up to the prosecutor, and civilly, and as he believed with a good intention, advised him to give them something to get rid of them, which he did. To show that this was not *bonâ fide* advice to the prosecutor, but in reality a mode of robbing him, it was proposed to give evidence of other demands of money made by the same mob at other houses, at different periods of the same day, when some of the prisoners were present. Parke, J., having conferred with Vaughan, B., and Alderson, B., said, "We are of opinion, that what was done by the mob, before and after the particular transaction at the prosecutor's house, but in the course of the same day, and when any of the prisoners were present, may be given in evidence." He afterwards stated that the judges (it was a special commission) had communicated with Lord Tenterden, who concurred with them in his opinion. In R. v. Geering, 20 L. J. M. C. 215, the prisoner was indicted for the murder of her husband, in September, 1848, by administering arsenic to him. The prisoner was also charged, in three other indictments, with the murder, be similar means, of her son George, in December, 1848; of another son, James, in March, 1849; and of an attempt to murder, by similar means, another son, Benjamin, in April, 1849. On the part of the prosecution, evidence was tendered consisting of a medical *post-mortem* analysis of the intestines, heart, &c., of the husband, and two sons who were dead, and also a *medical analysis of the vomit of [*94] Benjamin, showing the presence of arsenic in each case. Evidence was also tendered that all the parties lived together, and that the prisoner cooked the victuals. The evidence was objected to, but Pollock, C. B., said that the domestic history of the family during the period that the four deaths occurred was receivable in evidence, to show that during that time arsenic had been taken by four members of it, with a view to enable the jury to determine as to whether such taking was accidental or not. His lordship took time to consider whether he ought to reserve the point, but after consulting Alderson, B., and Talfourd, J., resolved not to do so, and the prisoner was executed. In R. v. Roebuck, 25 L. J. M. C. 51, S. C. Dears. & B. C. C., the prisoner was indicted for obtaining money from a pawnbroker by falsely pretending that a chain was silver. The chain was of a very inferior metal, and evidence was admitted, apparently without objection, that twenty-six chains were found on the prisoner, and that these were of similar materials. Evidence was also admitted that the defendant, a few days after the occasion in question, offered a similar chain to another pawnbroker, under similar circumstances. This was objected to, and the point, with other points, reserved. There is no trace of any discussion on this point, or any allusion to it in the judgment of the court in any of the reports; but the conviction was affirmed. The prisoner did not appear by counsel. In R. v. Holt, 9 W. R. 74, the prisoner was tried for obtaining by false pretences a sum of money from one Hirst. It appeared that the prisoner was employed by his master to take orders for goods, but was forbidden to receive money. On the 30th of April the prisoner obtained from Hirst the sum of nine shillings and sixpence, in payment for goods bought by Hirst of the prisoner's master, and which sum the prisoner falsely represented that he had authority to receive: this was the offence charged in the indictment. Evidence was also tendered that within a week after the 30th of April the defendant obtained from another customer of his master the sum of eleven shillings by a similar false representation. The evidence was objected to, but received on the ground that it showed the intent of the prisoner when he committed the act

charged in the indictment, and the question was reserved for the consideration of the Court of Criminal Appeal. No counsel appeared on either side, and no reasons are given for the judgment; but the conviction was quashed, Erle, J., merely saying that, upon the facts stated in the indictment, the court thought the evidence objected to inadmissible.

Perhaps the ground upon which this decision proceeded was this: that the only shape in which the evidence was admissible, if at all, was for the purpose of showing that the prisoner knew he did not possess the authority which he represented himself to have; and it may have been thought that for this purpose the evidence was not relevant, because if any *bonâ fide* mistake existed upon this point, it would operate in one case as well as another, so that a mere repetition of the act would not, as in many other cases, add anything to the evidence of guilt, though it might seem that this is rather an objection to the weight of the evidence than to its admissibility. In R. v. Richardson, 2 F. & F. 343, the prisoner was indicted for embezzlement; three acts of embezzlement were charged in the indictment. It appeared that the prisoner's duty was to make various payments on account of his employers, and to keep [*95] weekly accounts of the *money so expended. The sums so expended were correctly entered, but in casting up the items at the end of each week, the totals were made to exceed the real amount by sums varying from 1*l.* to 3*l.* The prisoner, in accounting with his master, took credit for the larger sums. For the prosecution, in order to show that this was not the result of innocent mistake on the part of the prisoner, evidence was tendered that in numerous weeks, both before and after that charged in the indictment, similar mistakes, always in favor of the prisoner, had been made. This evidence was objected to, but Williams, J., ruled that it was admissible, to counteract an obvious defence on the part of the prisoner, and he said that Pollock, C. B., entirely agreed with him on the point.

Evidence of character.] Evidence of character is admissible for the prisoner, who may show, by general evidence, that his character is such that he is not likely to have committed the offence which is imputed to him. He can only support that part of his character which is impeached, and only by general evidence, not by evidence of his conduct on particular occasions. The proper form of the question is, "From your knowledge of the prisoner, does he bear a good character for honesty, humanity," &c., as the case may be.(1)

(1) Good character is evidence, but not strong in favor of the accused. Commonwealth v. Hardy, 2 Mass. 317; Schaller v. The State, 14 Missouri, 502; McDaniel v. The State, 8 Smedes & Marshall, 401; Felix v. The State, 18 Alabama, 720; Cacemi v. The People, 2 Smith, 501. It is in a case of doubt, or to rebut the legal presumption arising from the possession of stolen articles, that evidence of good character has most weight. The State v. Ford, 3 Strobhart, 517; Epps v. The State, 19 Georgia, 102. There are cases of circumstantial evidence, where the testimony adduced for and against a defendant is nearly balanced, in which a good character may be very important to a man's defence; a stranger, for instance, may be placed under circumstances tending to render him suspected. He may show that, notwithstanding these suspicious circumstances, he is of perfectly good character in the neighborhood in which he resides and where he is known, and that may be sufficient to exonerate him. Commonwealth v. Webster, 5 Cushing, 295.

The prisoner's character cannot be put in issue by the State, unless he opens the door by giving testimony to it. The People v. White, 14 Wendell, 111; The Commonwealth v. Webster, 5 Cushing, 295. But it is not a conclusion of law that from his silence the jury are to believe that he is a man of bad character. The State v. O'Neal, 7 Iredell, 251; Ackley v. The People, 9 Barbour, 609; The People v. Bodine, 1 Dana, 282. When a defendant has, of his own accord, put his character in issue, the examination may extend to particular facts. The Commonwealth v. Robinson, Thacker's Crim. Cas. 230. The prosecution may give evidence of bad character subsequent to the time of the commission of the offence charged. Evidence of a bad reputation subsequently acquired may indeed be of little weight, but still it will have some bearing, as commonly the descent from virtue to crime is gradual. The Commonwealth v. Sackett, 22 Pick. 394.

On a trial for murder, evidence of the character of the deceased is not admissible, except where

Evidence is also, in all cases, admissible to show that an opponent witness bears such a character and reputation that he is unworthy of belief. But it is not allowed (with the exception of facts which go to prove that the witness is not an impartial one, see p. 96) to prove particular facts in order to discredit him.(1) R v. Watson,

the killing is attended by circumstances to create a doubt of its character. Quesenberry v. The State, 3 Stewart, 308.

In a prosecution for perjury, proof of the general bad character of the defendant for truth and veracity would be inadmissible. Dewit v. Greenfield, 5 Ohio, 227; see The Commonwealth v. Hopkins, 2 Dana, 418; Walker v. The Commonwealth, 1 Leigh, 574.

When the character of an individual, in regard to any particular trait or as developed under peculiar circumstances is in issue, it is to be established by evidence of general reputation, and not by positive evidence of general bad conduct. Keener v. The State, 18 Georgia, 194.

Omission to offer testimony to a prisoner's good character does not authorize either the inference that it is bad or an argument to that effect. The State v. Upham, 38 Maine, 261.

When a particular trait of character is in issue, evidence of character must be restricted to that trait. The State v. Dalton, 27 Missouri, 13; The People v. Josephs, 7 California, 129.

To authorize a witness to testify to the general character of a person in respect to his habits, he should first state that he is acquainted with that person's general character in the particular to which he deposes; but if his testimony shows that fact, whether brought out on preliminary examination or examination in chief, it will be sufficient. Elam v. The State, 25 Alabama, 53.

Good character in a clear case will be of no avail. Freeland's Case, 1 Rogers's Rec. 82; People v. Kirby, 1 Wheeler's C. C. 64; The State v. Wells, 1 Coxe, 424; Commonwealth v. Hardy, 2 Mass. 317. It is in case of doubtful facts, or to rebut the legal presumption of guilt arising from the possession of stolen articles, that a good character proved in court is of most effect. State v. Ford, 3 Strobhart, 517.

If, on the trial of an indictment, the defendant introduces evidence of his good character prior to the alleged commission of the crime charged, it is competent to the government to prove that subsequently to that time his character had been bad. The Commonwealth v. Sackett, 22 Pick. 394.

(1) Jackson v. Osborn, 2 Wend. 555; Commonwealth v. Moore, 2 Dana, 402; Rixey v. Bayse, 4 Leigh, 330; Wike v. Lightner, 11 Serg. & Rawle, 198; Swift's Evidence, 143.

When character is put in issue, evidence of particular facts may be admitted, but not where it comes in collaterally. Commonwealth v. Moore, 2 Dana, 402; see Sachet v. May, 3 Id. 80.

To discredit a witness, it may be asked, whether he is not a man of bad moral character. State v. Stallings, 2 Hayw. 300; Hume v. Scott, 3 Marsh. 261. *Contra*, Skillinger v. Howell, 5 Halst. 309. If such question be asked, the impeaching witness may be cross-examined as to his character for veracity. Noel v. Dickey, 3 Bibb, 268; see Mobely v. Hamit, 1 Marsh. 591; Kimmel v. Kimmel, 3 Serg. & Rawle, 336.

The character for veracity of a female witness cannot be impeached by evidence of her general character for chastity. Gilchrist v. McKee, 4 Watts, 380; Jackson v. Lewis, 13 Johns. 504; Commonwealth v. Moore, 3 Pick. 194; see Commonwealth v. Murphy, 14 Mass. 387; Sword v. Nester, 3 Dana, 453; 2 Starkie's Ev., new ed. 216, n. 1.

The credit of a witness may be impeached by showing that he was intoxicated at the time the events happened to which he testifies: Tuttle v. Russel, 2 Day, 201; Fleming v. The State, 5 Humphreys, 564; though general character for intemperance is inadmissible. Brindle v. McIlvaine, 10 Serg. & Rawle, 282.

Neighborhood is coextensive with intercourse. It is not necessary that the character testified to should be proved to be that of the place where he resides. Chess v. Chess, 1 Penna. Rep. 32.

A party calling a witness as to character is confined to general questions, but the opposite party may ask particulars. People v. De Graff, 1 Wheeler's C. C. 205; People v. Clark, Ibid. 295.

A witness who is introduced to prove that another witness is unworthy of credit, should be examined as to the general character of such witness for truth and veracity. The proper inquiry is, whether the witness knows the general character of the witness attempted to be impeached, and if so, what is his general reputation for truth. On the cross-examination the inquiry should be limited to the witness's opportunity for knowing the character of such witness; for how long a time, and how generally such unfavorable reports have prevailed, and from what sources they have been derived. It is not allowable to inquire of the impeacher whether he would believe the witness attempted to be impeached on oath. Phillips v. Kingsfield, 19 Maine, 375.

A witness who is introduced for the purpose of discrediting another witness in the cause, must profess to know the general reputation of the witness sought to be discredited, before he can be heard to speak of his own opinions or of the opinions of others, as to the reliance to be placed on the testimony of the impeached witness. The State v. Parks, 3 Iredell, N. C. Law Rep. 296; The State v. O'Neal, 4 Ibid. 88.

When testimony is offered to impeach the general character of a witness for truth, the inquiries are not limited to the character of the witness prior to the suit, but extend to the time of the examination of the witness. The State v. Howard, 9 N. Hamp. 485. The proper inquiries are, what is the general reputation of the witness as to truth, and whether, from general reputation, the person testifying would believe such witness under oath as soon as men in general. Ibid.

When a witness is sought to be impeached on the ground of his bad character, and the persons called for that purpose testify that they are acquainted with his general character, they may then be asked whether, from such general character, they would believe the witness on oath; and this, though they expressly disclaim all knowledge of the witness's character for truth and veracity. Johnson v. The People, 3 Hill, 178.

On cross-examination, inquiries as to the means of knowledge of the character of the witness, the

2 Stark. N. P. C. 152; R. v. Layer, 14 How. St. Tr. 285. The proper question is, "From your knowledge of his general character, would you believe him on his oath?"

origin of reports against him, how generally such reports have prevailed, and from whom and when he heard them, are admissible. The State v. Howard, 9 N. Hamp. 485.

After an equal number of witnesses have been sworn on each side, in the impeaching or supporting the character of a party or witness, it is in the discretion of the presiding judge whether a greater number of witnesses shall be examined. Bissell v. Cornell, 24 Wend. 354; Bunnell v. Butler, 23 Conn. 65.

When a witness called to impeach the character for veracity of another witness, who had given material testimony, swore that the character of the last-mentioned witness was not on a par with that of mankind in general, he was asked, on cross-examination, what individual he had heard speak against the character of that witness, it was held that this question was a proper one. Weeks v. Hall, 19 Conn. 376.

When a witness is impeached on the ground of bad character, evidence may be given of previous statements made by the witness, consistent with his testimony on the trial. The State v. Dove, 10 Iredell, 469; The State v. Dennis, 32 Vermont, 158.

When the character of a witness is impeached, the State may introduce testimony to show that the facts to which the impeached witness testified are true. John v. The State, 16 Georgia, 200.

When the credibility of a witness has been attacked from the nature of his evidence, from his situation, from bad character, from proof of previous inconsistent statements, or from imputations directed against him on cross-examination, the party introducing him may prove other consistent statements for the purpose of corroborating him. March v Harrell, 1 Jones's Law, N. C. 329.

As a general rule, it is not competent in support of the testimony of a witness to prove that he has made declarations out of court corresponding with his testimony in court. The People v. Finnegan, 1 Parker's Crim. Rep. 147. But such testimony was allowed where the witness, on cross-examination, had been asked questions tending to discredit his testimony. The State v. De Wolf, 8 Conn. 93; Carter v. The People, 2 Hill, 317.

So where the witness is impeached on the ground of bad character. The State v. Dove, 10 Iredell, 469.

In a prosecution for rape, statements made by the prosecutrix, immediately after the transaction, may be given in evidence to corroborate her. Laughlin v. The State, 18 Ohio, 99; Johnson v. The State, 17 Ohio, 593.

Testimony to support the character of a witness cannot be given in evidence, unless the credibility of the witness is impeached. Colt v. The People, 1 Parker's Crim. Rep. 611. A witness called to sustain the character of an impeached witness, testifying that he has known him for a number of years, and that he knows his associates, but is not acquainted with his general character for truth and veracity, will be allowed to testify that he would believe him on his oath. The People v. Davis, 21 Wendell, 309.

On the trial of a prisoner for rape, evidence of the good character of the prosecutrix is admissible by way of confirming her credibility. Turney v. The State, 8 Smedes & Marshall, 104; The State v. De Wolf, 8 Conn. 93.

On the trial of an indictment for adultery, if one act of adultery, committed by the defendant with the woman named in the indictment, is proved by the testimony of a witness whose credit is impeached, other instances of improper familiarity between the defendant and the same woman, not long before, may be given in evidence to corroborate the witness. Commonwealth v. Merriam, 14 Pickering, 418.

It is not necessary that a man's character should have been matter of discussion amongst his neighbors to enable a witness to speak of his reputation for truth. Crabtree v. Rile, 21 Illinois, 180; Boon v. Weathered, 23 Texas, 675.

Witnesses in his neighborhood acquainted with the character of the impeached witness, although they had never heard anything for or against his veracity, may testify that they would believe him on oath. Taylor v. Smith, 16 Georgia, 7.

A witness called to impeach the character of another witness should be asked, in the first instance, whether he has the *means* of knowing the *general character* of the witness impeached. The State v. O'Neal, 4 Iredell, 88. The questions are not confined to the character of the witness prior to the suit, but extend to the time of the examination. The State v. Howard, 9 N. Hamp. 485. The proper inquiries are, what is the general reputation of the witness as to truth, and whether, from such general reputation, the person giving testimony would believe such witness under oath. Ibid.

The general character of a witness, at his place of business, cannot be shown by evidence of what rumor said of it before he came to that place. Campbell v. The State, 23 Alabama, 44.

As to the proper mode of inquiry in impeaching the character of a witness: The State v. Randolph, 24 Conn. 363; Hooper v. Moore, 3 Jones's Law, 428; Wilson v. The State, 3 Wisconsin, 798; Stokes v. The State, 18 Georgia, 17; Holmes v. Stateler, 17 Illinois, 453; Teese v. Huntingdon, 23 Howard (U. S.), 2; Pierce v. Newton, 13 Gray, 528; Mash v. The State, 36 Mississippi, 77; Macdonald v. Garrison, 2 Hilton (N. Y.), 510; Boon v. Weathered, 23 Texas, 675; Crabtree v. Rile, 21 Illinois, 180; Gilliam v. The State, 1 Head, 38; Henderson v. Hayne, 2 Metcalfe (Ky.), 342; Eason v. Chapman, 21 Illinois, 33; The State v. Sater, 8 Clarke, 420; Boswell v. Blackman, 12 Georgia 591; Kelley v. Proctor, 41 N. Hamp. 139; Long v. Morrison, 14 Indiana, 595; Cook v. Hunt, 24 Illinois, 535; Wright v. Paige, 36 Barbour, 438; Wilson v. The State, 16 Indiana, 392; Crabtree v. Hagenbaugh, 25 Illinois, 233; Shaw v. Emery, 42 Maine, 59; Ward v. The State, 28 Alabama, 53; Thurman v. Virgin, 18 B. Mon. 785; Craig v. Ohio, 5 Ohio (N. S.), 605; Ruche v. Beaty, 3 Indiana, 70; Webber v. Hanke, 4 Michigan, 198; Willard v. Goodenough, 30 Vermont, 393; Pleasant v. The State, 15 Arkansas, 624.

A party cannot give evidence to confirm the good character of a witness, unless his general char-

Mawson v. Hartsink, 4 Esp. 102, per Lord Ellenborough, C. J. But the person who calls a witness is always supposed to put him forward as a person worthy of belief; he cannot, therefore, if his testimony should turn out unfavorably, or even if the witness should assume a position of hostility, give general evidence to discredit him. Bull, N. P. 297. How far a party may contradict his own witness, we shall see presently, p. 96.(1) And if the character of any witness for credibility be impeached, either

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acter had been previously impugned by the other party. Braddee v. Brownfield, 9 Watts, 124; Werte v. May, 9 Harris, 274.

When, on the trial of an indictment, a material witness for the prisoner, on his cross-examination by the counsel for the prosecution, admitted that he had been complained of and bound over upon a charge of passing counterfeit money: *held*, that in answer the prisoner was entitled to give evidence of the witness's good character for truth. Carter v. The People, 2 Hill, 317.

An admission by a witness that he had been prosecuted, but not tried for perjury, does not authorize the party calling him to give evidence of his general good character. The People v. Gay, 1 Parker, C. R. 308.

On the trial of an indictment for rape, alleged to have been committed on board a vessel, the prisoner attempted to discredit the testimony of the complainant: 1. By showing, on cross-examination, that her story was improbable in itself. 2. By disproving some of the facts to which she testified. 3. By evidence that her conduct, while on board the vessel and afterwards, was inconsistent with the idea of the offence having been committed; and 4. By calling witnesses to show that the account which she had given of the matter out of court did not correspond with the statements under oath: *held*, evidence of her good character inadmissible in reply. The People v. Hulse, 3 Hill, 309.

Proof of contradictory statements will not warrant admission of character. Frost v. McCargar, 29 Barbour, 617; Chapman v. Cooley, 12 Richardson's Law, 654; Vance v. Vance, 2 Metcalfe (Ky.), 581; Newton v. Jackson, 23 Alabama, 335. *Contra*, Burrel v. The State, 18 Texas, 713; Stamper v. Griffin, 12 Georgia, 450.

The testimony of a witness, upon cross-examination, that he had been tried for a crime in another State, and acquitted, does not authorize the party calling him to introduce evidence of his general character. Harrington v. Lincoln, 4 Gray, 563. Nor will evidence tending to contradict him. Haywood v. Reed, Ibid. 574.

An attempt to impeach a witness by asking another witness what was his character for truth, warrants the introduction of evidence to support his character, though the answer to the question was that his character was good. The Commonwealth v. Ingraham, 7 Gray, 46.

When a witness, on cross-examination, admitted that he had been bound over for perjury: *held*, that it did not let in evidence to sustain his general character. The People v. Gay, 3 Selden, 378.

(1) Lawrence v. Barker, 5 Wend. 301; Jackson v. Varick, 7 Cowen, 238; De Lisle v. Priestman, 1 Browne, 176; Cowder v. Reynolds, 12 Serg. & Rawle, 281; Queen v. The State, 5 Har. & J. 232; Perry v. Massey, 1 Bailey, 32; Winslow v. Mosely, 2 Stewart, 137; Webster v. Lee, 5 Mass. 334; Steinback v. Columbian Ins. Co., 2 Caines, 129; Stuckton v. Dernutt, 7 Watts, 39.

But an attesting witness is a witness of the law, and may be discredited by any one who examines him. Crowell v. Kirk, 3 Devereux, 355; see Jackson v. Varick, 7 Cowen, 238. *Contra*, Whitaker v. Salisbury, 15 Pick. 534; Patterson v. Schenck, 3 Green, 434; Booker v. Bowles, 2 Blackf. 90.

It has been held in North Carolina, that the Attorney-General may produce evidence to discredit a witness for the Commonwealth. State v. Morris, 1 Hayw. 438. But see Brown's Case, 2 Rogers's Rec. 151, and Queen v. The State, 5 Har. & J. 232.

A witness subpœnaed by the plaintiff, but not examined by him, but by defendant, may be impeached by the plaintiff. Beebe v. Sinker, 2 Root, 160; The Commonwealth v. Boyer, 2 Wheeler's C. C. 151.

Although a party calling a witness shall not be allowed to impeach his general character, yet he may show that he has told a different story at another time. Cowder v. Reynolds, 12 Serg. & Rawle, 281.

But a party cannot, after examining a witness, give in evidence his former testimony and declarations ostensibly to discredit him, but, in truth, to operate as independent evidence. Smith v. Price, 8 Watts, 447.

Where a witness gives evidence against the party calling him, and is an unwilling witness, or in the interest of the opposite party, he may be asked by the party calling him, at the discretion of the court, whether he has not, on a former occasion, given different testimony as to a particular fact. Bank Northern Liberties v. Davis, 6 Watts & Serg. 285.

A party may prove the fact to be different from what one of his own witnesses has stated it to be. That is not discrediting his witness. Spencer v. White, 1 Iredell's N. C. Rep. 236.

The rule that a party cannot discredit his own witness by proving that he had made contradictory statements at other times, does not apply to those cases where the party is under the necessity of calling the subscribing witness to an instrument. Dennett v. Dow, 17 Maine, 19.

A party cannot discredit his own witness or show his incompetency, though he may call other witnesses to contradict him as to a fact material to the issue, in order to show how the fact really is. Franklin Bank v. Steam Nav. Co., 11 Gill & Johns. 28.

A party cannot be allowed to insist that his own witness is not to be believed. He has the right, if surprised by his testimony, to show by other witnesses that the facts testified to are otherwise. But he cannot impeach him directly or indirectly. Hunt v. Fish, 4 Barbour, 324; Burkhalter v. Edwards, 16 Georgia, 593.

A party cannot impeach his own witness by proof of statements contradictory to his evidence in court, although he may prove a fact to be otherwise than his own witness states it. The Common-

by direct evidence or upon cross-examination, his testimony may be supported by general evidence that his character is such that he is worthy of credit.

These are the only cases in which evidence of character can be given in chief; as to the cross-examination of witnesses upon their character, see tit. Practice.

Evidence used for the purpose of contradiction only.] Any fact material to the issue, which has been proved by one side, may be contradicted by the other. The only fact material to the issue, with reference to which there is any peculiarity in this respect, is the credibility of a witness. As has already been said, that is a point upon which a witness may be impeached by direct evidence, showing *generally* his want of credibility; and, as we shall hereafter see, a witness may also be cross-examined as to particular facts which go to discredit him. But whether it be to contradict the direct evidence which impeaches the witness's credit, or to contradict the suggestions thrown out by the line of cross-examination, it is clear that, in order to reinstate the witness, no evidence can be used but *general* evidence that he is worthy [*96] of credit, *in the same way as he may be impeached by *general* evidence that he is not so.

In a precisely similar manner, if a witness, on cross-examination, refuses to admit facts which damage his credit, he cannot be contradicted on these points, if they are not otherwise material to the issue. Spenceley v. De Willott, 7 East, 108; R. v. Yewing, 2 Campb. 638.(1)

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wealth v. Starkweather, 10 Cushing, 59; Brolley v. Lapham, 13 Gray, 294; Champ v. The Commonwealth, 2 Metcalfe (Ky.), 17.

Party cannot discredit his own witness by asking him if he had not made contradictory statements. Sanchie v. The People, 8 Smith, 147.

The State cannot impeach her own witness. Quinn v. The State, 14 Indiana, 589.

Proof that a witness had made material false statements, which are relied on as proving him unworthy of credit, will not authorize the party calling him to introduce evidence of his general reputation for truth Brown v. Mooers, 6 Gray, 451.

(1) Ware v. Ware, 8 Greenl. 42; Atwood v. Felton, 7 Conn. 66; The State v. Alexander, 1 Rep. Const. Ct. 171. Cross-examination to irrelevant matter will not bring it into issue. Griffith v. Eshleman, 4 Watts, 51; Page v. Hemans, 14 Maine, 478; Goodhand v. Benton, 6 Gill. & Johns. 481; Williams v. The State, Wright (Ohio), 42; Smith v. Drew, 3 Whart. 154; Norton v. Valentine, 15 Maine, 36; see The People v. Byrd, 1 Wheeler's C. C. 242.

A witness may be cross-examined as to any collateral fact, which has any tendency to test either his accuracy or veracity, but the party must be bound by the answers of the witness, and cannot adduce proof in contradiction of such answers. And if, in the course of the trial, testimony is given without objection tending to contradict such answers, it is not even then competent for the party offering the first witness to give independent proof tending to corroborate the witness as to these collateral matters. Stevens v. Beach, 2 Verm. 585.

In respect to collateral matters drawn out by cross-examination, the answers of the witness are in general to be regarded as conclusive. The exception to this rule is, when the cross-examination is as to matters which, though collateral, tend to show the temper, disposition, or conduct of the witness towards the cause or the parties. The answers of the witness as to these matters may be contradicted. The State v. Patterson, 2 Iredell, N. Car. Rep. 346.

A witness cannot be cross-examined on immaterial matters in order to contradict him and impeach his credibility. Rosenbaum v. The State, 33 Alabama, 354; Blakey v. Blakey, Ibid. 611; Seavy v. Dearborn, 19 N. Hamp. 351; Cornelius v. The Commonwealth, 15 B. Monr. 539; The State v. Thibeau, 30 Vermont, 100; Hersom v. Henderson, 3 Foster, 498; Morgan v. Frees, 15 Barbour, 352; Mitchum v. The State, 11 Georgia, 615; Orten v. Jewitt, 23 Alabama, 662; Powers v. Leach, 26 Vermont, 270; Winter v. Meeker, 25 Conn. 456; Cokely v. The State, 4 Iowa, 477; Seale v. Chambliss, 35 Alabama, 19; The People v. McGinnis, 1 Parker's Crim. Rep. 387. It is not collateral but relevant to the main issue to inquire into the motives of a witness, and a party who examines him in regard to them is not bound by his answers, but may contradict him. The People v. Austin, 1 Parker's Crim. Con 154; Newcomb v. The State, 37 Mississippi, 383; Bersch v. The State, 13 Indiana, 434; Collins v. Stephenson, 5 Gray, 438.

A witness may be cross-examined as to prior conversations with third persons which tend to show ill will on his part towards the party against whom he is called, both for the purpose of affecting his credibility and also of laying the foundation for the contradiction of his testimony. Powell v. Martin, 10 Iowa, 568.

A witness must be inquired of as to time, place, and person, before he can be impeached by calling witnesses to contradict him. Wright v. Hicks, 15 Georgia, 160.

Before a witness can be contradicted by his own statements made out of court his attention must

The two last-mentioned rules are founded on the necessity which exists of putting some limit on the extent to which an inquiry may be carried, without which proceedings might be spun out to an interminable length.

If a prisoner calls witnesses to character, these may be contradicted by other witnesses, but particular facts cannot be now inquired into. There was formerly an exception to this, contained in the 14 & 15 Vict. c. 19, s. 9 (*infra*, tit. "Practice"), which, while it prevented the previous conviction of the prisoner being inquired into at the same time as the subsequent offence, made special provision that it might be given in evidence in answer to witnesses to character. This statute is repealed by the 24 & 25 Vict. c. 95, and is only re-enacted in larceny and similar offences by 24 & 25 Vict. c. 96, s. 116; and in coining offences by 24 & 25 Vict. c. 97, s. 37. Inasmuch as in other cases the previous offence may be inquired into at the same time

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be specially called to them; it is not enough to ask a general question without naming the person. The State v. Marler, 2 Alabama, 43; Brown v. Kimball, 25 Wend. 259; Joy v. The State, 14 Indiana. 139; Cook v. Hunt, 24 Illinois, 535; Baker v. Joseph, 16 California, 173; Mendenhall v. Banks, 16 Indiana, 284; Judy v. Johnson, Ibid. 371; Morrison v. Myers, 11 Iowa, 538; Evertson v. Carpenter, 17 Wend. 419; Stewart v. Chadwick, 8 Clarke, 463; Vatton v. National, 6 Smith, 32; The State v. Davis, 29 Missouri, 391; Ketchingman v. The State, 6 Wisconsin, 426; Sutton v. Reagan et al., 5 Blackf. 217; Unis v. Charlton's Adm., 12 Grattan, 484; Atkins v. The State, 16 Arkansas, 568; Vatton v. National, 22 Barbour, 9; Budlong v. Van Nostrand, 24 Barbour, 25; Hooper v. Moore, 3 Jones's Law, 428; Stacey v. Graham, 4 Kernan, 492; Bryan v. Walter, 14 Georgia, 485; Smith v. The People, 2 Michigan, 415; Conrad v. Griffey, 16 Howard, U. S. 38; The People v. Austin, 1 Parker C. R. 154; Barb. v. Steam Navigation Co., 11 Gill & Johns. 28. *Contra*, Gould v. Norfolk Lead Co., 9 Cushing, 338; The Commonwealth v. Hawkins, 3 Gray, 463; Howland v. Conway, 1 Abbott Admiralty, 281; Cook v. Brown, 3 N. Hamp. 460; Hedge v. Clapp, 22 Conn. 262.

A witness may, in the discretion of the judge, be recalled and examined in a leading manner to contradict a witness introduced to attack his credit. Thomasson v. The State, 22 Georgia, 499.

When there is a dispute as to localities, a diagram which is drawn in accordance with the testimony of the witness, may be given to the jury without having been first exhibited to the witness whose testimony it contradicts. Bishop v. The State, 9 Georgia, 121.

A witness may be impeached by showing that he has made contradictory statements, although his denial of such statements is not positive, but merely that he does not remember them. Nute v. Nute, 41 N. Hamp. 60; Ray v. Bell, 24 Illinois, 444. *Contra*, Mendenhall v. Bank, 16 Indiana, 284.

The examination of a witness before the committing magistrate, if his presence can be obtained, is not admissible, but when he has been examined it may be used to contradict him. The State v. McLeod, 1 Hawks, 344; Oliver v. The State, 5 Howard, 14.

On a trial for murder, the deposition of a witness given before the inquest, taken down at the time by the coroner, and read to and signed by the witness, may be introduced to contradict him. Wormeley v. The Commonwealth, 10 Grattan 658.

Where the credit of a witness is attacked by proving former statements contradictory to his statements in court, it is competent in his support, to show statements made at other times and places consistent therewith. Dorsett v. Miller, 3 Sneed, 72. *Contra*, Smith v. Stickney, 17 Barbour, 489; The People v. Finnegan, 1 Parker C. R. 147; Lamb v. Stewart, 2 Ohio, 230; Stahle v. Spohn, 8 Serg. & Rawle, 317. A witness may object to answer as to what he testified on a former trial. Mitchell v. Hinman, 8 Wend. 667.

That the contradictory statements of a witness cannot be met by proof of others agreeing with his testimony, see Ware v. Ware, 8 Greenl. 82; Jackson v. Etz, 5 Cowen, 314; Munson v. Hastings, 12 Verm. 346. The contrary doctrine is held in Johnson v. Patterson, 2 Hawks. 183; Cook v. Curtiss, 6 Har. & J. 93; Henderson v. Jones, 10 Serg. & Rawle, 322; Coffin v. Anderson, 4 Blackf. 395. A witness whose credit has been impeached by evidence of contradictory statements cannot be sustained by proof of good character. Russell v. Coffin, 8 Pick. 143; Rogers v. Moore, 10 Conn. 13. *Contra*, Richmond v. Richmond, 10 Yerg. 343.

Proof of declarations made by a witness out of court, in corroboration of testimony given by him on the trial of a cause, is as a general and almost universal rule, inadmissible. It seems, however, that to this rule there are exceptions, and that under special circumstances such proof will be received; as when the witness is charged with giving his testimony under the influence of some motive prompting him to make a false or colored statement, it may be shown that he made similar declarations at a time when the imputed motive did not exist. So in contradiction of evidence tending to show that the account of the transaction, given by the witness, is a fabrication of late date, it may be shown that the same account was given by him before its ultimate effect and operation arising from a change of circumstances could have been foreseen. Robb v. Hackley, 23 Wend. 50.

When no design to misrepresent is charged against a witness in consequence of his relation to the party or to the cause, evidence of similar statements made by him on former occasions is not admissible to support the truth of what he may testify. State v. Thomas, 3 Strobhart, 269.

When the credit of a witness has been impeached by proof that in a certain conversation he had made statements inconsistent with the truth of his testimony, he may on his re-examination be asked and may state what that conversation was to which the impeaching witness referred. The State v. Winkley, 14 N. Hamp. 480.

as the subsequent one, there is little probability of witnesses to character being called in such a case.

It was held that if a prisoner's counsel elicited, on cross-examination, from the witnesses for the prosecution, that the prisoner has borne a good character, a previous conviction might be put in evidence against him in like manner as if witnesses to his character had been called. Per Parke, B., R. v. Gadbury, 8 C. & P. 676: 34 E. C. L. R. It was "giving evidence" within the proviso in the 14 & 15 Vict. c. 19, s. 9. R. v. Shrimpton, 2 Den. C. C. R. 319; S. C. 21; L. J. M. C. 37.

Evidence that a witness is not impartial.] What has been just said as to not giving evidence of particular facts merely for the purpose of impeaching the credit of a witness, does not apply where the fact sought to be proved goes to show that the witness does not stand indifferent between the contending parties. Best. Ev. 723. Thus, in R. v. Yewing, *supra*, the witness was asked whether he had not said that he would be avenged upon his master, and would soon fix him in gaol. This he denied, but Lawrence, J., allowed him to be contradicted. So also it may be proved that a witness has been bribed to give his evidence: R. v. Langhorn, 7 How. St. Tr. 446; or that he has endeavored to suborn others: R. v. Lord Strafford, Id. 400; both of which cases were recognized in Att.-G. v. Hitchcock, 1 Ex. R. 93. And the same law was assumed by the judges, in answering a question put to them by the House of Lords, in the Queen's Case, 2 Brod. & B. 311: 6 E. C. L. R. But the question must be one which goes directly to prove, and not merely to suggest, improper conduct or partiality of the witness. Thus, in the case of the Att.-G. v. Hitchcock, *supra*, a revenue case, the question put to the witness was, whether he had not said that the officers of the Crown had offered him a bribe to give his testimony, which he denied; and on this the Court of Exchequer held that he could not be contradicted.

An important rule was laid down in the Queen's Case, *supra*, with reference to [*97] this species of evidence. It was there decided, that if *it be intended to offer evidence of statements made by a witness touching the matter in question, which show that he is not a credible witness, either from improper conduct or partiality, that the witness must be first asked, in cross-examination, whether or no he made the statements imputed to him, in order that he may, if he choose, admit and attempt to explain them. The principles and reasoning of this decision seem to apply to acts as well as statements.

Evidence to contradict the party's own witness.] It has already been said, that a party who calls a witness cannot bring evidence to discredit him; but if a witness state material facts which make against the party who calls him, other witnesses may be called to prove the facts were otherwise. The great doubt has been whether it is competent to a party to prove that a witness called by him, who has given evidence against him, has made at other times a statement contrary to that made by him at the trial, which has been sometimes looked upon in the same light as discrediting your own witness. So far as regards civil proceedings, the following rule has been laid down by the Common Law Procedure Act, 1854, which provides, in sect. 22, that a party producing a witness may, "in case the witness shall, in the opinion of the judge, prove *adverse*, contradict him by other evidence, or by leave of the judge, prove, that he has made at other times a statement inconsistent with his present testimony; but before such last-mentioned proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to the witness, and he must be asked, whether or not he has made such state-

ment." And in Ireland this enactment has been made to apply to both civil and criminal cases, 19 & 20 Vict. c. 102, s. 25. It contains, however, an extraordinary blunder, because it has made the contradicting of a witness on material points by a party who calls him dependent in all cases on *his proving adverse in the opinion of the judge;* by *adverse* being meant *hostile*, whereas it can hardly have been the intention of the legislature thus to narrow the old rule in civil cases. See the case of Greenough v. Eccles, 28 L. J. C. P. 160. Before the passing of the Common Law Procedure Act, 1854, there was no distinction drawn between civil and criminal cases, and the authorities have been discussed together. It would be useless to state them here, except at great length, as, on a strict investigation, it will appear that the question is discussed in them under very different aspects. They will be found collected in 2 Phill. & Arn. Ev. ch. 10, s. 4, the authors of which work, though strongly inclining to the opposite opinion, admit that the weight of modern authority is against the admissibility of the witness's own previous statement to contradict him.

Evidence of former statements to confirm a party's own witness.] The only occasion on which, if at all, a party can confirm his own witness by proof of former statements made by him according with that made at the trial, is when the witness's credibility has been attacked, either on cross-examination, or by independent evidence. Whether it is admissible in this case has been much controverted. In some cases such evidence has been admitted. Luttrell v. Reynell, 1 Mod. 282; R. v. Friend, 13 How. St. Tr. 32. See also R. v. Harrison, 12 How. St. Tr. 861. So it is laid down by Gilbert, C. B., that though hearsay be not allowed as direct evidence, yet it may be *in corroboration of a witness's testimony, to show that he [*98] affirmed the same thing before on other occasions, and that the witness is still consistent with himself; for such evidence is only in support of the witness that gives in his testimony upon oath. Gilb. Ev. 135, 6th ed. See also Hawk. P. C., b. 2, c. 36, s. 48. These writers were followed by Mr. Justice Buller in his treatise on the law of *nisi prius*, citing the case of Luttrell v. Reynell, B. N. P. 294; but in R. v. Parker, 3 Dougl. 242: 26 E. C. L. R., the same learned judge said that the case of Luttrell v. Reynell and the passage in Hawkins were not now law. The case of R. v. Parker, was a prosecution for perjury tried before Eyre, B. For the prosecution the depositions of a deceased person were given in evidence, and upon the cross-examination of one of the prosecutor's witnesses, it was proposed to inquire into certain declarations of the deceased person, not on oath, for the purpose of corroborating some facts in the deposition material to the prisoner. Eyre, B., rejected the evidence of these declarations, and the court of King's Bench, on a motion for a new trial, held the rejection proper. This case was referred to by Lord Redesdale in the *Berkeley Peerage Case*, where his lordship gave his opinion in conformity thereto. Lord Eldon also concurred in that opinion. In conformity with these latter decisions the rule is laid down by Mr. Phillipps, with this exception, that where the counsel on the other side impute a design to misrepresent from some motive of interest or friendship, it may, in order to repel such an imputation, be proper to show that the witness made a similar statement at a time when the supposed motive did not exist. 2 Phill. Ev. 445, 9th ed.

*WITNESSES.

ATTENDANCE, REMUNERATION, AND PROTECTION OF WITNESSES.

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Mode of compelling the attendance of witnesses—recognizance] There are two modes of compelling the attendance of witnesses; first by recognizance, secondly by subpœna.

The power to bind witnesses by recognizance to appear and give evidence was originally given by the 1 & 2 P. & M. c. 13, and 2 & 3 P. & M. c. 10. It was further extended by the 7 Geo. 4, c. 64, which repealed the prior statutes; and is now regulated by the 11 & 12 Vict. c. 42, s. 20, by which power is given in all cases, whether of felony or misdemeanor, to bind by recognizance the prosecutor and witnesses to appear and give evidence at the next court of oyer and terminer and general gaol delivery, or the next court of quarter sessions, as the case may be. The same power is exercised by coroners under the 7 Geo. 4, c. 64, s. 4, in cases of murder and manslaughter.

When a trial is postponed, the presiding judge, exercising the ordinary functions of a justice of the peace, usually binds over the prosecutor and witnesses to appear and give evidence at the next assizes or the next quarter sessions, as the case may be.

If a witness on his examination before a magistrate refuse to be bound over he may, by the express provisions of the 11 & 12 Vict. c. 42, s. 20, be committed. It seems doubtful whether, in any case, a witness can be compelled to find sureties for his or her appearance. Per Graham, B., Bodmin Summ. Ass. 1827; 2 Stark. Ev. 82, 2d ed.; per Lord Denman, Evans v. Rees, 2 A. & E. 59. It was once thought that an infant was bound to find sureties in such a case, and could be committed in default, on the ground that his own recognizance would be invalid; but it has been since held that infancy is no ground for discharging a forfeited recognizance to appear at the assizes and prosecute for felony. Ex parte Williams, 13 Price, 670. It is still the practice generally not to take the recognizance of a married woman, but that of her husband, or some person present willing to be bound for her, if any such [*100] there be; but, if no such person be at hand, she herself *is frequently bound; and there seems no reason why her recognizance should not be binding.

Formerly it was the practice to estreat indiscriminately all recognizances for the appearance of the prosecutor or witnesses when the witnesses did not appear, but now, by the express provisions of the 7 Geo. 4, c. 64, s. 31, it is enacted that "in every case where any person bound by recognizance for his or her appearance, or for whose appearance any other person shall be so bound to prosecute or give evidence in any case of felony or misdemeanor, or to answer for any common assault, or to articles of the peace, or to abide an order in bastardy, shall therein make default, the officer of the court by whom the estreats are made out shall, and is hereby required to prepare

a list in writing specifying the name of every person so making default, and the nature of the offence in respect of which every such person, or his or her surety was so bound, together with the residence, trade, profession, or calling of every such person and surety, and shall in such list distinguish the principal from the sureties, and shall state the cause, if known, why each such person has not appeared; and whether by reason of the non-appearance of such person the ends of justice have been defeated or delayed; and every such officer shall, and is hereby required, before any such recognizance shall be estreated, to lay such list, if at a court of oyer and terminer and gaol delivery in any county besides Middlesex and London, or at a court of great sessions, or at one of the superior courts of the counties palatine, before one of the justices of those courts respectively; if at a court wherein a recorder or other corporate officer is the judge or one of the judges, before such recorder or other corporate officer; and if at a session of the peace, before the chairman or two other justices of the peace who shall have attended such court, who are respectively authorized and required to examine such list, and to make such order touching the estreating or putting in process of any such recognizance as shall appear to them respectively to be just; and it shall not be lawful for the officer of any court to estreat or put in process any such recognizance without the written order of the justice, recorder, corporate officer, chairman, or justices of the peace before whom respectively such list shall have been laid."

Mode of compelling attendance of witnesses—by subpœna for prosecution.] Where a witness is not bound by recognizance to appear he may be compelled to do so by *subpœna*.(1) This process is issued by the clerk of the peace at sessions, or by the clerk of the assize at the assizes, or it may be issued from the crown office. And the last is the most effectual mode, for not only, as will be seen presently, are the proceedings upon it for contempt more speedy and effective, but it is itself more effectual, as it may be served anywhere in the United Kingdom.

In order to render the process to compel attendance of witnesses more effectual, it was provided by the 45 Geo. 3, c. 92, s. 3, that the service of a subpœna on a witness in any part of the United Kingdom, for his appearance on a criminal prosecution in any other part, shall be as effectual as if it had been in that part where he is required to appear. It has been held on this statute, that by the word "part" in this section is signified one of the great divisions, as Scotland or Ireland. R. v. Brownell, 1 Ad. & Ell. 598: 28 E. C. L. R. It does not seem, therefore, that any increased validity is thereby given to writs of subpœna issued *from courts [*101] of limited jurisdiction, which at common law are only available within such jurisdiction.

Where there are writings or documents in the possession of a witness, which it is desired that he should produce on the trial, a clause of *duces tecum*, directing the witness to bring with him into court the documents in question, is added to the writ of *subpœna*. If the documents are in the possession of the party or his attorney, a notice to produce must be given. Where the documents are in the possession of the prosecutor, and the prisoner is desirous of having them produced upon the trial, the safest mode of proceeding appears to be to serve the prosecutor with a *subpœna duces tecum*, and not to rely on a notice to produce, since it may be a question whether a prosecutor is so far a party to the proceeding as to be affected by a notice to produce.

(1) The defendant is entitled to a subpœna before the grand jury have found the bill. 1 Burr's Trial, 178; United States v. Moore, Wallace, 23.

The *subpœna duces tecum*, is compulsory on the witness, and though it is a question for the decision of the presiding judge, whether the witness in court should produce the documents required, yet he ought to be prepared to produce them, if the judge be of that opinion. Amey v. Long, 9 East, 473; R. v. Greenway, 7 Q. B. 126: 53 E. C. L. R.(1)

A person subpœnaed merely to produce a document need not be sworn: Perry v. Gibson, 1 A. & E. 48: 28 E. C. L. R.; and if sworn by mistake, is not liable to be cross-examined by the opposite party. Rush v. Smyth, 4 Tyrw. 675; 1 Cr. M. & R. 194. See further, *post*, Examination of Witnesses.

The prosecutor ought not include more than four persons in one subpœna. Doe v. Andrewes, Cowp. 845; Tidd, 855.

A subpœna requiring the party to attend a trial on the commission day extends to the whole assizes, which, by fiction of law, are supposed to last but one day. Scholes v. Hinton, 10 M. & W. 15.

If the party whose attendance is required be a married woman, the service should be upon her personally. Goodwin v. West, Cro. Car. 522; 2 Phill. Ev. 373, 9th ed.

The witness must be personally served, by leaving with him a copy of the *subpœna*, or a ticket which contains the substance of the writ. 2 Phill. Ev. 373, 9th ed.; 2 Russ. by Greaves, 945; 1 Stark. Ev. 77, 2d ed.; Maddeson v. Shore, 5 Mod. 355. Where a copy only is served, the original must be shown to the witness, whether he require it or not, otherwise he cannot be attached. Wadsworth v. Marshall, 3 Tyrw. 228; 1 C. & M. 87: 41 E. C. L. R. It must be served a reasonable time before the day of trial. Service upon a witness at two in the afternoon, in London, requiring him to attend the sittings at Westminster in the course of the same evening, has been held to be too short. Hammond v. Stewart, 1 Str. 510; 2 Tidd, 856, 8th ed.

In a criminal case a person who is present in court, when called as a witness, is bound to be sworn and to give his evidence, although he has not been subpœnaed. An indictment for stopping up a way is a criminal case for this purpose. Per Littledale, J., R. v. Sadler, 4 C. & P. 218. So a witness being sworn, and having in court a document in his possession, is bound to produce it if required, though he have not received any notice to produce, nor been served with a *subpœna duces tecum*. Dwyer v. Collins, 7 Exch. R. 639; S. C. 21 L. J. Ex. 225.

Mode of compelling the attendance of witnesses—by subpœna for prisoner.] In [*102] cases of misdemeanor, the defendant was always *entitled to a writ of subpœna, but it was otherwise in capital cases, in which the party is not, at common law, entitled to call witnesses at all. In practice it had become common to allow witnesses for the prisoner to be heard in capital cases, about Lord Coke's time; but they did not give their testimony on oath, and could not be compelled to give their attendance. But by the 7 Wm. 3, c. 3, s. 7, all persons indicted for high treason, whereby corruption of blood may ensue, shall have the like process of the court where they shall be tried, to compel their witnesses to appear for them, as is usually granted to compel witnesses to appear against them. And by the 1 Anne, st. 1, c. 9, all witnesses on behalf of a prisoner, for treason or felony, shall be sworn in the same manner as witnesses for the crown, and be liable to all the penalties of perjury. Since that statute the process of subpœna is allowed to prisoners in cases of felony. 2 Hawk. P. C., c. 46, s. 172. A witness who refuses, after having been supœnaed to attend, to give evidence for a prisoner, is liable to an attachment in the same manner as if subpœnaed for the prosecution. 1 Stark. Ev. 85, 2d ed.; *post*, p. 103.

(1) The *subpœna duces tecum* is not a process of right. 1 Burr's Trial, 137, 182; Gray v. Pentland, 2 Serg. & Rawle, 31.

Mode of compelling the attendance of witnesses—habeas corpus ad testificandum.] Where a person required as a witness is in custody, or under the duress of some third person, as a sailor on board of a ship of war, so as to prevent his attendance, the mode of compelling is to issue a *habeas corpus ad testificandum.* For this purpose application must be made to the court before which the prisoner is to be tried, or to a judge, upon an affidavit, stating that the party is a material witness, and willing to attend. R. v. Roddam, Cowp. 672; 2 Phill. Ev. 374, 9th ed.; 1 Stark. Ev. 80, 2d ed. The court will then, if they think fit, make a rule, or the judge will grant his *fiat* for a writ of *habeas corpus:* R. v. Burbage, 3 Burr. 1440; 2 Phill. Ev. 375, 9th ed.; which is then sued out, signed, and sealed. Tidd's Prac. 809.

Formerly, it was doubted whether persons in custody could be brought up as witnesses by writ of *habeas corpus*, to give evidence before any other courts than those at Westminster; but by the 43 Geo. 3, c. 140, a judge of the King's Bench or Common Pleas, or a baron of the Exchequer, may, at his discretion, award a writ of *habeas corpus ad testificandum*, for bringing any prisoner detained in any gaol in England before a court-martial, or before commissioners of bankruptcy, commissioners for auditing the public accounts, or other commissioners, acting by virtue of any royal commission or warrant.

By the 44 Geo. 3, s. 102, U. K., the judges of the King's Bench, or Common Pleas, or barons of the Exchequer in England or Ireland, or the justices of oyer and terminer, or gaol delivery (being such judge or baron), have power to award writs of *habeas corpus*, for bringing prisoners, detained in gaol, before such courts, or any sitting at *nisi prius*, or before any court of record in the said parts of the said United Kingdom, to be there examined as witnesses, and to testify the truth before such courts, or before any grand, petit, or other jury, in any cause or matter, civil or criminal, which shall be depending, or to be inquired into, or determined, in any of the said courts.

The application under this statute ought to be to a single judge. R. v. Gordon, 2 M. & S. 582.

The writ should be left with the sheriff or other officer, who will then be bound to bring up the body, on being paid his reasonable *expenses. 2 Phill. Ev. 375, [*103] 9th ed.; 1 Stark. Ev. 81, 2d ed. If the witness be a prisoner of war, he cannot be brought up, without an order from the Secretary of State. Furly v. Newnham, 2 Doug. 419.

A witness may be brought up on *habeas corpus* from a lunatic asylum, on an affidavit that he is fit for examination, and not dangerous. Fennel v. Tait, 5 Tyrw. 218; 1 Cr. M. & R. 584, S. C.

Mode of compelling the attendance of a witness—by warrant from the secretary of state or judge.] It is enacted by 16 & 17 Vict. c. 30, that any secretary of state, and any judge of the superior courts of Common Law at Westminster, may, if he thinks fit, "upon application by affidavit issue a warrant or order under his hand, for bringing up any prisoner or person, confined in any gaol, prison, or place, under any sentence, or under commitment for trial or otherwise (except under process in any civil action, suit, or proceeding), before any court, judge, justice, or other judicature, to be examined as a witness in any cause or matter, civil or criminal, depending, or to be inquired of, or determined in or before such court, judge, justice, or judicature; and the person required by any such warrant or order, to be so brought before such court, judge, justice, or judicature, shall be so brought under the same care and custody, and be dealt with in like manner, in all respects, as a prisoner re-

quired by any writ of *habeas corpus* awarded by any of her Majesty's superior courts of law at Westminster, to be brought before such court to be examined as a witness in any cause or matter depending before such court, is now by law required to be dealt with."

Mode of compelling the attendance of witnesses—consequences of neglect to obey subpœna.] Where a person has been duly served with a subpœna, and who is able to do so, neglects to appear in obedience to it, he is punishable by attachment, and if taken under the attachment, he may be detained until he has given evidence upon the trial of the prisoner, and may then be set at liberty. 1 Chitty, C. L. 614.(1) The party disobeying is subject to an attachment, although the cause was not called on. Barrow v. Humphreys, 3 B. & A. 598. It is not necessary, in order to make a witness liable for disobeying a subpœna, that the jury should have been sworn. Mullett v. Hunt, 3 Tyrw. 875; 1 Cr. & M. 752. Neither does it seem requisite that the party should have been called on his subpœna, particularly if he did not attend the court at all. Dixon v. Lee, 5 Tyrw. 180; 1 Cr. M. & R. 645; R. v. Stretch, 5 A. & E. 503. But in order to ground a motion for an attachment, the affidavit must state that the party was a material witness. Tinley v. Porter, 2 M. & W. 822; and if it appear, by the notes of the judge at the trial, or upon affidavit, that the testimony of the witness could not have been material, the rule for an attachment will not be granted. Dicas v. Lawson, 5 Tyrw. 235; 1 Cr. M. & R. 934.

If the subpœna issued out of the crown office, the court of Queen's Bench will, upon application, grant the attachment. R. v. Ring, 8 T. R. 585. When the process is not issued out of the crown office, and it is served in one part of the United Kingdom for the appearance of a witness in another part, it is enacted by 45 Geo. 3, c. 92, ss. 3, 4, U. K., that the court issuing such process may, upon proof to their satisfaction of the service of the subpœna, transmit a certificate of the default of the [*104] witness under the seal of the court, or *under the hand of one of the justices thereof to the court of King's Bench if the service were in England, to the court of Justiciary if in Scotland, and to the court of King's Bench in Ireland, if in Ireland, which courts are empowered to punish the witness in the same way as if he had disobeyed a subpœna issued out of these courts, provided the expenses have been tendered. *Vide ante*, p. 100.

Where the subpœna has not issued from the crown office, application must be made to the court out of which the process issued; for it has been decided that disobedience to a subpœna issued by a court of quarter sessions is not a contempt of the court of King's Bench. R. v. Brownell, *supra*. It has been said that justices in sessions have no power of proceeding against a party by attachment. Hawk. P. C. bk. 2, c. 8, s. 33, the authority for which appears to be the case of R. v. Bartlett, 2 Sess. Ca. 291. But courts of quarter sessions may fine an individual for a contempt in not obeying the subpœna, in like manner as it is their constant practice to fine jurors who do not attend when summoned. See R. v. Clement, 4 B. & A. 233. It has been held, that if a witness refuses to give evidence before a court of quarter sessions, he may be fined and imprisoned until the fine be paid. R. v. Lord Preston, 1 Salk. 278. And it can scarcely be doubted that he may be committed, though he may not be attached, for there is a distinction between commitment and attachment. See R. v. Bartlett, *ubi supra*; Bac. Abr. Courts, E. A peer of the realm is bound to obey a subpœna, and is punishable in the same manner as any other subject for

(1) United States v. Caldwell, 2 Dall. 333.

disobedience. Id. If the witness can neither be attached or committed, he may be indicted.

Remuneration of witnesses.] At common law there was no mode provided for reimbursing witnesses for their expenses in criminal cases; but by the 27 Geo. 2, c. 3, 18 Geo. 3, c. 19, and 58 Geo. 3, c. 70, provision was made for this purpose in cases of felony. By the 7 Geo. 4, c. 64, the above statutes are repealed, and the expenses of witnesses in most cases of misdemeanor, and all cases of felony, are now allowed. The various statutory provisions which empower courts of justice to grant costs in criminal cases showing when witnesses will be entitled to them, will be found discussed at length under the title "Costs."

Witness bound to answer without tender of expenses.] Where a subpœna is served on a person in one part of the United Kingdom for his appearance in another, under the 45 Geo. 3, c. 92 (*ante*, p. 100) it is provided that the witness shall not be punishable for default, unless a sufficient sum of money has been tendered to him, on the service of the subpœna, for defraying the expenses of coming, attending, and returning. In this case, therefore, in order that the subpœna may be effectual, the expenses must be tendered. But this only applies to a witness brought from one great division of the United Kingdom, as England or Ireland, to another. *Supra*, p. 100.(1) It has, indeed, been doubted whether in other criminal cases a witness may not, unless a tender of his expenses has been made, lawfully refuse to obey a subpœna, and the doubt is founded upon the provision of the above statute. 1 Chitty, Cr. Law, 613. The better opinion, however, seems to be, and it is so laid down in books of authority, that witnesses making default on the trial of criminal prosecutions (whether felonies or misdemeanors), are not exempted from attachment *on the ground that their expenses were not tendered at the time of the [*105] service of the subpœna, although the court would have good reason to excuse them for not obeying the summons, if in fact they had not the means of defraying the necessary expenses of the journey. 2 Phill. Ev. 383, 9th ed.; 2 Russ. by Greaves, 947. "It is," says Mr. Starkie, "the common practice in criminal cases, for the court to direct the witness to give his evidence, notwithstanding his demurrer on the ground that his expenses have not been paid." 1 Ev. 83 (*a*), 2d ed. And, accordingly, at the York summer assizes, 1820, Bayley, J., ruled, that an unwilling witness, who required to be paid before he gave evidence, had no right to demand such payment. His lordship said, "I fear I have not the power to order your expenses;" and on asking the Bar if any one recollected an instance in point, Scarlett answered, "It is not done in criminal cases." 1 Anon. Chetw. Burn. 1001; 2 Russ. by Greaves, 948 (*a*). So on the trial of an indictment which had been removed into the Queen's Bench by *certiorari*, a witness for the defendant stated, before he was examined, that at the time he was served with the subpœna no money was paid him, and asked the judge to order the defendant to pay his expenses before he was examined. Park, J., having conferred with Garrow, B., said, "We are of opinion that I have no authority in a criminal case, to order a defendant to pay a witness his expenses, though he has been subpœnaed by such defendant; nor is the case altered by the

(1) Witnesses for the defendant in a prosecution for a misdemeanor are not bound to attend the trial, unless their fees are paid as in civil cases; otherwise in prosecutions for felony. Chamberlain's Case, 4 Cow. 49.

The insufficiency of the sum tendered is of no avail, if no objection on that account was made by the witness at the time. Andrews v. Andrews, Coleman, 119; S. C. 2 Johns. Cas. 109.

indictment being removed by *certiorari*, and coming here as a civil cause." R. v. Cooke, 1 C. & P. 321 : 12 E. C. L. R. In R. v. Cozen, Glouc. Spr. Ass. 1843, 2 Russ. by Greaves, 948 (*a*), Wightman, J., directed an officer of the Ecclesiastical Court, who had brought a will from London under a *subpœna duces tecum*, to go before the grand jury, although he objected on the ground that his expenses had not been paid. But the court might refuse to grant an attachment in the case of a poor witness, if his expenses were not paid.

Protection of witnesses from arrest.] A witness attending to give evidence, whether subpœnaed or only having consented to attend (Smith v. Stewart, 3 East, 89), is protected from arrest *eundo, morando, et redeundo*. Meekins v. Smith, 1 H. Bl. 636. A reasonable time is allowed to the witness for going and returning, and in making this allowance the courts are disposed to be liberal. 1 Phill. Ev. 374, 9th ed.; 1 Stark. Ev. 90, 2d ed. A witness residing in London is not protected from arrest between the time of the service of the subpœna and the day appointed for the examination ; but a witness coming to town to be examined, is, as it seems, protected during the whole time he remains in town, *bonâ fide*, for the purpose of giving his testimony. Gibbs v. Phillipson, 1 Russell & Mylne, 19. It has been held that a person subpœnaed as a witness in a criminal prosecution, tried at the King's Bench sittings, but who was committed for a contempt of court in striking the defendant, has the same privilege from arrest in returning home after his imprisonment has expired, that he would have had in returning home from the court if he had not been so committed. R. v. Wigley, 7 C. & P. 4 : 32 E. C. L. R. If a witness is improperly arrested, the court out of which the subpœna issued, or a judge of the court in which the case has been or is to be tried, will order him to be discharged. Archb. Cr. Law, 161, 9th ed. See 3 Stark. N. P. 132; see Arch. Pr. of the Q. B., 10th ed. 734.(1)

[*106] *WITNESSES.

INCOMPETENCY FOR WANT OF UNDERSTANDING.

Infants, ... 106
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It is for the court to decide upon the competency of witnesses, and for the jury to determine their credibility. It is the province of the former to judge whether there

(1) The protection does not extend to the service of a summons unless in the actual presence of the court. Blight's Ex. v. Fisher et al., Peters' C. C. Rep. 41. *Contra*, Halsey v. Stewart, 1 Southard, 366. See Miles v. McCullough, 1 Binn. 77 ; Hays v. Shield, 2 Yeates, 222; Wetherill v. Seitzinger, 1 Miles, 237. As a summons is a mere notice and does not interfere with the duties of a witness, it seems not within the reason of the rule. The case is different with a witness attending from another county, district, or State, and who ought not by reason of such attendance to be subjected to the inconvenience of defending a suit at a distance from his home. See Hopkins v. Coburn, 1 Wend. 292.

A witness attending before a magistrate under a rule to take his deposition is protected. United States v. Edone, 9 Serg. & Rawle, 147. So a witness from another State. Norris v. Beach, 2 Johns. 294; Sanford v. Chase, 3 Cowen, 381. So while at his lodgings, as well as going to or returning from court. Hurst's Case, 4 Dall. 387, S. C. 1 Wash. C. C. Rep. 136. But not after his discharge while engaged in his private affairs. Smythe v. Banks, 4 Dall. 329.

The privilege is personal and may be waived. Brown v. Getchell, 11 Mass. 11; Fletcher v. Baxter, 2 Atk. 224; Prentis v. The Commonwealth, 5 Rand. 697.

As to writs of protection, see Ex parte Hall, 1 Tyler, 274 ; Ex parte McNeil, 3 Mass. 288. One who attends without a subpœna is not privileged though he may have the writ. Ex parte Neil, 6 Mass. 264.

be *any* evidence; of the latter whether there be *sufficient* evidence. Dougl. 375, B. N. P. 297; Rosc. N. P. Ev. 103, 5th ed.(1)

Infants.] It is said by Gilbert, C. B., that infants under the age of fourteen are not regularly admissible as witnesses, though there is no time fixed wherein they are to be excluded from evidence, but that the reason and sense of their evidence are to appear from the questions propounded to them, and their answers.(2) Gilb. Ev. 144. At one time their age was considered as the criterion of their competency, and it was a general rule that none could be admitted under the age of nine years, very few under ten. R. v. Traver, 2 Str. 700; 1 Hale, P. C. 302; 2 Hale, P. C. 278; 1 Phill. Ev., 9th ed. But of late years no particular age is required in practice to render the evidence of a child admissible. A more reasonable rule has been adopted, and the competency of children is now regulated, not by their age, but by the degree of understanding which they appear to possess. 1 Phill. Ev. 4, 9th ed. In R. v. Brazier, 1 East, P. C. 448; 1 Leach, 199, S. C., Blackstone, Nares, Eyre, and Buller, JJ., were of opinion that the evidence of a child five years of age would have been admissible, if she had appeared on examination to be capable of distinguishing between good and evil. But others of the judges, particularly Gould and Willes, JJ., held that the presumption of law, of want of discretion under seven, was conclusive. Subsequently all the judges agreed that a child of any age, if capable of distinguishing between good and evil, might be examined upon oath, and that a child of whatever age could not be examined unless sworn. This is now the established rule in all cases, civil as well as criminal, and whether the prisoner is tried for a capital offence, or one of an inferior nature. According to this rule the admissibility of children depends not merely upon their possessing a competent degree of understanding, but also in part upon their having received a certain share of religious instruction. A child whose intellect appears to be in other respects sufficient to enable it to give useful evidence, may, from *defect of religious instruction, be wholly unable to give any account [*107] of the nature of an oath, or of the consequences of falsehood. 1 Phill. Ev. 9th ed. In a recent case of trial for murder, where it appeared that a girl eight years old, up to the time of the deceased's death, was totally ignorant of religion, but subsequently she had received some instruction as to the nature and obligation of an oath, but at the trial seemed to have no real understanding on the subject of religion, or a future state, Patteson, J., would not allow her to be sworn, observing, "I must be satisfied that this child feels the binding obligation of an oath from the general course of her religious education. The effect of the oath upon the conscience of the child should arise from religious feelings of a permanent nature, and not merely from instructions confined to the nature of an oath, recently communicated to her for the purposes of this trial; and as it appears that previous to the happening of the circumstances, to which this witness comes to speak, she had had no religious education whatever, and had never

(1) Cook et al. v. Mix, 11 Conn. 432.
The question whether a witness is competent, though depending upon conflicting testimony, is for the court to decide, not the jury. Reynolds v. Lounsbury, 6 Hill, 534.

(2) A child over fourteen may be examined without previous interrogation. Den v. Vanden, 2 South. 589. Under fourteen is presumed incapable. State v. Doherty, 2 Tenn. Rep. 80; Commonwealth v. Hutchinson, 19 Mass. 225. See 18 Johns. 105. The testimony of an infant of seven years, corroborated by circumstances, was held sufficient to justify a conviction for a rape. The State v. Le Blanc, 1 Const. Rep. 354.
A child of any age, capable of distinguishing between good and evil, may be examined on oath; and the credit due to his statements is to be submitted to the consideration of the jury, who should regard the age, the understanding, and the sense of accountability for moral conduct, in coming to their conclusion. The State v. Whittier, 21 Maine, 341.
In a criminal trial a child seven years of age may testify, but his credibility is a matter for the jury to consider. Washburn v. The People, 10 Michigan, 372.

heard of a future state, and now has no real understanding on the subject, I think that I must reject her testimony." R. v. Williams, 7 C. & P. 320: 32 E. C. L. R. Mr. Pitt Taylor observes upon this case (Ev. 1007, 2d ed.), "Perhaps the language which the learned judge is reported to have used was somewhat stronger than the law warranted, and it certainly went further than the facts required, as the child even when offered as a witness, had no real knowledge of the nature of an oath. Had not this been the case, it seems difficult to understand upon what valid ground her testimony could have been rejected; for whether she was instructed in religious knowledge previously or subsequently to the commission of the crime in question, or whether the instruction was intended to excite permanent feelings or merely to secure the temporary purpose of enabling her to swear to the facts she had witnessed, can signify nothing; provided that at the time when she was called upon to give her evidence, she was really aware of the solemn responsibility which devolved upon her of speaking the truth. Accordingly in Ireland it has been held that even on an indictment for murder, an infant might be examined, though her religious knowledge had been communicated to her after the perpetration of the offence, and with the sole object of rendering her a competent witness." R. v. Milton, Ir. Cir. Rep. 61, per Doherty, C. J. In R. v. Nicholas, 2 C. & K. 246: 61 E. C. L. R., Pollock, C. B., refused to put off the trial in order that a child of six years old might receive instruction, but said that he thought there were cases in which such an application might be entertained; and that the judge should act according to his discretion.

Where a case depends upon the testimony of an infant, it is usual for the court to examine him as to his competency to take an oath, previously to his going before the grand jury, and if found incompetent, for want of proper instruction, the court will, in its discretion, put off the trial, in order that the party may, in the meantime, receive such instruction as may qualify him to take an oath. 1 Stark. Ev. 94, 2d ed. This was done by Rooke, J., in the case of an indictment for a rape, and approved of by all the judges.(1) 1 Leach, 430 (*n*); 2 Bac. Ab. by Gwill. 577 (*n*). An application to postpone the trial upon this ground ought properly to be made before the child is examined by the grand jury; at all events, before the trial has commenced, for if the jury are sworn, and the prisoner is put upon his trial before the incompe-
[*108] tency of the witness is discovered, the judge *ought not to discharge the jury upon this ground. 1 Phill. Ev. 5, 9th ed., citing R. v. Wade, *post*, tit. Practice. There the witness was an adult, but the principle seems to apply equally to the case of a child. If a child is, from want of understanding, incapable of giving evidence upon oath, proof of its declaration is inadmissible. R. v. Tucker, 1808, MS.; 1 Phill. Ev. 6, 9th ed, Anon. Lord Raym. cited 1 Atk. 29.

Degree of credit to be given to the testimony of infants.] It is said by Blackstone, that "where the evidence of children is admitted, it is much to be wished, in order to render it credible, that there should be some concurrent testimony of time, place, and circumstances, in order to make out the fact; and that the conviction should not be grounded solely on the unsupported testimony of an infant under years of discretion." 4 Com. 214. In many cases undoubtedly the statements of children are to be received with great caution, but it is clear that a person may be legally convicted upon such evidence alone and unsupported; and whether the account of the child requires to be corroborated in any part, or to what extent, is a question exclusively for the jury, to be determined by them on a review of all the circumstances of the

(1) Jenner's Case, 2 Rogers's Rec. 147.

case, and especially of the manner in which the evidence of the child has been given. 1 Phill. Ev. 6, 9th ed.

It may be observed that the preliminary inquiry usually made for ascertaining their competency is not always of the most satisfactory nature, and sometimes is of such a description that merely by a very slight practising of the memory a child might be made to appear competent and qualified as a witness. The inquiry is commonly confined to the ascertaining of the fact whether a child has a conception of Divine punishment being a consequence of falsehood, it seldom extends so far as to ascertain the child's notion of an oath, and scarcely ever relates to the legal punishment of perjury. Independently of the sanction of an oath, the testimony of children, after they have been subjected to cross-examination, is often entitled to as much credit as that of grown persons. What is wanted in the perfection of the intellectual faculties is sometimes more than compensated by the absence of motives to deceive. 1 Phill. Ev. 6, 9th ed.

Deaf and dumb persons.] It was formerly held that a person born deaf and dumb was, *primâ facie*, in contemplation of law an idiot. R. v. Steel, 1 Lea, C. C. 452; but this presumption has been disputed by Wood, V. C., in Harrod v. Harrod, 1 Kay & J. 9. If it appear that such person has the use of his understanding, he is criminally answerable for his acts: 1 Hale, P. C. 37; and is also competent as a witness.(1) Thus where a man deaf and dumb from birth, was produced as a witness on a trial for larceny, he was allowed to be examined through the medium of his sister, who was sworn to interpret to the witness, "the questions and demands made by the court to the witness, and the answers made to them." The sister stated, that for a series of years she and her brother had been enabled to understand one another by means of certain arbitary signs and motions, which time and necessity had invented between them. She was certain that her brother had a perfect knowledge of the tenets of Christianity, and that she could communicate to him notions of the moral and religious nature of an oath, and of the temporal dangers of perjury. R. v. Ruston, 1 Leach, 408. *So in Scotland, upon a trial for rape, the woman, who was [*109] deaf and dumb, but had been instructed by teachers, by means of signs, with regard to the nature of an oath, of a trial, and of the obligation of speaking the truth, was admitted to be examined. R. v. Martin, 1823, Alison's Prac. Crim. Law of Scotl. 486.

Idiots and lunatics.] Persons not possessing the use of their understanding, as idiots, madmen, and lunatics, if they are either continually in that condition, or subject to such a frequent recurrence of it as to render it unsafe to trust to their testimony, are incompetent witnesses.

An idiot is a person who has been *non compos mentis* from his birth, and who has never any lucid intervals: Co. Litt. 247; Bac. Ab. Idiot (A. 1); and cannot be received as a witness. Com. Dig. Testm. (A. 1.)

A lunatic is a person who enjoys intervals of sound mind, and may be admitted as a witness, *in lucidis intervallis.* Com. Dig. Testm. (A. 1.) He must of course have been in possession of his intellect at the time of the event to which he testifies, as well as at the time of examination; and it has been justly observed, that it ought to appear that no serious fit of insanity has intervened, so as to cloud his recollection, and

(1) State v. De Wolf, 9 Conn. 98. When the witness can, it is better to make him write his answers. Morrison v. Lennard, 3 Carr. & P. 127. Eng. Com. L. Reps. xiv, 238; Snyder v. Nations, 5 Blackf. 295.

cause him to mistake the illusions of imagination for the events he has witnessed. Alison's Prac. C. P. of Scotl. 436. With regard to those persons who are afflicted with *monomania*, or an aberration of mind on one particular subject, not touching the matter in question, and whose judgment in other respects is correct, the safest rule appears to be to exclude their testimony, it being impossible to calculate with accuracy the extent and influence of such a state of mind.

Where a lunatic is tendered as a witness, it is for the judge, assisted by medical testimony, to determine whether he shall be admitted, and if, upon his examination upon the *voire dire*, he exhibits a knowledge of the religious nature of an oath, and appears capable of giving an account of transactions of which he has been an eye-witness, it is a ground for his admission. It is for the jury to judge of the credit that is to be given to his testimony. R. v. Hill, 2 Den. C. C. R. 254.(1)

[*110] *WITNESSES.

INCOMPETENCY FROM WANT OF RELIGIOUS PRINCIPLE.

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General rules.] It is an established rule that all witnesses who are examined upon any trial, civil or criminal, must give their evidence under the sanction of an oath, or some affirmation substituted in lieu thereof. This rule is laid down as an acknowledged proposition by some of our earliest writers: Sheppard's Abridg. Tryal; and it appears to be of universal application, except in the few cases in which a solemn affirmation has been allowed by statute (see *post*) in lieu of an oath. No exemption from this obligation can be claimed in consequence of the rank or station of a witness. A peer cannot give evidence without being sworn: Lord Shaftesbury v. L. Digby, 3 Keb. 631; R. v. Lord Preston, 1 Salk. 278; and the same appears to be the case in regard to the king himself. 2 Rol. Abr. 686; Omichund v. Barker, Willes' Rep. 550. The rule also holds even in the case of a judge: Kel. 12; or juryman: Bennett v. Hundred of Hertford, Sty. 233; Fitzjames v. Moys, 1 Sid. 133; Kitchen v. Manwaring, cited Andr. 321; 7 C. & P. 648: 32 E. C. L. R.; who happens to be cognizant of any fact material to be communicated in the course of a trial. 1 Phill. Ev. 7, 9th ed. An examination on oath implies that a witness should go through a ceremony of a particular import, and also that he should acknowledge the accuracy of that ceremony to speak the truth. 1 Phill. Ev. 8, 9th ed. It is therefore necessary, in order that a witness's testimony should be received, that he should believe in the existence of a God, by whom truth is enjoined and

(1) Livingston v. Kiersted, 10 Johns. 362. The question whether a witness, sane at the time he testifies, was insane at the time of the transaction with regard to which he testifies, goes to the credibility of his testimony, and not to his competency, and is therefore a subject for evidence to the jury, to be adduced by the opposing party with his other evidence. Holcomb v. Holcomb, 28 Conn. 177.

A person in a state of intoxication is inadmissible. Gebhart v. Skinner, 15 Serg. & Rawle, 235.

It is no objection either to the competency or credibility of a witness, that he is subject to fits of mental derangement, if it appears that he is sane at the time he is offered. Campbell v. The State, 23 Alabama, 44.

Insanity of witness at the time he testifies is a question of competency for the court. Holcomb v. Holcomb, 28 Conn. 177.

falsehood punished. Id. 10, 9th ed. It is not sufficient that a witness believes himself bound to speak the truth from a regard to character, or to the common interests of society, or from a fear of the punishment which the law inflicts upon persons guilty of perjury. R. v. Ruston, 1 Leach, C. C. 455. Atheists, therefore, and such infidels as do not possess any religion that can bind their consciences to speak the truth, are excluded from being witnesses. Bull, N. P. 292; Gilb. Ev. 129. Although it was formerly held that infidels (that is to say, persons professing some other than the Christian faith) could not be witnesses, on the ground that they were under none of the obligations of our religion, and therefore could not be under the influence of the oaths which our courts administer: Gilb. Ev. 142; yet a different rule has since prevailed; and it is now well settled, since the case of Omichund v. Barker, Willes, 549, that those infidels who believe in a God, and that he will punish them if they swear falsely, may be admitted as witnesses in this country.(1)

*It was said by Willes, C. J., that he was clearly of opinion that those [*111] infidels (if any such there be) who either do not believe in a God, or if they do, do not think that he will either reward or punish them in this world or the next, cannot

(1) Persons who do not believe in the obligation of an oath, and a future state of rewards and punishments, are incompetent witnesses. Curtiss v. Strong, 4 Day's Case, 51; Wakefield v. Ross, 5 Mason, 16; State v. Cooper, 2 Tenn. 96. It is not enough to believe in God, and that men are punished in this life. Atwood v. Wilton, 7 Conn. 66. [Altered in Connecticut by legislative enactment, May, 1830.] But the witness need not believe in the eternity of future punishment. Butts v. Smartwood, 2 Cowen, 431, 433 n., 572 n. His belief may be proved from his previous declarations and avowed opinions, and he cannot be admitted to explain them himself. Curtiss v. Strong, 4 Day's Cases, 51; Norton v. Ladd, 4 N. Hamp. 444; The State v. Petty, 1 Harper, 62; Jackson v. Gridley, 18 Johns. 98. He may show reform of conduct and opinion since the declarations proved. Ibid. A single declaration of disbelief proved, is not enough. Case of Thornton et al., Bucks Co., Pa., Pamph. One who does not believe in the existence of a God is not a competent witness, and the fact may be established by the testimony of other witnesses. Thurston v. Whitney, 2 Cushing, 104.

Contra, that disbelief in a future state goes only to credit. Hunscum v. Hunscum, 15 Mass. Rep. 184. And see Noble v. People, 1 Bru. 29; Easterday v. Hilborne, Wright, 345.

Any person, who believes in the existence of a God or a Supreme Being, who is the just moral Governor of the universe, who will, either in this life or the next, reward virtue and punish vice, and who feels that an oath will be binding upon his conscience, cannot be excluded from giving his testimony on the ground of his religious belief. Arnold v. Arnold, 13 Verm. 362.

The true test of a witness's competency on the ground of his religious principles is, whether he believe in the existence of a God who will punish him if he swear falsely; and within this rule are comprehended those who believe future punishments not to be eternal. Cubbison v. McCreary, 2 Watts & Serg. 262.

One who believes in the existence of God, and that an oath is binding on the conscience, is a competent witness, though he does not believe in a future state of rewards and punishments. Brock v. Milligan, 10 Ohio. 121,

A person who believes that there is no God, is not a competent witness. To prove this it is competent to show his settled and previous declarations on the subject. Though the witness may have been for this reason incompetent, yet if the objection has been removed by a change of views he should be examined. Scott v. Hooper, 14 Verm. 535.

The declarations of a witness are competent evidence of his disbelief of the existence of a Supreme Being. Smith v. Coffin, 18 Maine, 157.

Although, after the proof of such declarations, an honest change of opinion may be shown, and the proposed witness thereby rendered competent, yet the testimony of another person that the witness offered was then, and for many years next preceding, had been, a Universalist, and was an active member of a Universalist society, and has ever been and then was a firm believer in the Christian religion, was held to be inadmissible. Ibid.

When declarations of disbelief are proved, the person offered as a witness cannot be permitted to testify to his belief in a Supreme Being in order to qualify himself for admission. Ibid.

To show a witness incompetent from a defect of religious belief, his conversation or declarations on religious topics are admissible. Bartholemy v. The People, 2 Hill, 249. See Quinn v. Crowell, 4 Whart. 334.

A belief in a future state of rewards and punishments, or a belief in the inspired character of the Bible, are not essential to the competency of a witness. It is enough if he believes in a God who will punish false swearing. Blair v. Seaver, 2 Casey, 274; Shaw v. Moore, 4 Jones's Law, 25.

The incompetency of a witness for want of religious belief, may be proved at the option of the party seeking to exclude him either by the *voire dire* or by evidence of his declarations previously made. Harrel v. The State, 1 Head, 125.

The want of religious belief in a witness cannot be shown by examination of the witness himself. The Commonwealth v. Smith, 2 Gray, 516.

As to incompetency for religious belief, see Central Military Tract, R. R. Co. v. Rockafellow, 17 Illinois, 541.

be witnesses in any case, nor under any circumstances, for this plain reason, that an oath cannot possibly be any tie or obligation upon them. Omichund v. Barker, Willes, 549. A witness was rejected on this ground by Grose, J., at the Bedford Spring Assizes, 1789, on an indictment for murder. Anon. 1 Leach, 341 (*n*).

An adult witness will, of course, be presumed to profess those principles of religion which render him a competent witness.

What the exact question is which is the subject of inquiry in such a case does not appear to be fully decided. The witness must believe in the existence of a Divine Power, who would be offended by perjury, and would be capable of punishing it. The doubt has been whether it is also necessary that the witness should believe in a future state of rewards and punishments; from the case of Omichund v. Barker, it seems that Willes, C. J., thought that the expectation of temporal punishment proceeding from a Divine Power was sufficient.

There has also been some dispute as to the mode in which the state of the witness's belief is to be ascertained. The preponderance of authority is in favor of the witness being himself examined as to his religious opinion. Ph. & Am. Ev. 12; The Queen's Case, 2 B. & B. 284; R. v. Taylor, 1 Peake 11; R. v. White, 1 Lea. 430; R. v. Serva, *infra;* Best Ev. 208. It is, however, the opinion of some writers (and this opinion is supported by the practice in America) that the witness ought not to be questioned at all, but that the fact should be proved by the oath of persons acquainted with him. Mr. Best (*ubi supra*) strongly contends that evidence both of the party himself and others, is admissible on the point.

The inquiry can never be carried further, if the witness himself asserts his belief. Thus in R. v. Serva, 2 C. & K. 53, a negro, who was called as a witness, stated, before he was sworn, that he was a Christian, and had been baptized; Platt, B., held that he might be sworn, and that no further question could be asked before he was so.

In R. v. James, 6 Cox, C. C. 5, after the jury had delivered their verdict, it was discovered that one of the witnesses had not been sworn; the jury were then directed to reconsider their verdict, and to leave out of their consideration the evidence given by the unsworn witness.

It is not yet settled by the Scotch law, whether a witness professing his disbelief in a God, and in a future state of rewards and punishments, is admissible. "When the point shall arrive," says Mr. Alison, "it is well worthy of consideration, whether there is any rational ground for such an exception;—whether the risk of allowing unwilling witnesses to disqualify themselves by the simple expedient of alleging that they are atheists, is not greater than that of admitting the testimony of such as make this profession." Alison, Prac. Cr. L. Scotl. 438. The policy of the rule has also been questioned by English text writers. Best Ev. 212.

Form of the oath.] The particular form or ceremony of administering an oath is quite distinct from the substance of the oath itself. 1 Phill. Ev. 8, 9th ed. The form of oaths under which God is invoked as a witness, or as an avenger of perjury, is to be accommodated to the religious persuasion which the swearer entertains of [*112] *God; it being vain to compel a man to swear by a God in whom he does not believe, and whom he therefore does not reverence. Puffend. b. 4, c. 2, s. 4. The rule of our law therefore is, that witnesses may be sworn according to the peculiar ceremonies of their own religion, or in such a manner as they may consider binding on their consciences.(1) Phill. Ev. 9, 9th ed. Per Alderson, B., in Miller v. Salomons, 7

(1) That form of oath is to be used which the witness holds obligatory. Curtiss v. Strong, 4 Day's Case, 51.

Ex. R. 534, 535; and per Pollock, C. B., Id. 558. A Jew consequently is sworn upon the Pentateuch, with his head covered. 2 Hale, P. C. 279; Omichund v. Barker, Willes, 543. But a Jew who stated that he professed Christianity, but had never been baptized, nor even formally renounced the Jewish faith, was allowed to be sworn on the New Testament. R. v. Gilham, 1 Esp. 285. A witness who stated that he believed both the Old and New Testament to be the word of God, yet as the latter prohibited, and the former countenanced swearing, he wished to be sworn on the former, was permitted to be sworn. Edmonds v. Rowe, Ry. & Moo. N. P. C. 77: 21 E. C. L. R. So where a witness refused to be sworn in the usual form, by laying his right hand on the book, and afterwards kissing it, but desired to be sworn by having the book laid open before him, and holding up his right hand; he was sworn accordingly. Dalton v. Colt, 2 Sid. 6; Willes, 553. And where on a trial for high treason, one of the witnesses refused to be sworn in the usual manner, but put his hands to his buttons; and in reply to a question, whether he was sworn, stated that he was sworn and was under oath; it was held sufficient. R. v. Love, 5 How. St. Tr. 113. A Scotch witness has been allowed to be sworn by holding up the hand without touching the book, or kissing it, and the form of the oath administered was, "You swear according to the custom of your country, and of the religion you profess, that the evidence," &c. &c. R. v. Milldrone, Leach, 412; Mee v. Reid, Peake, N. P. C. 23. Lord George Gordon, before he turned Jew, was sworn in the same manner, upon exhibiting articles of the peace in the King's Bench. MS. McNall, on Ev. 97. In Ireland it is the practice to swear the Roman Catholic witnesses upon a Testament with a crucifix or cross upon it. Id. The following is also given as the form of a Scotch Covenanter's oath: "I, A. B., do swear by God Himself, as I shall answer to him at the great day of judgment, that the evidence I shall give to the court and jury, touching the matter in question, is the truth, the whole truth, and nothing but the truth: so help me God." 1 Leach, 412 (*n*); R. v. Walker, O. B. 1788; Ibid. A Mahomedan is sworo on the Koran. The form in R. v. Morgan, 1 Leach, 54, was as follows: The witness first placed his right hand flat upon the book, put the other hand to his forehead, and brought the top of his forehead down to the book, and touched it with his head. He then looked for some time upon it, and being asked what effect that ceremony was to produce, he answered that he was bound by it to speak the truth. The deposition of a Gentoo has been received, who touched with his hand the foot of a Brahmin. Omichund v. Barker, 1 Atk. 21. The following is given in a recent case as the form of swearing a Chinese. On entering the box the witness immediately knelt down, and a China saucer having been placed in his hand, he struck it against the brass rail in front of the box and broke it. The crier of the court then, by direction of the interpreter, administered the oath in these words, which was translated by the interpreter into the Chinese language, "You shall tell the truth and the whole *truth; the saucer is cracked, and if you do not [*113] tell the truth, your soul will be cracked like the saucer." R. V. Entrehman, 1 Carr. & M. 248; 41 E. C. L. R.

The 1 & 2 Vict. c. 105, s. 1, U. K., enacts that "in all cases in which an oath may lawfully be and shall have been administered to any person either as a juryman or a witness, or a deponent in any proceeding, civil or criminal, in any court of law or equity in the United Kingdom, or on appointment to any office or employment, or on any occasion whatever, such person is bound by the oath administered, provided the same shall have been administered in such form and with such ceremonies as such person may declare to be binding; and every such person, in case of wilful false swearing, may be convicted of the crime of perjury in the same manner as if

the oath had been administered in the form and with the ceremonies most commonly adopted."

A witness may be asked, whether he considers the form of administering the oath, to be such as will be binding on his conscience. The most correct and proper time for asking a witness this question is before the oath is administered; but as it may happen that the oath may be administered in the usual form, by the officer, before the attention of the court, or party, or counsel, is directed to it, the party is not to be precluded; but the witness may, nevertheless, be afterwards asked whether he considers the oath he has taken as binding upon his conscience. If he answers in the affirmative he cannot then be further asked, whether there be any other mode of swearing more binding upon his conscience. The Queen's Case, 2 Br. & B. 284: 6 E. C. L. R. So where a person who was of the Jewish persuasion at the time of trial, and an attendant on the synagogue, was sworn on the Gospels as a Christian, the court refused a new trial on this ground; being of opinion that the oath as taken was binding on the witness, both as a religious and moral obligation; and Richardson, J., added, that if the witness had sworn falsely, he would be subject to the penalties of perjury. Sells v. Hoare, 3 Br. & B. 232: 7 E. C. L. R.; 7 B. Moore, 36, S. C.

Affirmation in lieu of oath.] Formerly it was necessary in all cases that an oath, that is a direct appeal to the Divine Power, should be made by the witness. Many conscientious persons have objected to this, and various sects have been established, part of whose religious creed it is to do so. In order to prevent the difficulty which arose from large classes of the community being thus rendered unavailable as witnesses, various statutes have from time to time been passed exempting such persons from the necessity of taking the usual form of oath, and allowing them to substitute a solemn affirmation in its stead. Thus, by the 9 Geo. 4, c. 32, s. 1, U. K., "Every Quaker or Moravian who shall be required to give evidence in any case whatsoever, criminal or civil, shall, instead of taking an oath in the usual form, be permitted to make his or her solemn affirmation or declaration, in the words following: 'I, A. B., being one of the people called Quakers [or one of the persuasion of the people called Quakers, or of the united brethren called Moravians, *as the case may be*], do solemnly, sincerely, and truly declare and affirm:' which said affirmation or declaration shall be of the same force and effect in all courts of justice and other places, where by law an oath is required, as if such Quaker or Moravian had taken an oath in the usual form; and if any person making such declaration or affirmation shall be [*114] *convicted of having wilfully, falsely, and corruptly affirmed or declared, any matter or thing, which, if the same had been sworn in the usual form, would have amounted to wilful and corrupt perjury, every such offender shall be subject to the same pains, penalties, and forfeitures, to which persons convicted of wilful and corrupt perjury are or shall be subject."

By the 3 & 4 Wm. 4, c. 49, U. K., Quakers and Moravians are permitted to make an affirmation or declaration, instead of taking an oath, "in all places, and for all purposes whatsoever, where an oath is or shall be required, either by the common law, or by any act of Parliament;" and any such affirmation or declaration, if false, is punishable as perjury.

Where a prosecutor, who had been a Quaker, but had seceded from the sect, and called himself an Evangelical Friend, stated that he could not affirm according to the form, either in the 9 Geo. 4, c. 32, or in the 3 & 4 Wm. 4, c. 49, and he was allowed to give evidence under a general form of affirmation; the judges were unanimously

of opinion that his evidence was improperly received. R. v. Doran, 2 Lew. C. C. 27; 2 Moo. C. C. 37.

This case led to the passing of 1 & 2 Vict. c. 77, U. K., which enacts that any person who shall have been a Quaker or a Moravian may make solemn affirmation and declaration, in lieu of taking an oath, as fully as it would be lawful for any such person to do if he still remained a member of either of such religious denominations of Christians, which said affirmation or declaration shall be of the same force and effect as if he or she had taken an oath in the usual form; and such affirmation or declaration, if false, is punishable as perjury. Every such affirmation or declaration is to be in the words following: "I, A. B., having been one of the people called Quakers [or one of the persuasion of the people called Quakers, or of the united brethren called Moravians, *as the case may be*], and entertaining conscientious objections to the taking of an oath, do solemnly, sincerely, and truly, declare and affirm."

By the 3 & 4 Wm. 4, c. 82, U. K., the class or sect of dissenters called Separatists, when required upon any lawful occasion to take an oath, in any case where by law an oath is or may be required, are also allowed to make an affirmation or declaration instead, in the words following: "I, A. B., do, in the presence of Almighty God, solemnly, sincerely, and truly affirm and declare, that I am a member of the religious sect called Separatists, and that the taking of an oath is contrary to my religious belief, as well as essentially opposed to the tenets of that sect; and I do also in the same solemn manner, affirm and declare," &c.

But, besides the persons comprised within these sects, other persons called as witnesses not unfrequently refused to be sworn from what they asserted to be conscientious motives, it is, therefore, provided by the 24 & 25 Vict. c. 66, s. 1, that if any person called as a witness in any court of criminal jurisdiction in England or Ireland, or required, or desiring to make an affidavit or deposition in any criminal proceeding, shall refuse or be unwilling from alleged conscientious motives to be sworn, it shall be lawful for the court or judge, or other presiding officer or person qualified to take affidavits or depositions, upon being satisfied of the sincerity of such objection, to permit such person, instead of being sworn, to make his or her solemn affirmation or declaration in the words following: "I, A. B., *do solemnly, sincerely, and [*115] truly affirm and declare that the taking of any oath is according to my religious belief unlawful, and I do also solemnly, sincerely, and truly affirm and declare," &c. Which solemn affirmation and declaration shall be of the same force and effect as if such person had taken an oath in the usual form. By s. 2, "If any person making such solemn affirmation or declaration shall wilfully, falsely, and corruptly affirm or declare any matter or thing which, if the same had been sworn in the usual form, would have amounted to wilful and corrupt perjury, every such person so offending shall incur the same penalties as by the laws and statutes of this kingdom are or may be enacted or provided against persons convicted of wilful and corrupt perjury."(1)

Persons excommunicated.] It was formerly considered that persons excommunicated could not be witnesses; but by the 53 Geo. 3, c. 127, s. 3, persons excommunicated shall incur no civil disabilities.

(1) A witness who has no objections to be sworn may not be affirmed. Williamson v. Carrol, 1 Harrison, 271.

*WITNESSES.

INCOMPETENCY FROM INTEREST.

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To what extent interest still a ground of incompetency—husband and wife.] INCOMPETENCY from interest was removed to a great extent by the 6 & 7 Vict. c. 85, and almost entirely by the 14 & 15 Vict. c. 99, and 16 & 17 Vict. c. 83. An important exception, however, is expressly made with regard to husbands and wives, who remain, as at common law, incompetent witnesses either *for* or *against* each other. See 14 & 15 Vict. c. 99, s. 3, and 16 & 17 Vict. c. 83, s. 3.(1)

The rule is absolute, subject to certain exceptions which will be explained presently, and cannot be waived. It excludes them from giving evidence, not only of facts, but of statements made by either in the nature of admissions. But any conversation between husband and wife may be proved by third persons who are present at or overhear it. R. v. Smithie, 5 C. & P. 332: 24 E. C. L. R.; R. v. Simons, 6 C. & P. 540: 25 E. C. L. R.; R. v. Bartlett, 7 C. & P. 832: 32 E. C. L. R.(2)

But the rule only extends to cases where the husband or wife are actually on their trial. It was once thought otherwise, but the mistake seems to have arisen from not having drawn the distinction clearly enough between competency and privilege. See p. 118.

Where the relation of husband and wife has once subsisted, the one is an inadmissible witness for or against the other, even after the relation has ceased, with

(1) Snyder et al. v. Snyder, 6 Binney, 488; Daniel v. Proctor et al., 1 Devereux, 428; Higden v. Higden, 6 I. I. Marshall, 53; Lucas v. The State, 23 Conn. 18. Though separated by articles. Terry v. Belcher, 1 Bailey, 568. But she has been held competent for her husband in an action of book debt. Stanton v. Wilson et al., 3 Day's Cases, 37. And in forcible entry and detainer, the wife of the proseontor is a good witness to prove the force, but only the force. Resp. v. Shryber, 1 Dall. 68. A release to baron and feme, he being absent, will make her a good witness. Commonwealth v. Briggs, 5 Pick. 429; Dwilley v. Dwilley, 46 Maine, 377; Walker v. Sanborn, Ibid. 470; Bird v. Hunston, 10 Ohio (N. S.), 418.

The conjugal relation will not prevent a woman from testifying as to whether she has had intercourse with other men than her husband. Chamberlain v. The People, 9 Smith, 85.

Neither husband nor wife is competent to prove non-access. Ibid.

The mother of a bastard child who is a married woman, though from necessity she is a competent witness to prove the illicit intercourse, and who is in fact the father of the child, is not competent to prove the non-access of the husband, his absence from the State, nor any fact which can be proved by other testimony. The People v. Ontario, 15 Barbour, 286.

(2) Burger v. Tribble, 2 Dana, 333; Moody v. Fulmer, Wharton's Dig. 308; Smith v. Soudder, 11 Serg. & Rawle, 325; Sackit v. May, 3 Dana, 80. Unless they form a part of the *res gestæ*. Park v. Hopkins, 2 Bailey, 408; Thomas v. Hargrave, Wright's (Ohio) Rep. 595. On an indictment against husband and wife, her admissions are good against herself, but not against him. Commonwealth v. Briggs, 5 Pick. 429.

Facts known to a widow, which did not come to her knowledge by reason of her relation as wife, she is competent to testify. Walker v. Sanborn, 46 Maine, 470.

respect to matters which occurred during the continuance of the relation. Thus, where a woman divorced by act of Parliament, and married again, was called to prove a contract by her former husband, she was rejected by Lord Alvanley. If she might be a witness, his lordship observed, in a civil proceeding, she might equally be so in a criminal proceeding; and it could never be endured that the confidence which the law had created whilst the parties remained in the most intimate of all relations, should be broken whenever by the misconduct of one party the relation has been dissolved. Monroe v. Twisleton, Peake Ev. App. xci, 5th ed. *Upon [*117] the authority of this case, Best, C. J., rejected the testimony of a widow called to prove a conversation between herself and her late husband. Doker v. Hasler, Ry. & M., N. P. C. 198 : 21 E. C. L. R. In Beveridge v. Minter, 1 C. & P. 364 : 12 E. C. L. R. Lord Tenterden, C. J., received the evidence; but in O'Connor v. Marjoribanks, 4 M. & G. 435 : 43 E. C. L. R., the Court of Common Pleas held, that it was the sounder and better rule to exclude the testimony of each respecting the other in *all* cases, according to the law laid down by Lord Alvanley in Monroe v. Twisleton.(1)

Only extends to lawful husband and wife.] It is only where there has been a valid marriage, that the parties are excluded from giving evidence for or against each other. Therefore, on an indictment for bigamy, *after proof of the first marriage*, the second wife is a competent witness against the husband, for the marriage is void.(2) B. N. P. 287; Bac. Ab. Ev. A. 1; 1 East, P. C. 469. See p. 117. So where a woman had married the plaintiff, and lived with him as his wife during the time of the transactions to which she was called to speak, but had left him on the return of a former husband, who had been absent from England upwards of thirty years, and was supposed to be dead, Patteson, J., held that there was no objection to her giving evidence for the defendant. Wells v. Fisher, 1 Moo. & R. 99, S. C. 5 C. & P. 12. Of course, therefore, a woman who cohabits with a man as his wife, but is not so in fact, is a competent witness for or against him. Mathews v. Galindo, 4 Bingh. 610.

Where other persons are indicted with husband or wife.] Where several persons are indicted together, an attempt is sometimes made to call the wife of one prisoner as evidence for or against another.(3) In very few cases has this been allowed to be done. In R. v. Smith, 1 Moo. C. C. 289, three prisoners were indicted for

(1) State v. J. N. B., 1 Tyler, 36; State v Phelps, 2 Tyler, 374. A widow is not permitted to testify to declarations made by her husband during coverture, to contradict and impeach the testimony given by him on a former trial between the parties. Egdell v. Bennett et al., 7 Verm. 554. She is however a competent witness as to facts which happened during coverture, although it would not have been competent for her husband to have testified to them if living. Ibid., Coffin v. Jones, 13 Pick. 441.

The widow is not competent, after the death of her husband, to make any disclosure in relation to him, which implies a violation of the confidence reposed in her as a wife. McGee v. Maloney, 1 B. Monroe, 225.

A widow is competent to testify against the administrator of her deceased husband in respect to any facts which she did not learn from the latter. Babcock v. Booth, 2 Hill, 181.

In an action for *crim. con.* with the plaintiff's wife, *held*, that after a divorce *a vinculo matrimonii*, she was a competent witness for the husband to prove the charge. But a wife is generally incompetent, even after divorce, to testify *against* the husband as to facts occurring during the continuance of the marriage, and which might affect the husband either in his pecuniary interest or character. Otherwise, *semble* as to facts occurring after divorce. In cases of bastardy involving the adultery of the wife, she is incompetent to prove non-access of her husband; but from necessity she is admitted to prove the criminal intercourse. Ratcliff v. Wales, 1 Hill. 63.

(2) On the trial of an indictment for bigamy, the second wife, it seems, is a witness either for or against the prisoner. The State v. Patterson, 2 Iredell, 346,

After a divorce *a vinculo*, the husband is competent to prove the marriage on an indictment against another for adultery with the wife before divorce. The State v. Dudley, 7 Wisconsin, 664.

(3) The wife of one of several defendants jointly indicted and on trial for murder, is not a com-

a burglary. One of the prisoners, Draper, set up an *alibi*, and called Smith's wife in support of it, but Littledale, J., refused to let her be examined, saying that the evidence of the prosecution would be thereby weakened altogether, and that so the witness's husband would be benefited. The question was reserved, and all the judges, except Graham, B., and Littledale, J. (who seems to have changed his opinion), thought the evidence rightly rejected. Four years afterwards, the case of R. v. Hood, 1 Moo. C. C. 281, was reversed. Under what precise circumstances the evidence was tendered does not appear, but the person who was tendered was the wife of a man who, though implicated in the offence, was not included in the indictment. But this distinction seems to have been overlooked, and the court refused to allow the point to be argued, saying that it was concluded by R. V. Smith, *supra*. So where, upon an indictment against Webb and three other prisoners for sheep-stealing, the counsel for the prosecution proposed to call the wife of Webb to prove facts against the other prisoners, and urged that it was only in cases where the acquittal or conviction of one prisoner had a direct tendency to cause the acquittal or conviction of the other prisoners, that the wife of one prisoner was incompetent to give evidence for or against the other prisoners, Bolland, B., held that the witness was incompetent. R. v. Webb, Glouc. Spr. Ass. 1830, 2 Russ. by Grea. 982. The authority of R. v. Smith is impugned by Mr. Greaves in a note to Russ. 981; [*118] and was formerly so by Mr. Phillipps (1 Phill. Ev. 75, 9th ed.); but *in the last edition of the latter work the passage is omitted. In R. v. Sills, 1 C. & K. 494: 47 E. C. L. R., where A. and B. were indicted for burglary, and a part of the stolen property was found in the house of each of the prisoners, Tindal, C. J., allowed the wife of A. to be called on behalf of B. to prove that she took to B.'s house the property which was found there. But it seems very difficult to reconcile this decision with that of R. v. Smith, which was not referred to; indeed, the matter was not at all discussed. By far the great preponderance of authority is, therefore, in favor of the proposition, that in no case, where the husband is on his trial, can the wife be called as a witness, and *vice versâ*.(1)

Where husband or wife is not indicted, but implicated.] Where the guilt of the husband or wife is not the subject of inquiry, though they may have been implicated in the transaction, then the question assumes a different aspect, and a different class of considerations is applicable. The witness, in this case, is not incompetent, and all that he or she can do is to refuse to answer certain questions. There is only one case in which the witness was held in such a case to be not competent,

petent witness for the others, to show that there was no conspiracy on their part to do any act connected with the murder of the deceased. Mask v. The State, 32 Mississippi, 405.

The wife of one of several defendants jointly indicted and tried together, is an incompetent witness for the others. The Commonwealth v. Robinson, 1 Gray, 555.

It is not universally a rule to exclude the wife of one defendant as a competent witness for the other, when the trial is separate. Cornelius v. The Commonwealth, 3 Metcalfe (Ky.), 481.

The wife of one jointly indicted is a competent witness for those associated with him in the indictment, if tried separately. Thompson v. The Commonwealth, 1 Metcalfe (Ky.), 13.

Two persons were jointly indicted for murder: one as principal, the other as aiding and abetting They were separately tried. The wife of the second was offered as a witness for the first: she was held competent. Workman v. The State, 4 Sneed, 425.

(1) Commonwealth v. Eastland, 1 Mass. 15. That the wife of one is a material witness for the other, is a sufficient ground for a separate trial. Ibid. Case of Shaw et al., 1 Rogers's Rec. 177. See People v. Colburn, 1 Wheeler's C. C. 479; State v. Anthony, 1 McCord, 285.

Whether the trial be joint or separate, one defendant in an indictment cannot, until finally discharged, be a witness for another, and whenever the wife of one is not permitted to testify for the others on a joint trial, she will not be received for them, although her husband be not then on trial. State v. Smith, 2 Iredell's N. C. Law Rep. 402.

that of R. v. Cliviger, 2 T. R. 268, but this is now no longer law. To what protection the husband or wife is entitled will be found discussed at p. 140.(1)

In cases of treason.] Whether or not the wife is a competent witness against her husband on a charge of treason appears to be doubted. In R. v. Grigg, T. Raym. 1, which was an indictment for bigamy, it is said *obiter*, that a wife could not be a witness against her husband *except in treason;* but on the other hand, it has been asserted that a wife is not bound, in case of high treason, to discover her husband's treason: Brownl. Rep. 47; and there are many authorities to the same effect which appear to settle the point. 1 Hale, P. C. 301; Hawk. P. C. b. 2, c. 46, s. 182; Bac. Ab. Evid. A. 1. See 2 Stark, Ev. 404, 2d ed.; 2 Russ. 607; 1 Phill. Ev. 71, 9th ed.; Best Ev. 229.

Cases of personal injury.] It is quite clear that a wife is a competent witness against her husband, in respect of any charge which affects her liberty or person. Per Hullock, B., R. v. Wakefield, p. 157, Murray's ed.; 2 Russ. 606.(2) Thus in R. v. Lord Audley, who was tried as a principal in the second degree, for a rape upon his own wife; the judges resolved that though, in a civil case, the wife is not a competent witness, yet that in a criminal case of this nature, being the party grieved, upon whom the crime is committed, she is to be admitted as a witness against her husband. 3 How. St. Tr. 414; 1 Hale, P. C. 301. So on an indictment against the husband for an assault upon the wife. R. v. Azire, 1 Str. 633; B. N. P. 287. So a wife is always permitted to swear the peace against her husband, and her affidavit has been permitted to be read, on an application to the Court of King's Bench, for an information against her husband, for an attempt to take her away by force, after articles of separation. Lady Lawley's Case, B. N. P. 287. Upon an indictment under the repealed statute, 3 Hen. 7, c. 2, for taking away and marrying a woman contrary to her will, she was a competent witness to prove the case against her husband *de facto*. R. v. Fulwood, Cro. Car. 488; R. v. Brown, 1 Vent. 243; R. v. Naagen Swenden, 14 How. *St. Tr. 559, 575. And she was consequently a witness [*119] *for* him. R. v. Perry, *coram* Gibbs, C. J., 1794; Hawk. P. C. b. 2, c. 46, s. 79, cited Ry. & Moo. N. P. C. 353: 21 E. C. L. R. But a doubt has been entertained, whether, if the woman afterwards assent to the marriage, she is capable of being a witness. In R. v. Brown (*supra*), it is said by Lord Hale, that most were of opinion that, had she lived with him any considerable time, and assented to the marriage by a free cohabitation, she should not have been admitted as a witness against her husband. 1 Hale, P. C. 302. But Mr. Justice Blackstone, in his Commentaries, has expressed a contrary opinion. 4 Com. 209. And the arguments of Mr. East, on the same side, appear to carry great weight with them. 1 East, P. 454. In a case before Mr. Baron Hullock, where the defendants were charged, in one count, with a conspiracy to carry away a young lady, under the age of sixteen, from the custody ap-

(1) A wife cannot testify in matters tending to criminate her husband, who is jointly indicted with another person, but is not brought to trial. The State v. Bradley, 9 Richardson's Law, 168.

The testimony of a wife, the only tendency of which is to discredit her husband, is not admissible. Keaton v. McGwier, 24 Georgia, 217.

(2) Trever's Case, 1 Rogers's Rec. 107; Resp. v. Hevice et al., 2 Yeates, 114; Soulis's Case, 5 Greenl, 407; Wiggin's Case, 2 Rogers's Rec. 156; State v. Boyd, 2 Hill, 288.

A wife can be a witness against her husband in a criminal proceeding, only when he is charged with committing or threatening an injury to her person. Upon an indictment against her husband for using criminal means, subornation of perjury, to wrong her in a judicial proceeding, she cannot be a witness against him. The People v. Carpenter, 9 Barbour Sup. Ct. 580.

The oath of a married woman will not sustain a warrant for the arrest of her husband for adultery; nor can a husband be a witness in a case against his wife for adultery. The Commonwealth v. Jailer, 1 Grant's Cases, 218.

pointed by her father, and to cause her to marry one of the defendants; and in another count, with conspiring to take her away by force, being an heiress, and to marry her to one of the defendants; the learned judge was of opinion, that even assuming the witness to be at the time of the trial the lawful wife of one of the defendants, she was yet a competent witness for the prosecution, on the ground of necessity, although there was no evidence to support that part of the indictment which charged force; and also on the ground that the latter defendant, by his own criminal act, could not exclude such evidence against himself. R. v. Wakefield, 257, Murray's ed.; 2 Russ. 605; 2 Stark. Ev. 402 (*n*), 2d ed.

Upon an indictment under Lord Ellenborough's Act against a man for shooting at his wife, the latter was admitted as a witness by Mr. Baron Garrow, after consulting Holroyd, J., upon the ground of the necessity of the case; and Mr. Justice Holroyd sent Mr. Baron Garrow the case of R. v. Jagger, 1 East, P. C. 455, York Assizes, 1797, where the husband attempted to poison his wife with a cake in which arsenic was introduced, and the wife was admitted to prove the fact of the cake having been given her by her husband, and Mr. Justice Rooke afterwards delivered the opinion of the twelve judges, that the evidence was rightly admitted. Mr. Justice Holroyd, however, said, that he thought the wife could only be admitted to prove facts which could not be proved by any other witness. 2 Russ. 196. Upon the same principle that the evidence of the wife, if living, would be received to prove a case of personal violence, her dying declarations are admissible in case of murder by her husband.(1) R. v. Woodcock, 1 Leach, 500; R. v. John, Id. 504 (*n*); 2 Russ. 606. And in similar cases of personal violence, the examinations of the party (husband or wife) murdered, taken before a magistrate, pursuant to the statute, would, as it seems, be admissible against the husband or wife, where the evidence of the husband or wife, if living, would have been admissible. See McNally Ev. 175.

On the same principle the husband would be admissible as a witness against the wife in case of personal injury to him.

In cases of bigamy.] As has already been said (p. 117), after proof of the first marriage, no reliance can be placed on the second marriage as creating the relation of husband and wife, and, therefore, the parties to that marriage become competent witnesses for or against each other. It has been contended by two writers of authority [*120] (Allison's Pr. Cr. *Law, 463; Best Ev. 228) that the evidence should be admitted in those cases on the ground of the personal injury. But that opinion has not yet received the sanction of authority.

Incompetency in other cases.] The only other case of incompetency is that of a grand juror, who has sometimes been rejected on account of the oath of secrecy which he takes before the inquiry. But even as to him the case has been considered doubtful. Phill. Ev. 893, 8th ed. Indeed, Lord Kenyon allowed a grand juryman to be called to prove who was the prosecutor of an indictment, being of opinion that it was a fact the disclosure of which did not infringe upon his oath.(2) Sykes v. Dunbar, 2 Selw. N. P. 1004. The Court of King's Bench refused to receive an affidavit from a grand juryman, as to the number of grand jurors who concurred in finding the bill.

(1) Pennsylvania v. Stoops, Addis. 332.

(2) A grand juror on the trial of an indictment may be compelled to disclose what was given in evidence by a witness before the grand jury. The State v. Broughton, 7 Iredell, 96.

A member of the grand jury which found an indictment is a competent witness on the trial to prove that a certain person did not testify before the grand jury. The Commonwealth v. Hill, 11 Cushing, 137. See *post*, p. 144, n. 1.

R. v. Marsh, 6 A. & E. 236: 51 E. C. L. R. So where a grand jury returned an indictment containing ten counts, indorsed, "a true bill on both counts," and the prisoner pleaded to the whole ten counts, Patteson, J. (the grand jurors having been discharged), would not allow one of them to be called as a witness to explain their finding. R. v. Cooke, 8 C. & P. 582: 34 E. C. L R. It is no exception against a person's giving evidence, either for or against a prisoner. that he is one of the judges appointed to try him. 2 Hawk. P. C. c. 46, s. 17; Bac. Ab. Evid. (A. 2.) In R. v. Hacker, two of the persons in the commission for the trial came off the bench and were sworn, and gave evidence, and did not go up to the bench again during his trial. Kel. 12; Sid. 153.(1)

A juror may give evidence of any fact material to be communicated in the course of a trial, but of course he must be sworn. 3 Com. 735.

Accomplice—always admissible.] Notwithstanding the common-law rule which formerly prevailed that witnesses who were interested in the inquiry were not admissible, an exception was always made in the case of an accomplice who was willing to give evidence; and this exception has been stated to be founded on necessity, since, if accomplices were not admitted, it would frequently be impossible to find evidence to convict the greatest offenders. Hawk. P. C. b. 2, c. 46, s. 94.(2)

It makes no difference whether the accomplice has been convicted or not, or whether he be joined in the same indictment with the prisoner to be tried or not; provided he be not put upon his trial at the same time. Hawk. P. C. b. 2, c. 46, s. 90. Where A., B., C., and D. were indicted together, after plea, and before they were given in charge to the jury, Williams, J., allowed D. to be removed from the dock and examined as a witness against his associates. R. v. Gerber, Temp. & M. 647. It is not a matter of course to admit an accomplice to give evidence on the trial even though his testimony has been received by the committing magistrates; but an application to the court for the purpose must be made. 1 Phill. Ev. 28, 9th ed. The court usually considers, not only whether the prisoners can be convicted without the evidence of the accomplice, but also whether they can be convicted with his evidence. If, therefore, there be sufficient evidence to convict without his testimony, the court will refuse to allow him to be admitted as a witness. So if there be no reasonable probability of a conviction even with his evidence, the court will refuse to admit him as a witness. Thus where several prisoners were committed as principals and several as receivers, but no corroboration could be given as to the receivers *against [*121] whom the evidence of the accomplice was required, Gurney, B., refused to permit one of the principals to become a witness. R. v. Mellor, Staff. Sum. Ass. 1833. So in R. v. Saunders, Worc. Spr. Ass. 1842, on a motion to admit an accomplice, Patteson, J., said, "I doubt whether I shall allow him to be a witness; if you want him for the purpose of identification and there is no corroboration, that will not do." In R. v. Salt, Staff. Spr. Ass. 1843, where there was no corroboration of an accomplice,

(1) The presiding judge at the Court of Sessions cannot be sworn as a witness. The People v. Miller, 2 Parker C. R. 197.

A justice, before whom a cause is being tried by a jury, cannot testify therein except by consent. McMillen v. Andrews, 10 Ohio (N. S.), 112.

(2) Brown v. The Commonwealth, 2 Leigh. 769. At the discretion of the court, upon motion of the public prosecuting officer. People v. Whipple, 9 Cowen, 707. See Kinchelow v. The State, 5 Humphreys, 9.

An accomplice is a competent witness, and the value of his testimony is for the jury. Gray v. The People, 26 Illinois, 344.

One who was jointly indicted with the defendant, but as to whom a *nolle prosequi* has been entered, is a competent witness for the prosecution. The State v. Clamp, 16 Missouri, 385.

Wightman, J., refused to allow him to become a witness: 2 Russ. by Grea. 959(*f*); and again in R. v. Sparks, F. & F. 388, where the counsel for the prosecution applied for leave to call an accomplice who had pleaded guilty, Hill, J., refused to permit it until the other evidence had been given, in order to see whether it was sufficient to corroborate that of the accomplice. *Vide infrà*, p. 122.

The practice, where the testimony of an accomplice is required to prove the case before the grand jury, and he is in custody, is for the counsel for the prosecution to move that he be allowed to go before the grand jury, pledging his own opinion, after a perusal of the facts of the case, that the testimony is essential. 2 Stark. Ev. 11, 2d ed. Where the accomplice has been joined in the indictment, and, before the case comes on, it appears that his evidence will be required, the usual practice is, before opening the case to apply to have the accomplice acquitted. R. v. Rowland, Ry. & Moo. N. P. C. 401: 21 E. C. L. R. Where the case has proceeded against all the prisoners, but no evidence appears against one of them, the court will, in its discretion, upon the application of the prosecutor, order that one to be acquitted for the purpose of giving evidence against the rest. R. v. Fraser, 1 McNally, 56.

Accomplice—when competent for prisoner.] It is quite clear that an accomplice is a competent witness for the prisoner, in conjunction with whom he himself committed the crime. R. v. Balmore, 1 Hale, P. C. 305.(1)

Accomplice—promise of pardon.] Although Lord Hale thought that if a man had a promise of pardon if he gave evidence against one of his confederates, this disabled his testimony, 2 Hale P. C. 280; yet it was fully settled, before the statutes were passed which removed the disabilities of witnesses on the ground of interest, that such a promise, however it might affect the credibility of the witness, would not destroy his competency. R. v. Tonge, Kelynge, 18; Phill. Ev. 27, 9th ed.(2)

Accomplice—corroboration of.] The state of the law as to the corroboration of accomplices is somewhat peculiar. It has been repeatedly laid down that a conviction on the testimony of an accomplice uncorroborated is legal.(3) The point was

(1) United States v. Heany, 4 Wash. C. C. Rep. 428. Defendants jointly indicted for a riot, cannot be witnesses for or against each other, until they are discharged from the prosecution or convicted. The State v. Mooney et al., 1 Yerger, 431.

The testimony of an accomplice who has been joined in the same indictment with the principal, is admissible for defendant only when he has been acquitted, or when the defendants are tried severally. Armistead v. The State, 18 Georgia, 704.

One of several jointly indicted for the same offence cannot be a witness for his co-defendants, until he has ceased to be a party, either by an entry of *nolle prosequi* as to him, a verdict of acquittal, or a judgment against him as guilty upon his confession or otherwise. The State v. Young, 39 N. Hamp. 283; The State v. Nash, 7 Clarke, 347.

One of several jointly indicted is not competent for the other. The State v. Edwards, 19 Missouri, 674; The People v. Donnelly, 2 Parker, C. R. 182; The State v. Dumphey, 4 Minnesota, 438.

Where two persons indicted jointly for a felony, claim separate trials, the one tried first is not entitled to have the other examined as a witness in his behalf. McIntyre v. The People, 5 Selden, 38; *Contra*, Lazier v. The Commonwealth, 10 Grattan, 708.

When an accomplice or co-defendant in a criminal proceeding elects to be tried separately, he is a competent witness for the other. The People v. Labra, 5 California, 183; The State v. Stotts, 26 Missouri, 307; Marshall v. The State, 8 Indiana, 498; Sloan v. The State, 9 Ibid. 565; Hunt v. The State, 10 Ibid. 69; *Contra*, Moss v. The State, 17 Arkansas, 327.

(2) An accomplice giving evidence against his associate in crime, does not thereby become entitled to pardon. Commonwealth v. Dabney, 1 Robinson, 696.

(3) Case of Brown et al., 2 Rogers's Rec. 38; People v. Reeder, 1 Wheeler's C. C. 418; McDowell's Case, 5 Rogers's Rec. 94. Upon the trial of an indictment, an accomplice in the commission of the offence is a competent witness for the prosecution; and the testimony of a witness thus situated will, if the jury are fully convinced of its truth, warrant the conviction of the defendant, though it be uncorroborated by other testimony. The People v. Costello, 1 Denio, 53. But it is most proper to

considered by the twelve judges, and so decided in R. v. Attwood, 1 Lea. 464; and again in R. v. Durham, Id. 478. And that the rule is so has also been acknowledged by Lord Hale, 1 Hale, P. C. 304, 305; Lord Ellenborough, R. v. Jones, 2 Camp. 132; Lord Denman, R. v. Hastings, 7 C. & P. 152: 32 E. C. L. R.; Alderson, B., R. v. Wilk, Id. 273; Gurney, J., R. v. Jarvis, 2 Moo. & R. 40; and lastly by the Court of Criminal Appeal in R. v. Stubbs, 25 L. J. M. C. 16.

But while the law is thus fully established, the practice of judges *is almost [*122] invariable to advise juries not to convict upon the evidence of an accomplice who is uncorroborated, and sometimes judges, where the testimony of the accomplice is the only evidence, take upon themselves to direct an acquittal of the prisoner. Of course it is always proper for a judge in the exercise of his discretion to *advise* a jury to acquit the prisoner in any case, but it is submitted that it is not usually his province to *direct* an acquittal unless there be no legal evidence against the prisoner, which in the face of the above decisions cannot be the case if an accomplice has given evidence against him. The almost absolute terms, moreover, in which judges state it to be their practice to advise juries not to convict in such cases, leave it impossible to conceive in what case the principle so frequently acknowledged in the cases above quoted is to receive any application. And lastly, the practice already alluded to of not permitting the accomplice to be called until it appears that his evidence can be satisfactorily corroborated, can only be justified on the assumption that on his evidence, uncorroborated, a legal conviction could not be founded. Thus the law remains in that anomalous state in which the bare existence of a principle is acknowledged, but which principle is constantly disapproved of and frequently violated. As the law now stands, it is universally agreed by all the authorities that, if the accomplice were uncorroborated, a judge would be wrong who did not advise the jury not to convict; whereas the Court of Criminal Appeal would be bound to pronounce an opinion that a judge who did not so advise them was right.

Accomplice—nature of corroboration.] Another point which arises with respect to the corroboration of accomplices, and upon which the authorities are by no means so well agreed, is as to what is the nature of the corroboration which ought to be required. We say *required*, but it is rather difficult to say by what or how the require-

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acquit, where the testimony of an accomplice is not corroborated in material circumstances. Commonwealth v. Grant, Thacher's Crim. Cas. 438.

Where the direct charge rests for its proof upon the testimony of accomplices, it is sufficient to convict if it be corroborated by the evidence of credible witnesses, although such evidence has only an indirect tendency to establish the commission of the particular offence charged. The People v. Davis, 21 Wend. 309.

The evidence of an accomplice is altogether for the jury, and they, if they please, may act upon it without any confirmation of his statement. State v. Brown, 3 Strobhart, 508.

There may be a conviction on the uncorroborated evidence of an accomplice. Stocking v. The State, 7 Indiana, 326; Dick v. The State, 30 Mississippi, 593; The State v Stebbins, 29 Conn. 463; The State v. Watson, 31 Missouri, 361; Steinham v. The United States, 2 Paine, C. C. 168; *Contra*, Upton v. The State, 5 Clark. 465. The State v. Howard, 32 Vermont, 380; The State v. Willis, 9 Iowa, 582.

The uncorroborated testimony of an accomplice should be received with great caution, and the court should always so instruct the jury; but they are not to be instructed that in point of law a conviction cannot be obtained upon such testimony. The People v. Costello, 1 Denio, 83.

As to evidence in corroboration of an accomplice. The State v. Ford, 3 Strobhart, 517; The State v. Walcott, 21 Conn. 272.

Evidence offered in corroboration of the testimony of an accomplice, in other respects unobjectionable, is competent, although it does not go so far as to implicate the defendant. The State v. Watson, 31 Missouri, 361.

One who purchases intoxicating liquor sold contrary to law, for the express purpose of prosecuting the seller for an unlawful sale, is not an accomplice, and is a competent witness on the trial of the seller, but the jury should be instructed to receive his evidence with the greatest caution and distrust. The Commonwealth v. Downing, 4 Gray, 29.

ment is to be exacted, for by law no corroboration is required at all. Probably the word has been used in forgetfulness of the principle we have just been discussing, and which only seems to be remembered when its existence is called in question. The practice, however, is for the present purpose much more important than the principle, and we shall, therefore, consider how far the evidence ought to be corroborated.

It must be recollected that an accomplice is in most cases present at the committal of the offence; and even if not so, he may be presumed to be on those terms of intimacy with the accused which would render his knowledge of all the circumstances attending the commission of the crime extremely probable. There may be many witnesses therefore who give testimony which agrees with that of the accomplice, but which, if it does not serve to identify the accused parties, is no corroboration of the accomplice; the real danger being that the accomplice should relate the circumstances truly, and at the same time attribute a share in the transaction to an innocent person.

It may indeed be taken that it is almost the universal opinion that the testimony of the accomplice should be corroborated as to the person of the prisoner against whom he speaks. This was so held by Patteson, J., in R. v. Addis, 6 C. & P. 388 : 25 E. C. L. R., and again in R. v. Kelsey, 2 Lew. 45; by Williams, J., in R. v. Webb, 6 C. & P. 595; by Alderson, B., in R. v. Wilks, 7 C. & P. 272 : 32 E. C. L. R.; by Gurney, J., in R. v. Dyke, S. C. & P. 261; and by Lord Abinger, C. B., in R. v. Farlar, 8 C. & P. 106 : 34 E. C. L. R.

[*123] *And in the latter case of R v. Stubbs, 25 L. J. M. C. 16, Parke, B., said, "My practice always has been to tell the jury not to convict the prisoner, unless the evidence of the accomplice be confirmed, not only as to the circumstances of the crime, but also as to the person of the prisoner;" and Cresswell, J., added, "You may take it for granted, that the accomplice was at the committal of the offence, and may be corroborated as to the facts; but that has no tendency to show that the parties accused were there."

What appears to be required is, that there should be some fact deposed to, independently altogether of the evidence of the accomplice, which, taken by itself, leads to the inference not only that a crime has been committed, but that the prisoner is implicated in it. Thus, upon an indictment for receiving a sheep, knowing it to have been stolen, an accomplice proved that a brother of the prisoner and himself had stolen two sheep, and that the brother gave one of them to the prisoner, who carried it into the house in which the prisoner and his father lived, and the accomplice stated where the skins were hid. On the houses of the prisoner's father and the accomplice being searched, a quantity of mutton was found in each, which had formed parts of two sheep, corresponding in size with those stolen, and the skins were found in the place named by the accomplice. Patteson, J., held that this was sufficient; the finding of the mutton in the possession of the prisoner, in itself raising an implication of guilt on his part, which the testimony of the accomplice confirmed. R. v. Biskett, 8 C. & P. 732 : 34 E. C. L. R.

The point about which the opinions of judges appear to have fluctuated, is as to whether, where several are indicted, and the evidence of the accomplice is confirmed as to some only and not as to others, the jury ought to be advised to acquit those against whom there is no corroboration. On the one hand, it is strongly urged in a note by Mr. Starkie to the case of R. v. Dawber, 3 Stark. N. P. C. 34 (*n*) : 3 E. C. L. R., that a witness, if believed at all, must be believed *in toto*, and he cannot be considered as speaking the truth as to some of the prisoners and not as to the others.

The view of Mr. Starkie is supported by the case to which the note is appended; there, on the trial of several prisoners, an accomplice who gave evidence was confirmed in his testimony with regard to some of the prisoners, but not as to the rest. Bayley, J., informed the jury that if they were satisfied, by the confirmatory evidence, that the accomplice was a credible witness, they might act upon his testimony with respect to others of the defendants, though, as far as his evidence affected them, he had received no confirmation; and all the defendants were convicted. But to the argument used by Mr. Starkie it may be answered, that the whole practice of requiring corroboration is founded on the supposition that there are degrees of credibility, and that an accomplice, though not absolutely incredible, is only credible when confirmed; and that he will only speak the truth in part is just as probable as that he will not speak the truth at all. And this is the view that has been taken in the majority of the cases. Thus in R. v. Wells, M. & M. 326: 22 E. C. L. R., where an indictment was preferred against several as principals and accessories, the case was proved by the testimony of an accomplice, who was confirmed as to the accessories, but not as to the principal, Littledale, J., advised the jury that the case ought not to be considered as proved against the principal, and that all the prisoners ought, therefore, to be acquitted. So in R. v. *Morris, 7 C. & P. 270: 32 E. C. L. [*124] R., on an indictment against A., as principal, and B., as receiver, and the evidence of an accomplice was corroborated as against A., but not as against B., Alderson, B., thought that it was not sufficient; and in R. v. Stubbs, *supra*, Jervis, C. J., said, "There is another point to be noticed: when an accomplice speaks as to the guilt of three prisoners, and his testimony is confirmed as to two of them only, it is proper, I think, for the judge to advise the jury, that it is not safe to act on his testimony as to the third person in respect of whom he is not confirmed, for the accomplice may speak truly as to all the facts of the case, and at the same time in his evidence substitute the third person for himself in his narrative of the transaction."

Accomplice—by whom to be corroborated.] The practice of requiring the evidence of an accomplice to be confirmed, appears to apply equally when two or more accomplices are produced against a prisoner. In a case where two accomplices spoke distinctly to the prisoner, Littledale, J., told the jury, that if their statements were the only evidence, he could not advise them to convict the prisoner, adding, that it was not usual to convict on the evidence of one accomplice, without confirmation, and that, in his opinion, it made no difference whether there were more accomplices than one. R. v. Noakes, 5 C. & P. 326: 24 E. C. L. R. *Sed qu.* In one case, it was held by Mr. Justice Parke, that a confirmation by the wife of an accomplice was insufficient, as the wife and the accomplice must be considered as one for this purpose. R v. Neale, 7 C. & P. 168: 32 E. C. L. R. See also R. v. Jellyman, 8 C. & P. 604: 34 E. C. L. R., *acc.* As to which also, *quære.*

Accomplice—situation of an accomplice when called as a witness.] Where a prisoner, arraigned for treason or felony, confessed the fact before plea pleaded, and appealed or accused others his accomplices in the same crime, this which was termed approvement, and which was only admitted at the discretion of the court, entitled him to pardon. But as the practice of appeal in cases of treason and felony is now abolished (53 Geo. 3, c. 46), this consequence of it has also ceased.(1)

(1) One who confesses himself guilty of a felony, and accuses others of the same crime, in order to shield himself from punishment, is an approver, and as such is an incompetent witness; but a confession of other felonies will not make the party confessing an approver. Myers v. The People, 26 Illinois, 173; Gray v. The People, Ibid. 344.

The practice now adopted is for the magistrate before whom the accomplice is examined, or for the court before which the trial is had, to direct that he shall be examined, upon an understanding that if he gives his evidence in an unexceptionable manner, he shall be recommended for a pardon. But this understanding cannot be pleaded by him in bar of an indictment, nor can he avail himself of it at his trial, for it is merely an equitable claim to the mercy of the crown, from the magistrate's express or implied promise of an indemnity, upon certain conditions that have been performed. It can only come before the court by way of application to put off the trial, in order to give the party time to apply elsewhere. R. v. Rudd, Cowp. 331; 1 Leach, 115, S. C. So where two prisoners, under sentence for murder, on being brought before the K. B. by *habeas corpus*, were asked what they had to say why execution should not be awarded against them, and one of them pleaded, *ore tenus*, that the king, by proclamation in the Gazette, had promised pardon to any person, except the actual murderer, who should give information whereby such murderer should be apprehended and convicted; and that he, not being the actual murderer, had given such information, and thereby entitled himself to the pardon; such plea, [*125] on demurrer *ore tenus* by the *Attorney-General, was held not sufficient. R. v. Garside, 2 A. & E. 266: 29 E. C. L. R. After giving his evidence, but not in such a way as to entitle him to favor, an accomplice is frequently indicted for the same offence (see *post*); and though he may have conducted himself properly, he is sometimes proceeded against for *other* offences. Thus, where an accomplice was admitted to give evidence against a prisoner for receiving stolen goods, and the latter was convicted, and the witness was afterwards prosecuted in another county for horse-stealing, and convicted, a doubt arising whether this case came within the equitable claim to mercy, it was referred to the judges, who were unanimously of opinion that the pardon was not to extend to offences for which the prisoner might be liable to prosecution out of the county, and the prisoner underwent his sentence. R. v. Duce, 1 Burn's Justice, 211, 24th ed. So where an accomplice who had been admitted as a witness against his companions, on a charge of highway robbery, and had conducted himself properly, was afterwards tried himself for burglary, Garrow, B., submitted the point to the judges, whether he ought to have been tried after the promise of pardon; but the judges were all of opinion that though examined as a witness for the crown, on the application of the counsel for the prosecution, there was no legal objection to his being tried for any offence with which he was charged, and that it rested entirely in the discretion of the judge whether to recommend a prisoner in such a case to mercy. R. v. Lee, Russ. & Ry. 364, 1 Burn, 212; R. v. Brunton, Id. 454, S. P. With respect to other offences, therefore, the witness is not bound to answer on his cross-examination. R. v. West, Phill. Ev. 28, 8th ed. (*n*). Where a receiver discovered the principals in a felony, under a promise of favor, and also disclosed another felony of the same kind, under an impression that by the course he had taken he had protected himself from the consequences, Coleridge, J., recommended the counsel for the prosecutor not to proceed with the indictment against the receiver for such other felony, adding, however, that if it was persisted in he was bound to try the case. The recommendation of the learned judge being yielded to, an acquittal was taken. R. v. Garside, 2 Lew. C. C. 38.

A prisoner who, after a false representation made to him by a constable in gaol, that his confederates had been taken into custody, made a confession, and was admitted as a witness against his associates, but on the trial denied all knowledge of the subject, was afterwards tried and convicted upon his own confession; and the

conviction was upheld by all the judges.(1) R. v. Burley, 2 Stark. Ev. 12 (*n*). So where in a case of burglary an accomplice, who had been allowed to go before the grand jury as a witness for the crown, upon the trial pretended to be ignorant of the facts on which he had before given evidence, Coleridge, J., ordered a bill to be preferred against him, to which he pleaded guilty, and judgment of death was recorded. R. v. Moore, 2 Lew. C. C. 37. So where an accomplice, after making a full disclosure before the committing magistrate, refused when before the grand jury to give any evidence at all, Wightman, J., ordered his name to be inserted in the bill of indictment, and he was convicted on his own confession. R. v. Holtham, Staff. Sp. Ass. 1843, 2 Russ. by Grea. 958. So where an accomplice who was called as a witness against several prisoners, gave evidence which showed that all, except one who was apparently the leader of the gang, were present at a robbery, but refused to give any evidence as to that one *being present, and the jury found all the [*126] prisoners guilty, Parke, B., thinking that the accomplice had refused to state that the particular prisoner was present in order to screen him, ordered the accomplice to be kept in custody till the next assizes, and then tried. R. v. Hokes, Staff. Sp. Ass. 1837, 2 Russ. by Grea. 958 (*d*).

In Scotland, the course pursued with regard to an accomplice who has been admitted against his confederates, differs from that adopted by the English law, and seems better calculated to further the ends of justice. "It has been long an established principle of our law," says Mr. Alison, "that by the very act of calling the *socius* and putting him in the box, the prosecutor debars himself from all title to molest him for the future, with relation to the matter libelled. This is always explained to the witness by the presiding judge as soon as he appears in court, and consequently he gives his testimony under a feeling of absolute security, as to the effect which it may have upon himself. If, therefore, on any future occasion, the witness should be subjected to a prosecution, on account of any of the matters contained in the libel on which he was examined, the proceedings would be at once quashed by the Supreme Court. This privilege is absolute, and altogether independent of the prevarication or unwillingness with which the witness may give his testimony. Justice, indeed, may often be defeated, by a witness retracting his previous disclosures, or refusing to make any confession after he is put into the box, but it would be much more put in hazard, if the witness was sensible that his future safety depended on the extent to which he spoke out against his associates at the bar. The only remedy, therefore, in such a case is committal of the witness for contempt or prevarication, or indicting him for perjury, if there are sufficient grounds for any of those proceedings." Alison's Prac. Cr. Law of Scotl. 453.

(1) Commonwealth v. Knapp, 10 Pick. 478.

An accomplice, who turns State's evidence, can keep back nothing. Alderman v. The People, 4 Michigan, 414; The State v. Condry, 5 Jones's Law, 418.

When an accomplice has a promise from the attorney-general, that he shall not be prosecuted if he will become State's evidence, and make a full disclosure, and upon such promise he makes a confession, but refuses afterwards to testify, it was held that he might be put on his trial, and the confession given in evidence against him. Commonwealth v. Knapp, 10 Pick. 478.

*EXAMINATION OF WITNESSES.

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Ordering witnesses out of court.] In general the court will, on the application of either of the parties, direct that all the witnesses but the one under examination shall leave the court.(1) And the right of either party to require the unexamined witnesses to retire, may be exercised at any period of the cause. Per Alderson, B., Southey v. Nash, 632. It is said, that with regard to a prisoner, this is not a matter of right. Stark. Ev. 162, 2d ed.; 4 St. Tr. 9. But whether it be a matter of right or of discretion for the judge, in practice the case of a prisoner forms no exception to the general rule. The rule has been held not to extend to the attorney in the cause, who may remain and still be examined as a witness, his assistance being in most cases necessary to the proper conduct of the cause. Pomeroy v. Baddeley, Ry. & Moo. N. P. C. 430: 21 E. C. L. R. But it extends to the prosecutor, if it be proposed to examine him as a witness. R. v. Newman, 3 C. & Kir. 260, per Lord Campbell, C. J. So, as it seems, a physician, or other professional person, who is called to give an opinion as a matter of skill upon the circumstances of the case, may be allowed to remain. By the law of Scotland, a medical witness is directed to remain in court during the trial, till the medical opinion of other witnesses begins. Alison's Prac. Crim. Law of Scotl. 489.

If a witness remains in court after an order made for the witnesses on both sides to withdraw, it is said to be a rule in the Court of Exchequer, that such a witness shall [*128] not be allowed to be afterwards *examined. Att.-Gen. v. Bulpit, 9 Price, 4. It appears, however, that the rule in the Exchequer is confined to revenue cases, and that, in other cases, the rule is the same as it is in other courts, namely, that the rejection of the evidence is entirely in the discretion of the judge: per Coleridge, J., Thomas v. David, 7 C. & P. 350: 32 E. C. L. R.; and that it is for him to say, whether, under all the circumstances of the case, he will relax the order which has been given. Parker v. McWilliam, 6 Bingh. 683: 19 E. C. L. R.; R. v. Colley,

(1) People v. Duffy, 1 Wheeler's C. C. 123; State v. Sparrow, 2 Murph. 487.
As to the exclusion of witnesses from the court room. Nelson v. The State, 2 Swan, 237; Johnson v. The State, 14 Georgia, 55; Sartorius v. The State, 24 Mississippi, 602; The People v. Green, 1 Parker C. R. 11; Benaway v. Conyne, 3 Chandler, 214; The State v. Sparrow, 3 Humphreys, 487; The State v. Brookshire. 2 Alabama, 303; The State v. Fitzsimmons, 30 Missouri, 236.
The fact that a witness, in disregard of the order of the court, continues in the court room while another is testifying, does not thereby disqualify him as a witness. Grimes v. Martin, 10 Iowa, 347.

Moo. & Malk. 329 : 22 E. C. L. R. In Chandler v. Horne, 2 Moo. & Rob. 423, Erskine, J., stated that it was now settled by all the judges that the judge has no right to reject the witness on this ground, however much his wilful disobedience of the order may lessen the value of his evidence; and see also to the same effect, Cobbett v. Hudson, 1 E. & B. 11 : 72 E. C. L. R.; S. C. 22 Law J., Q. B. 11.

Calling all witnesses whose names are on the indictment, &c.] Although a prosecutor was never in strictness bound to call every witness whose name is on the back of the indictment : R. v. Simmonds, 1 C. & P. 84 : 12 E. C. L. R.; R. v. Whitbread, Id. 84 (*n*) ; yet it is usual to do so in order to afford the prisoner's counsel an opportunity to cross-examine them : R. v. Simmonds, *supra ;* and if the prosecutor would not call them, the judge in his discretion might. Id. R. v. Taylor, Id. (*n*) ; R. v. Bodle, 6 C. & P. 186 : 25 E. C. L. R. The judges, however, have now laid down a rule, that the prosecutor is not bound to call witnesses merely because their names are on the back of the indictment, but that the prosecutor ought to have all such witnesses in court, so that they may be called for the defence, if they are wanted for that purpose. If, however, they are called for the defence, the person calling them makes them his own witnesses. R. v. Woodhead, 2 C. & K. 520 : 61 E. C. L. R.; per Alderson, B. And see R. v. Cassidy, 1 F. & F. 79 ; from which it appears that Parke, B., Cresswell, J., and Lord Campbell, C. J., agree in this ruling.

The court has no power to oblige a prosecutor to give to a defendant the additions and places of residence of witnesses named on the back of an indictment. R. v. Gordon, 2 Dowl. N. 417 ; S. C. 12 Law J. M. C. 84.

Calling all parties present at any transaction giving rise to a charge of homicide.] On a trial for murder, where the widow and daughter of the deceased were present at the time when the fatal blow was supposed to have been given, and the widow was examined on the part of the prosecution, Patteson, J., directed the daughter to be called also, although her name was not on the indictment, and she had been brought to the assizes by the other side. The learned judge observed, " Every witness who was present at a transaction of this sort, ought to be called ; and even if they give different accounts, it is fit that the jury should hear their evidence, so as to draw their own conclusion as to the real truth of the matter." R. v. Holden, 8 C. & P. 609 : 34 E. C. L. R. See also R. v. Stroner, 1 C. & K. 650 : 47 E. C. L. R. And it seems that the same course should be pursued even when the party is a near relative of the prisoner, as a brother : R. v. Chapman, 8 C. & P. 559 : 34 E. C. L. R.; or a daughter : R. v. Orchard, Id. (*n*). In R. v. Holden, it appeared that three surgeons had examined the body of the deceased, and that there was a difference of opinion among them. Two of them were called for the prosecution, but the third was not, *and as his name was not on the indictment, the counsel for the prose- [*129] cution declined calling him. Patteson, J., said, " He is a material witness who is not called on the part of the prosecution, and as he is in court I shall call him, for the furtherance of justice." He was accordingly examined by the learned judge.

Recalling and questioning witnesses by the court.] It has already appeared (*supra*) that the judge may in his discretion, for the furtherance of justice, call witnesses whom the counsel for the prosecution has refused to put into the box. So he may recall witnesses that have already been examined. Where, after the examination of witnesses to facts on behalf of a prisoner, the judge (there being no counsel for the prosecution) called back and examined a witness for the prosecution, it was held, that the prisoner's

counsel had a right to cross-examine again if he thought it material. Per Taunton, J., R. v. Watson, 6 C. & P. 653: 25 E. C. L. R. See also R. v. Stroner, 1 C. & K. 650: 47 E. C. L. R.

So during the progress of the trial the judge may question the witnesses, and although the prosecutor's counsel has closed his case, and the counsel for the defendant has taken an objection to the evidence, the judge may make any further inquiries of the witnesses he thinks fit, in order to answer the objection. R. v. Remnant, R. & R. 136. And in such a case the counsel for the defendant could not cross-examine the witness.

Evidence cannot be taken in cases of felony by consent, but in cases of misdemeanor it may.] Where there were two prosecutions against the prisoner for felony, and his counsel offered to admit the evidence taken on the first trial, as given in the second, Patteson, J., doubted whether that could be done, even by consent, in a case of felony, but the learned judge directed the witnesses to be resworn, and read their evidence over to them from his notes. R. v. Foster, 7 C. & P. 495: 32 E. C. L. R. In cases of misdemeanor, evidence may be taken by consent. Per Patteson, J., R. v. Foster, *supra*. Where, however, on an indictment for perjury, it appeared that the attorneys on both sides had agreed that the formal proof should be dispensed with, and part of the prosecutor's case admitted, Lord Abinger, C. B., said, "I cannot allow any admission to be made on the part of the defendant, unless it is made at the trial by the defendant or his counsel." The defendant's counsel declining to make any admission, the defendant was acquitted. R. v. Thornhill, 8 C. & P. 575: 34 E. C. L. R.

At what time the objection to the competency of a witness must be taken.] It was formerly considered necessary to take the objection to the competency of a witness on the *voire dire;* and if once examined in chief, he could not afterwards be objected to on the ground of interest:(1) R. v. Lord Lovat, 9 St. Tr. 639, 646, 704; 1 Phill Ev. 148, 8th ed.; but in modern practice the rule was relaxed. The examination of a witness, to discover whether he was interested or not, was frequently to the same effect as his examination in chief, so that it saved time, and was more convenient to let him be sworn in the first instance in chief; and in case it turned out that he was interested, it was then time enough to take the objection. Per Buller, J., Turner v. Pearte, 1 T. R. 719; Pengal v. Nicholson, Wight, 64, 4 Burr. 2256. So in Stone v. Black- [*130] burne, 1 Esp. 37, it *was said by Lord Kenyon, that objections to the competency of witnesses never come too late, but may be made in any stage of the cause. The Court of Exchequer has decided that the objection may be raised at any time during the trial.(2) Jacobs v. Layborn, 11 M. & W. 685.

(1) It is entirely a matter of discretion with the court whether the preliminary oath as to interest or the oath in chief shall be administered. But the better and more approved practice now is to swear the witness in chief and bring out the facts showing his interest either on direct or cross-examination. Seeley v. Engell, 17 Barbour, 530.

(2) Morton v. Beall's Adm., 2 Har. & Gill, 136; Bank of North America v. Wikoff, 2 Yeates, 39, S. C. 4 Dall. 151; Swift v. Dean, 6 Johns. 523; Fisher v. Willar, 13 Mass. 379; Evans v. Eaton, Peters C. C. Rep. 338; Baldwin v. West, Harden, 50; Cole v Cole, 1 Har. & Johns. 572; Butler v. Tufts, 13 Maine, 302. That objection to competency on the score of conviction of an infamous crime must be taken before the witness is sworn, see The People v. McGarrer, 17 Wend. 460. The party against whom an interested witness is called to testify, must make his objection as soon as the interest is discovered and he has an opportunity of doing it; otherwise he will be considered as having waived the objection. Therefore when a witness called by the plaintiff, was examined, cross-examined, and dismissed from the stand, and the next day the defendant objected to his competency on the ground of his interest, which was disclosed at the commencement of his examination, it was held that the objection came too late. Lewis v. Moore, 20 Conn. 211; Dent v. Hancock, 5 Gill, 120.

An objection to the admissibility of a witness in high treason, on the ground that he is not properly described in the list of witnesses furnished to the prisoner, in pursuance of the statute 7 Ann. c. 21, s. 14, must be taken in the first instance, otherwise the party might take the chance of getting evidence which he liked, and if he disliked it, might afterwards get rid of it on the ground of misdescription. R v. Watson, 2 Stark. 158: 3 E. C. L. R.; R. v. Frost, 9 C. & P. 183: 38 E. C. L. R.

Voire dire.] The most convenient time to object to the competency of a witness is before he is sworn, Yardley v. Arnold, 10 M. & W. 145, when the witness is questioned by the court upon the points suggested by the objecting party, and extrinsic evidence upon the point may also be received.(1) Bartlett v. Smith, 11 M. &

(1) An election to examine the witness himself on his *voire dire* precludes a resort to evidence *aliunde* to prove his interest. Mallett v. Mallett, 1 Root, 501; Lessee of Bisher v. Hall, 3 Ohio, 465; Mifflin v. Bingham, 1 Dall. 275; Cole v. Cole, 1 Har. & Johns. 572; Bridge v. Wellington, 1 Mass. 219; Butler v. Butler, 3 Day; Dow v. Osgood, 2 Tyler, 28; Welden v. Buck, Anthon's N. P. 10 n.; Berry v. Wallin et al., 1 Overton, 107; Ray v. Mariner et ux., 2 Hayw. 385; Chance v. Hine, 6 Conn. 231; Chatfield v. Lathrop, 6 Pick. 417. Though sworn on the *voire dire*, yet if his interest appears on his own examination in chief, he may be set aside. Evans v. Eaton, Peters's C. C. Reports, 338; Davis v. Barr, 9 Serg. et Rawle, 138; Baldwin v. West, Hardin, 50. And where on his cross-examination the witness denies his interest, this does not preclude a resort to other evidence. Stout v. Wood, 1 Blackf. 72; 1 Dall. *supra.* So when the examination on the *voire dire* leaves it doubtful, whether the witness be or be not interested. Shannon v. The Commonwealth, 8 Serg. & Rawle, 444; Galbraith v. Galbraith, 6 Watts, 112. If he refuse to answer on the *voire dire*, the court cannot presume him interested, but must commit him for contempt. Lott v. Burrell. 2 Rep Const. Ct. 167. The interest of a witness may be shown from his own examination or by evidence *aliunde;* but the adoption of either of these modes precludes a resort to the other for the same purpose and upon the same ground. Le Barrow v. Redman, 30 Maine, 536.

A resort to one mode to prove interest on one ground, does not prevent the use of the other mode to establish it on a distinct and different ground. Stebbins et al. v. Sachet, 4 Conn. 258.

The defendant called a witness to whom the plaintiff objected, on the ground of the want of a religious belief, and the judge admitted the testimony of witnesses in support of and in opposition to the objection, and afterwards the proposed witness was examined on his *voire dire*, and having testified to his belief, was admitted to give evidence in chief. Quinn v. Crowell, 4 Whart. 334.

Where the witness on the *voire dire* denies his interest generally, he may be interrogated particularly as to his situation to show that he has none. Emerton v. Andrews, 4 Mass. 653; Baldwin v. West, Hardin, 50; Reed's Lessee v. Dodson, 1 Overton, 396; Williams v. Matthews, 3 Cowen, 352. *Contra*, Moore v. Sheredine, 2 Har. & McHen. 453. But see Peter v. Beall, 4 Id. 342.

A witness who believes himself interested when in truth he is not, is competent. The State v. Clark, 2 Tyler, 273; Long v. Baillie, 4 Serg & Rawle, 226; Fernsler v. Carlin, 3 Ib. 130; Henry v. Morgan, 2 Binn. 497; Williams v. Matthews, 3 Cowen, 352; Davis v. Barclay, 1 Harper, 63; Rodgers v. Burton, Peck, 108; 6 Conn. Rep. 371; Dellone v. Rekmer, 4 Watts, 9; Commercial Bank of Albany v. Hughes, 17 Wend. 94. *Contra*, Richardson's Exrs. v. Hunt, 2 Munf. 148; Sentney v. Overton, 4 Bibb. 445; Trustees of Lansingburg v. Willard, 8 Johns. 428; Plump v. Whiting, 4 Mass. 518; Peter v. Beal, *supra;* Elliott v. Porter, 5 Dana, 304.

So an honorary obligation does not render the witness incompetent. Long v. Baillie, *supra;* Gilpin v. Vincent, 9 Johns. 219; Carman v. Foster, 1 Ashmead, 133; Smith v. Downs, 6 Conn. 365. See Skillinger v. Bolt, 1 Conn. 147; Coleman v. Wise et al., 2 Johns. 165; Moore v. Hitchcock, 4 Wend. 292.

The declaration of a witness as to his interest will not exclude him. Pierce v. Chase, 8 Mass. 487; Commonwealth v. Waite, 5 Id. 261; Vining v. Wooton. Cooke's Rep. 127; Henry v. Morgan, 2 Binn. 497; Fernsler v. Carlin, 3 Serg. & Rawle, 130; Lessee of Pollock v. Gillespie, 2 Yeates, 129. *Contra*, Colston v. Nicholls, 1 Har. & Johns. 105; Anon. 2 Hayw. 340. See Patten v. Halsted, 1 Coxe, 277. But the admission of his interest by the party who calls him will exclude him. Pierce v. Chase, 8 Mass. 487; Nichols v. Holgate et al., 2 Aiken, 138.

If a witness, shown to be incompetent on his *voire dire*, be allowed to testify, facts proved by him on his examination in chief cannot be looked to for the purpose of curing the error. Lay v. Lawson, 23 Alabama, 377.

A witness cannot, at the instance of the party calling him, repel an objection to his competency on the ground of interest established by other evidence. Anderson v. Young, 9 Harris, 443.

A witness on his *voire dire* is competent to prove that he has been released. Ault v. Rawson, 14 Illinois, 484.

The injured party is a competent witness under an indictment for forcible entry and detainer. Kersh v. The State, 24 Georgia, 191.

A witness who is promised by a party a sum of money if he will attend as a witness, and the party should gain the case, is incompetent. Holland v. Ingram, 6 Richardson, 50.

The interest of the witness must be present, certain, and vested. Harvey v. Anderson, 12 Georgia, 69; Scott v. Jester, 8 English, 437.

In an indictment for perjury, the prosecutor, unless he has a direct, certain and immediate interest in the record, is a competent witness. The State v. Farrow, 10 Richardson's Law, 165.

Admissions made by a witness out of court are not evidence to exclude him on the ground of interest,

W. 483; the Att.-G. v. Hitchcock, 1 Ex. 95; Cleave v. Jones, 7 Ex. 421. But a witness may be objected to at any time after he is sworn, if anything to suggest his incompetency be discovered: Jacobs v. Layborn, 11 M. & W. 685; and the court will then inquire into the point in the same way.

Examination in chief.] After the witness has been duly sworn by the officer of the court, he is examined in chief by the party calling him. Being supposed to be in the interest of that party, it is a rule, that upon such examination leading questions shall not be put to him.(1) Questions to which the answer, "yes," or "no," would not be conclusive upon the matter in issue, are not in general objectionable. It is necessary, to a certain extent, to lead the mind of the witness to the subject of the inquiry. Per Lord Ellenborough, Nicholl v. Dowding, 1 Stark. 81: 2 E. C. L. R. Thus, where the question is, whether A. and B. were partners, a witness may be asked whether A. has interfered in the business of B. Id. So where a witness being called to prove a partnership could not recollect the names of the component members of the firm, so as to repeat them without suggestion, Lord Ellenborough, alluding to a case tried before Lord Mansfield, in which the witness had been allowed to read a written list of names, ruled, that there was no objection to asking the witness, whether certain specified persons were members of the firm. Accerro v. Petroni, 1 Stark. 100. So for the purpose of identification, a particular prisoner may be pointed out to the witness, who may be asked whether he is the man. R. v. De Berenger, 1 Stark. Ev. 125, 1st ed.; 2 Stark. N. P. C. 129 (*n*): 3 E. C. L. R. And in R. v. Watson, 2 Stark. N. P. C. 128, the court held that the counsel for the prosecution might ask, in the most direct terms, whether any of the prisoners was the person meant and described by the witness. So where a question arose as to the contents of a written instrument which had been lost, and in order to contradict a witness who had been examined as to the contents, another witness was called, Lord Ellenborough ruled, that after exhausting the witness's memory as to the contents of the letter, he might be asked if it contained a particular passage recited to him, which had been sworn to on the other side, otherwise it would be impossible ever to come to a direct contradiction. Courteen v. Touse, 1 Campb. 43.

[*131] *Upon the same principle, viz., the difficulty or impossibility of attaining the object for which the witness is called, unless leading questions are permitted to be put to him, they have been allowed where they are necessary to establish a contradiction. Thus, where counsel, on cross-examination, asked a witness as to some expressions he had used, for the purpose of laying a foundation for contradicting him, and the witness denying having used them, the counsel called a person to prove that he had, and read to him the particular words from his brief, Abbott, C. J., held that he was entitled to do so. Edmonds v. Walter, 3 Stark, N. P. C. 8: 3 E. C. L. R.

Where a witness, examined in chief, by his conduct in the box shows himself de-

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but the statements of the party calling him are Walker v. Coursin, 7 Harris, 321; Martin v. Farnum, 4 Foster, 191; Lessee of Snyder v. Snyder, 6 Binn. 483; Stanford v. Stanford et al., 9 Conn. 275.

(1) What are leading questions. See Kemmerer v. Edelman, 11 Harris, 143; Wilson v. McCullough, Ibid. 440; Lee v. Tinges, 7 Maryland, 215; Sexton v. Brock, 15 Arkansas, 345; Willis v. Quinby, 11 Foster, 485; Bartlett v. Hoyt, 33 N. Hamp. 151; Hofler v. The State, 16 Arkansas, 534; Spear v. Richardson, 37 N. Hamp. 23; Floyd v. The State, 30 Alabama, 511; Mathis v. Buford, 17 Texas, 152; Dudley v. Elkins, 39 N. Hamp. 78; Allen v. the State, 28 Georgia, 395; Page v. Parker, 40 N. Hamp. 47; Pelamourges v. Clark, 9 Iowa, 1; Shields v. Guffey, Ibid. 322; Hopper v. The Commonwealth, 6 Grattan, 684.

Where a witness was asked a leading question which was objected to and ruled out, it was held, that the witness might testify to the same point if the question be properly put. Heisler v. The State, 20 Georgia, 153.

Leading questions on cross-examination. Boles v. The State, 24 Mississippi, 445; Long v. Steiger, 8 Texas, 460.

cidedly adverse to the party calling him, it is in the discretion of the judge to allow him to be examined, as if he were on cross-examination. Bastin v. Carew, Ry. & Moo. N. P. C. 127: 21 E. C. L. R.; Clarke v. Saffery, Id. 126; Murphy's Case, 8 C. & P. 297: 34 E. C. L. R.; per Lord Abinger, C. B., Chapman's Case, 8 C. & P. 558. But if he stands in a situation which, of necessity, makes him adverse to the party calling him, it was held by Best, C. J., that the counsel may, as a matter of right, cross-examine him. Clarke v. Saffery, R. & Moo. N. P. C. 126: 21 E. C. L. R. Somewhat similar to this is the question whether, where a witness, called for one party, is afterwards recalled by the other, the latter party may give his examination the form of a cross-examination; and it has been held, by Lord Kenyon, that he may; for, having been originally examined as the witness of one party, the privilege of the other to cross-examine remains through every stage of the case. Dickenson v. Shee, 4 Esp. 67; 1 Stark. Ev. 162, 2d ed.

Cross-examination.] Leading questions are admitted on cross-examination, in which much larger powers are given to counsel than in the original examination.(1) The form of a cross-examination, however, depends in some degree, like that of an examination in chief, upon the bias and disposition evinced by the witness under interrogation. If he should display a zeal against the party cross-examining him, great latitude with regard to leading questions may with propriety be admitted. But if, on the other hand, he betrays a desire to serve the party who cross-examines him, although the court will not in general interfere to prevent the counsel from putting leading questions, yet it has been rightly observed, that evidence obtained in this manner is very unsatisfactory and open to much remark. The rule with regard to putting leading questions on cross-examination was thus laid down by Mr. Justice Buller: "You may lead a witness upon cross-examination, to bring him directly to the point, as to the answer; but you cannot go the length of putting into the witness's mouth the very words he is to echo back again." R. v. Hardy, 24 How. St. Tr. 755.

In a later case, where an objection was made to leading a willing witness, Alderson, B., said, "I apprehend you may put a leading question to an unwilling witness, on the examination in chief, at the discretion of the judge; but you may always put a leading question in cross examination, whether a witness be unwilling or not." Parkin v. Moon, 7 C & P. 405: 32 E. C. L. R.

(1) Upon cross-examination, the witness cannot be asked a leading question in respect to new matter. Harrison v. Rowan, 3 Wash. C. C. Reps. 580. "And here," says Gibson, C. J., in Ellmaker v. Buckley, 16 Serg. & Rawle, 77, "I take occasion in broad terms to dissent from the doctrine broached in Mr. Phillipps's Law of Evidence (211), that a witness actually sworn, though not examined by the party who has called him, is subject to cross-examination by the adverse party; and that the right to cross-examine is continued through all the subsequent stages of the cause, so that the adverse party may call the same witness to prove his case, and for that purpose ask him leading questions."

The defendant cannot cross-examine the plaintiff's witnesses to matter entirely new, in order to introduce his defence untrammelled by the rules of a direct examination. Castor v. Bavington, 2 Watts & Serg. 505; Floyd v. Bovard, 6 Ibid. 75. A party may cross-examine as to the *res gestæ* given in evidence, though it be new matter. Markley v. Swartzlander, 8 Ibid. 172.

When a witness is called to state a particular fact, it is improper to lead him to a full statement of the defendant's case which is not yet opened to the court and jury; but it is not error to permit him to answer on his cross-examination a single question closely connected with what is proved, even if the answer operate in favor of the party putting the question. The Farmers' Bank v. Strohecher, 9 Watts, 183.

A party has no right to cross-examine any witness, except as to facts and circumstances connected with the matters stated in his direct examination. If he wishes to examine him on other matters, he must do so by making the witness his own, and calling him as such in the subsequent progress of the cause. A party cannot, by his own omission to take an objection to the admission of improper evidence brought out on a cross-examination, found a right to introduce testimony in chief to rebut or explain it. The Philadelphia & Trenton R. R. Co. v. Stimpson, 14 Peters, 448; *Contra*, Lewis v. Hodgdon, 17 Maine, 267.

When two or more prisoners are tried on the same indictment, and are separately defended, any witness called by one of them may be cross-examined on behalf of the [*132] others, if he gives any testimony *tending to criminate them. R. v. Burdett, Dears. C. C. R. 431; S. C. 24 L. J. M. C. 63.

Cross-examination of witnesses as to previous statements in writing.] It was settled in the Queen's Case, 2 B. & B. 292: 6 E. C. L. R., that when upon cross-examination, a witness is asked whether or no he has made any previous statement, the opponent party may interfere and ask, whether the representation referred to were in writing or verbal. If it appears to be in writing, then the writing itself must, if possible, be produced in order to show its contents, and they cannot be got from the witness under cross-examination. But if for any valid reason the writing cannot be produced, then the usual principles on which secondary evidence is admissible will apply, and the contents of the document may be proved by the admission of the witness.

If the counsel on cross-examination puts a paper into the witness's hand and questions him upon it, the counsel on the other side has a right to see the paper, and re-examine upon it. R. v. Duncombe, 8 C. & P. 369: 34 E. C. L. R.

Cross-examination of witnesses as to the contents of their depositions.] The subject of cross-examination of witnesses as to the contents of their depositions has already been alluded to under the head of "Depositions" (*supra*, p. 63), and the special rules laid down as to this particular kind of cross-examination have been there given.

As to the proper mode of conducting a cross-examination on depositions, the following cases have been decided.

In R. v. Edwards, 8 C. & P. 31, it was proposed on the part of the prisoner to put the depositions in the hands of a witness, and to desire him to look at his own, and then ask him whether he would adhere to the statement which he had just made, and the judges (Littledale and Coleridge, JJ.) thought there was no objection to this. But in R. v. Ford, 2 Den. C. C. 245, in which a similar course had been pursued, and the opinion of the Court of Criminal Appeal asked upon its propriety, Lord Campbell refused to hear it argued, saying it was *res judicata;* and referred to a case reserved by Parke, B., with a note of which the learned baron had furnished the court, and in which the judges decided that this course was inexpedient and ought not to be allowed. Lord Campbell added that the proper course was to read the deposition at the time, or put it in afterwards as the evidence of the party so using it.

In R. v. Smith, 1 Den. C. C. 536, the magistrate's clerk had put, irregularly, some questions to the witnesses, the answers to which were inserted by him in the depositions. Afterwards the witnesses appeared again before the magistrates, and, in the presence of the prsioners, were re-sworn; the depositions were read over, an opportunity was given to the prisoners to cross-examine the witnesses, and the depositions were then signed. On the trial the prisoners' counsel proposed to cross-examine a witness upon what passed between him and the magistrate's clerk, without putting in the depositions, which the judge at the trial refused to permit; but the Court of Criminal Appeal, upon a case reserved, held that the question was proper, inasmuch as the magistrate's clerk, a person in no authority, could not, by any act of his, attach to the writing a character which would exclude parol evidence of that which was so written.

[*133] **On what subjects a witness may be cross-examined.*] A witness may be

questioned on cross-examination not only on the subject of inquiry, but upon any other subject, however remote, for the purpose of testing his character for credibility, his memory, his means of knowledge, or his accuracy. Whether or no the question put will have that effect, will depend on the circumstances of the case, and frequently also upon information which is in possession of the cross-examining counsel only; judges, therefore, are in the habit of granting considerable license to counsel in this matter, from the implicit confidence which is placed in them that they will not turn the power which is put into their hands for the purposes of justice into an instrument of oppression. The moment it appears that a question is being put which does not either bear upon the issue, or enable the jury to judge of the *value* of the witness's testimony, it is the duty of the court to interfere, as well to protect the witness from what then becomes an injustice or an insult, as to prevent the time of the court from being wasted.

As to when a witness may refuse to answer questions put to him, see *post*, p. 137.

Cross-examination of witnesses producing documents only.] Where a witness is called merely to produce a document which can be proved by another, and he is not sworn, he is not subject to cross-examination. Simpson v. Smith, 1822, cor. Holroyd, J.; 2 Phill. Ev. 307, 9th ed.; and per Bayley, J., 1824, 1 Stark. Ev. 129, 2d ed.; Davis v. Dale, Moo. & Malk. 514: 22 E. C. L. R. Thus where, on an indictment for perjury, a sheriff's officer had been subpœnaed to produce a warrant of the sheriff, after argument he was ordered to do so without having been sworn. R. v. Murlis, Moo. & Malk. 515. But where the party producing a document is sworn, the other side is entitled to cross-examine him, although he is not examined in chief. R. v. Brooke, 2 Stark. 472: 3 E. C. L. R. Where, however, a person called to produce a document, was sworn by mistake, and asked a question which he did not answer, it was held that the opposite party was not entitled to cross-examine him. Rush v. Smyth, 4 Tyrw. 675; 1 Cr., M. & R. 94. So where a witness has been asked only one immaterial question, and his evidence is stopped by the judge, the other party has no right to cross-examine him. Crevy v. Carr, 7 C. & P. 64: 32 E. C. L. R. Where a witness is sworn, and gives some evidence, if it be merely to prove an instrument, he is to be considered a witness for all purposes. Morgan v. Bridges, 2 Stark. N. P. 314: 3 E. C. L. R.

Re-examination.] A re-examination, which is allowed only for the purpose of explaining any facts which may come out on cross-examination, must of course be confined to the subject-matter of the cross-examination. 1 Stark. Ev. 179, 2d ed. The re-examination of a witness is not to extend to any new matter, unconnected with the cross-examination, and which might have been inquired into on the examination in chief. If new matter is wanted, the usual course is to ask the judge to make the inquiry; in such cases he will exercise his discretion, and determine how the inquiry, if necessary, may be most conveniently made, whether by himself or by the counsel. 1 Phill. Ev. 840, 9th ed.

The rule with regard to re-examinations is thus laid down by Abbott, C. J., in the Queen's Case, 2 Br. & Bingh. 297: 6 E. C. L. R. "I think the *counsel [*134] has a right, on re-examination, to ask all questions which may be proper to draw out an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful; and also of the motive by which the witness was induced to use those expressions; but he has no right to go further, and introduce matter new in itself, and not suited to the purpose of explain-

ing either the expressions or the motives of the witness." "I distinguish between a conversation which a witness may have had with a party to a suit, whether criminal or civil, and a conversation with a third person. The conversations of a party to the suit relative to the subject-matter of the suit, are in themselves evidence against him, in the suit; and if a counsel chooses to ask a witness as to anything which may have been said by an adverse party, the counsel for that party has a right to lay before the court all that was said by his client in the same conversation; not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the part introduced upon the previous examination, provided only that it relate to the subject-mater of the suit; because it would not be just to take part of a conversation as evidence against the party, without giving the party at the same time the benefit of the entire residue of what he said on the same occasion." In Prince v. Samo, 7 A. & E. 627: 53 E. C. L. R., the Court of Q. B. said they could not assent to the doctrine laid down in the above case, and they held, that when a statement made by a party to a suit in giving evidence on a former trial, has been got out in cross-examination, only so much of the remainder of the evidence is allowed to be given on re-examination as tends to qualify or explain the statement made on cross-examination. Recognized in Sturge v. Buchanan, 10 A. & E. 605: 37 E. C. L. R.

When one of the plaintiff's witnesses stated on cross-examination facts not strictly evidence, but which might prejudice the plaintiff, it was held that, unless the defendant applied to strike them out of the judge's notes, the plaintiff was entitled to re-examine upon them. Blewitt v. Tregoning, 3 A. & E. 554: 30 E. C. L. R.

Memorandum to refresh witness's memory.] It has already been stated, that a witness may refer to an informal examination taken down by himself, in order to refresh his memory.(1) *Ante*, p. 58. So he may refer to any entry or memorandum he has made shortly after the occurrence of the fact to which it relates, although the

(1) Holladay v. Marsh, 2 Wend. 142; Lawrence v. Barker, 5 Pick. 301; Feeter v. Heath, 11 Wend. 477.

Where a clerk in a bank, called to prove notice of a dishonored note payable abroad, testified that two notices of non-payment for the indorsers were received by the bank, and he made the following memorandum on one for the bank: "Delivered like notice to M., June 4, 1839." which was produced; and he further testified that he made this memorandum at the time it purports to have been made, and that from the facts of receiving the notices and making the *memorandum*, he had no doubt but that he delivered such notices to the indorsers, though he had no recollection of having delivered them; it was held that said evidence was admissible. The New Haven Co. Bank v. Mitchell et al., 15 Conn. 206.

Where a witness testified that he was present at a conversation and made a memorandum of it immediately after it took place; that he had now no recollection of all the particulars, but that he had no doubt that the facts stated in the memorandum were true, and that he should have sworn to them from recollection within a short time afterwards, the memorandum was admitted in evidence, in connection with his testimony to show the particulars of the conversation. Haven v. Wendell, 11 N. Hamp. 112. See O'Neal v. Walton, 1 Richardson, 234. It is necessary that a witness testifying after inspecting a memorandum in court, should be able, after such inspection, distinctly to recollect the facts independent of the written memorandum. Green v. Brown, 3 Barbour, 119.

A witness may refresh his memory by referring to his own deposition given before a committing magistrate. Atkins v. The State, 16 Arkansas, 568.

If witness swear that he knows that the memorandum when made was true, though his memory is not refreshed by it, it may be read. The State v. Colwell, 3 Rhode Island, 132; Webster v. Clarke, 10 Foster, 245; Halsey v. Sinsebaugh, 1 Smith, 485; Russell v. Railroad, 3 Smith, 134; Taylor v. Stringer, 1 Hilton (N. Y.), 377; Guy v. Mead, 8 Smith, 462; The State v. Rawle, 2 Nott & McCord, 331. *Contra*, The People v. Elepa, 14 California, 144.

Memorandum by third person. Green v. Caulk, 16 Maryland, 556; Coffin v. Vincent, 12 Cushing, 98.

A witness may refresh his memory by reading a schedule prepared by his clerk in his presence and under his direction. 37 Maine, 246.

As to memoranda to refresh memory generally. Massey v. Hackett, 12 Louisiana, 54; Davidson v. Lallarde, Ibid. 826; Treadwell v. Wells, 4 California, 260; Clark v. The State, 4 Indiana, 156; Huff v. Bennett, 2 Seldon, 337; Harrison v. Middleton, 11 Grattan, 527.

entry or memorandum would not of itself be evidence: Kensington v. Inglis, 8 East, 289; as, formerly, on unstamped paper. Maugham v. Hubbard, 8 B. & C. 14: 15 E. C. L. R. But a witness cannot refresh his memory by extracts from a book, though made by himself: Doe v. Perkins, 3 T. R. 740; or from a copy of a book; for the rule requiring the best evidence makes it necessary to produce the original, though used only to refresh the memory. Burton v. Plummer, 2 A. & E. 343, 344: 29 E. C. L. R; Alcock v. The Royal Exchange Ins. Co., 13 Q. B. 292: 66 E. C. L. R.

Where a witness on looking at a written paper has his memory so refreshed, that he can speak to the facts from a recollection of them, his testimony is clearly admissible, although the paper may not have been written by him. Thus where it has been material to prove the date of an act of bankruptcy, the court has several times permitted witnesses to refer to their depositions taken shortly after the bankruptcy, though such depositions were of course not written by themselves, *but [*135] merely signed by them. Taylor Ev. 1095, 2d ed., and cases there cited.

Where the witness cannot speak without referring to a book, the book must be produced in court. Per Coleridge, J., Howard v. Canfield, 5 Dowl. P. C. 417. If produced, the counsel for the other party has a right to see it, and cross-examine from it: R. v. Hardy, 24 How. St. Tr. 824; or he may look at it and ask when it was written, without being bound to put it in evidence. R. v. Ramsden, 2 C. & P. 603: 12 E. C. L. R. If he cross-examines to other entries than those referred to by the witness, he makes them part of his own evidence. Per Gurney, B., Gregory v. Travenor, 6 C. & P. 281: 25 E. C. L. R.

Examinations as to belief.] A witness can depose to such facts only as are within his own knowledge; but even in giving evidence in chief, there is no rule which requires a witness to depose to facts with an expression of certainty that excludes all doubt in his mind. It is the constant practice to receive in evidence a witness's belief of the identity of a person, or of the fact of a certain writing being the handwriting of a particular individual, though the witness will not aver positively to these facts.(1) See R. v. Miller, 3 Wils. 427. It has been decided, that for false evidence so given, a witness may be indicted for perjury. R. v. Pedley, 1 Leach, 325; R. v. Schlesinger, 10 Q. B. 670: 64 E. C. L. R.

Examination as to opinion.] Although, in general, a witness cannot be asked what his opinion upon a particular question is, since he is called for the purpose of speaking as to *facts* only; yet where matter of skill and judgment is involved, a person competent to give an opinion may be asked what that opinion is.(2) Thus an

(1) A witness must not swear to impressions simply. That is descending to a test too vague. It should be persuasion or belief founded on facts within his own knowledge. Carter v. Connell, 1 Whart. 392; Carmalt v. Post, 8 Watts, 406; Salmon v. Feinour, 6 Gill and J. 60; Jones v. Chiles, 2 Dana, 32.

The testimony of a witness, *that he thought* the plaintiff told him that a certain sum of money had been paid to the plaintiff—*was very confident* he said so, but would not swear that he did—is a statement of the strength of the recollection of a fact by the witness, and is admissible evidence. Lewis v. Freeman, 17 Maine, 260.

The only impression which a witness should be allowed to state should be that of a fact feebly impressed upon his memory, and not the result of a process of reason and judgment. Crowell v. The Western Reserve Bank, 3 Ohio, 406.

The testimony of a witness will not be rejected because he accompanies it with the expression, "such is the impression of my mind," as every witness must swear according to the impression of his mind, more or less strong. Franklin v. The City of Macon, 12 Georgia, 257.

(2) Rochester v. Chester, 3 N. Hamp. 349; Forbes v. Carothers et al., 3 Yeates, 527; Carmalt v. Post, 8 Watts, 406; Gentry v. McMinnis, 3 Dana, 382; Bullock v. Wilson, 5 Porter, 338; Kellogg

engineer may be called to say what in his opinion was the cause of a harbor being blocked up. Folkes v. Chad, 3 Dougl. 157: 26 E. C. L. R.; 4 T. R. 498, S. C. In a variety of other cases, also, such evidence has been admitted. "Many nice questions," observes Lord Mansfield, "may arise as to forgery, and as to the impression of seals, whether the impression was made from the seal itself, or from an impression in wax. In such cases I cannot say that the opinion of seal-makers is not to be taken." Folkes v. Chad, 3 Dougl. 159. So it seems is the opinion of any person in the habit of receiving letters, of the genuineness of a postmark. See Abbey v Lill, 5 Bing. 299: 15 E. C. L. R. So antiquaries as to the date of ancient handwriting. Tracy Peerage, 10 Cl. & Fin. 191. So the opinion of a shipbuilder, on a question of seaworthiness. Thornton v Roy. Exch. Ass. Co., Peake N. P. C. 25, 1 Camp. 117; Chapman v. Walton, 10 Bing. 57: 21 E. C. L. R. However, the Court of Queen's Bench, in Campbell v. Richards, 5 B. & Ad. 840: 27 E. C. L. R., held (overruling several previous decisions), that the materiality of a fact concealed at the time of insuring, was a question for the jury alone. "Witnesses conversant in a particular trade may be allowed to speak to a prevailing practice in that trade; scientific persons may give their opinion on matters of science; but witnesses are not receivable to state their views on matters of legal or moral obligation, nor on the manner in which others would probably be influenced, if the parties acted in one way rather than another."

It is the constant practice to examine medical men as to their judgment with regard to the cause of a person's death, who has suffered violence; and where, on a trial [*136] for murder, the defence was insanity, *the judges to whom the point was referred were all of opinion that in such a case a witness of medical skill might be asked whether, in his judgment, such and such appearances were symptoms of insanity, and whether a long fast, followed by a draught of strong liquor, was likely to produce a paroxysm of that disorder in a person subject to it? Several of the judges doubted

v. Krauser, 12 Serg. & Rawle, 137; Morse v. The State, 6 Conn. 9; People v. De Graff, 1 Wheeler's C. C. 205.

The opinions of witnesses based upon a state of facts sworn to by others, are not proper evidence except in matters lying peculiarly within the knowledge of experts. Paige v. Hazard, 5 Hill, 603.

In questions of identity and personal skill a witness may testify to a belief not founded in knowledge, but the rule is otherwise in respect to facts which may be supposed to be within the compass of memory. Carmalt v. Post, 8 Watts, 406.

An opinion expressed by the crew of a vessel, in consultation with the master, on the soundness of a link in a chain cable which they were paying out to prevent her from dragging her anchor, is admissible in proof of its adequacy to the ordinary exigencies of the navigation. Reed v. Dick, 8 Watts, 479.

Testimony of the resemblance of the child to the alleged father, or the want of it, not being matter of fact, but merely of opinion, is not admissible. Kenniston v. Rowe, 16 Maine, 38.

On a question of mental capacity, the opinion of an intimate acquaintance, not a medical man, is competent when connected with facts and circumstances within his knowledge, and disclosed by him in his testimony as the foundation of his opinion. Culver v. Haslam, 7 Barbour, 314. It is not, in general, competent for witnesses to state opinions or conclusions from facts, whether such facts are known to them or derived from the testimony of others. The exceptions to the rule are confined to questions of science, trade, and a few others of the same nature. Morehouse v. Matthews, 2 Comstock, 514.

A witness may be asked whether in his opinion the prisoner was intoxicated at the time of the offence. The People v. Eastwood, 4 Kernan, 562.

A witness may be asked and may state his opinion as to the time of day when an event took place, and he may state his opinion as to the length of time which elapsed between two events. Campbell v. The State, 23 Alabama, 44.

The mere opinion of a witness with regard to the age of a person from his appearance, unaccompanied by the facts on which that opinion is founded, is inadmissible as evidence. Morse v. The State, 6 Conn. 9.

A party has no right to ask the opinion of a professional witness upon any question except one of skill or science. The People v. Bodine, 1 Denio, 282; Woodin v. The People, 1 Parker's Crim. Rep. 464; The People v. Thurston, Ibid. 49. When the opinions of witnesses not experts are admissible, see Cooper v. The State, 23 Texas, 331.

The opinion of a witness on a question not involving medical skill or science is inadmissible as evidence. Woodin v. The People, 1 Parker, C. R. 464.

whether the witness could be asked his opinion on the very point which the jury were to decide, viz., whether from the other testimony given in the case, the act with which the prisoner was charged was, in his opinion, an act of insanity. R. v. Wright, Russ. & Ry. 456. On an indictment for cutting and maiming, Park, J., on the authority of the above case, allowed a medical man who had heard the trial, to be asked whether the facts and appearances proved showed symptoms of insanity. R. v. Searle, 1 Moo. & R. 75. And it seems that in McNaughten's case such questions were allowed to be asked. 2 Russ. by Grea. 925 (*n*). A question may arise in these cases, whether, where a witness, a medical man, called to give his opinion as matter of skill, has made a report of the appearances or state of facts at the time, he may be allowed to read it as part of his evidence. The practice in Scotland on this point is as follows: The scientific witness is always directed to read his report, as affording the best evidence of the appearances he was called on to examine; yet he may be, and generally is, subjected to a further examination by the prosecutor, or to a cross-examination on the prisoner's part; and if he is called on to state any facts in the case, unconnected with his scientific report, as conversations with the deceased, confessions made to him by the prisoner, or the like, *utitur jure communi*, he stands in the situation of an ordinary witness, and can only refer to the memoranda to refresh his memory. Alison's Prac. Cr. Law of Scotland, 541.(1)

(1) As to the evidence of experts generally, see Norman v. Wells, 17 Wend. 136; Cattrill v. Myrick, 3 Fairfield, 222; Boies v. McAllister, Ibid. 308; Lester v. Pittsford, 7 Vermont, 158; Goodwin's Case, 5 Rogers's Rec. 26. Where the opinion of an expert is offered, the court may hear evidence first to ascertain whether he is an expert, and then allow the opinion to be given in evidence. Mendum's Case, 6 Randolph, 704.

A witness who has had opportunities of knowing and observing a person whose sanity is impeached, may not only depose to the facts he knows, but may also give his opinion or belief as to his sanity or insanity. Clary v. Clary, 2 Iredell, N. C. Law Rep. 78.

On a question of insanity, witnesses other than professional men may state their opinion in connection with the facts on which it was founded. Clark v. The State, 12 Ohio, 483; Norris v. The State, 16 Alabama, 776.

When witnesses give their opinion as to the sanity of a person, they must furnish the facts upon which their respective opinions are founded. Walker v. Walker, 14 Georgia, 242; Stewart v. Redditt, 3 Maryland, 67; Stewart v. Spedden, 5 Ibid. 433; Wilkinson v. Pearson, 11 Harris, 117; Dorsey v. Warfield, 7 Maryland, 65.

Neither professional nor unprofessional witnesses can give an opinion as to mental capacity or condition, without first showing the facts upon which the opinion is founded. White v. Bailey, 10 Michigan, 155.

The opinions of witnesses not medical men may be received on a question of sanity. Powell v. The State, 25 Alabama, 21. But a witness who is not a medical man is incompetent to express an opinion as to the particular species of fits with which any one is afflicted. McLean v. The State, 16 Alabama, 672.

Who are experts, see Page v. Parker, 40 New Hampshire, 47; Johnson v. The State, 35 Alabama, 370; The Commonwealth v. Rich, 14 Gray, 335; Howard v. Providence, 6 Rhode Island, 514; Crane v. Northfield, 33 Vermont, 124; Bricker v. Lighter, 4 Wright (Pa.), 199; Pelamourges v. Clark, 9 Iowa, 1.

The testimony of experts, as experts, cannot be received on subjects of general knowledge, familiar to men in general, and with which jurors are presumed to be acquainted. Concord Railroad v. Greely, 3 Foster, 237.

A physician cannot be asked his opinion as an expert, as to whether a rape could have been committed in a certain way, if the question is not one which it requires professional knowledge to decide Cook v. The State, 4 Zabriskie, 843.

Medical men may be called by the government in a trial for murder, to give an opinion as to whether a beating which had been testified to by themselves or other witnesses, was an adequate cause of death. Livingston's Case, 14 Grattan, 592.

Evidence of scientific persons, on a capital trial, as to any distinction, evinced by scientific investigation, between the appearance of stains of human blood and those of animals, is properly admissible. The State v. Knights, 43 Maine, 11.

An expert having heard the whole evidence given in a case, is incompetent to give his opinion as to the effect of such evidence, but he may, upon a case hypothetically stated. Luning v. The State, 1 Chandler, 178; The State v. Powell, 2 Halsted, 244; Lake v. The People, 1 Parker's Crim. Rep. 495.

Experts are not allowed to give their opinion on the case, when its facts are controverted, but counsel may put to them a state of facts, and ask their opinion thereon. United States v. McGlue, 1 Curtis C. C. 1; Daniels v. Mosher, 2 Michigan, 183.

The opinions of experts upon questions of art or science, to be admissible as evidence, must always

Where on an indictment for uttering a forged will, which together with the writings in support of such will, it was suggested, had been written over pencil-marks which had been rubbed out, Parke, B. (after consulting Tindal, C. J.), held, that the evidence of an engraver who had examined the paper with a mirror, and traced the pencil-marks, was admissible on the part of the prosecution, but that the weight of the evidence would depend upon the way in which it would be confirmed. R. v. William, 8 C. & P. 434: 34 E. C. L. R.

In proving the laws of foreign countries, also, the opinions of competent witnesses are admissible. The unwritten law of a foreign state may be proved by the parol evidence of witnesses possessing professional skill; but where the laws are in writing, a copy properly authenticated must be produced. Per Gibbs, C. J., Millar v. Heinrick, 4 Camp. 155; but see Boehtlinck v. Schneider, 3 Esp. 58. Thus on the trial of the Wakefields for abduction, a gentleman of the Scotch bar was examined as to whether the marriage, as proved by the witness, would be a valid marriage according to the law of Scotland. R. v. Wakefield, Murray's ed., p. 238. So it is laid down by a foreign writer of eminence, that foreign unwritten laws, customs, and usages, may be proved, and, indeed, must ordinarily be proved by parol evidence. The proper course is to make such proof by the testimony of competent witnesses, instructed in the law, under oath. Sussex Peerage Case, 11 Cl. & Fin. 115; Cocks v. Purday, 2 C. & Kir. 269: 61 E. C. L. R.(1)

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be predicated of the facts established by the proof in the case. Champ v. The Commonwealth, 2 Metcalfe, (Ky.), 17.

A medical witness may be asked his opinion on a hypothetical statement of facts. Reed v. The People, 1 Parker C. R. 481.

When in a trial for poisoning, circumstantial evidence is relied on, chemical analysis of the contents of the stomach and bowels should always be made. Joe v. The State, 6 Florida, 591.

Neither books of established reputation on the subject of insanity, nor statistics of the increase of insanity, can be read to the jury. Commonwealth v. Wilson, 1 Gray, 337; Melvin v. Easley, 1 Jones's Law, N. C. 386.

As to medical or scientific books, when they may be read to the jury. Luning v. The State, 1 Chandler, 178.

Medical witnesses, in giving their opinions as experts, are not confined to the results of their own observation and experience, but may give opinions upon information derived from books. The State v. Terrell, 12 Richardson's Law, 321.

(1) Talbot v. Seamen, 1 Cranch, 12, 38; Church v. Hubbert, 2 Id. 236; Strother v. Lucas, 6 Peters, 763; Consequa v. Willing et al., Peters's C. C. Rep. 225; Seton v. Delaware Ins. Co., 2 Wash. C. C. Rep. 175; Robinson v. Clifford, Id. 1; Hill v. Packard, 5 Wend. 375; 2 Id. 411; Raynham v. Canton, 3 Pick. 293; Bruchett v. Norton, 4 Conn. 517; Hempstead v. Reed, 6 Conn. 486; Tarlton v. Briscoe, 4 Bibb, 73; Talbot v. David, 2 Marsh. 609; Baptiste et al. v. Devalanbrun, 2 Har. & J. 86; Kenny v. Clarkson, 1 Johns. 385; Woodbridge v. Austin, 2 Tyler, 367; Firth v. Sprague, 14 Mass. 455; Smith v. Elder, 3 Johns. 145; Denison v. Hyde, 6 Conn. 508; Middlebury College v. Cheney, 1 Verm. 336; McRae v. Mattoon, 13 Pick. 53; Dyer v. Smith, 12 Conn. 384; Owen v. Boyle, 15 Maine, 147; Ingraham v. Hart, 11 Ohio, 255; Phillips v. Grigg, 10 Watts, 158.

It lies on the party objecting to parol proof to show that the law is written. Dougherty v. Snyder, 15 Serg. & Rawle, 87; Newsome v. Adams, 1 Louis. 153; Taylor v. Swell, 3 Id. 43; Livingston v. Maryland Ins. Co., 6 Cranch, 274.

The court, on the trial of a cause, may proceed on their knowledge of the laws of another State, and it is not necessary, in that case, to prove them, and their judgment will not be reversed when they proceed on such knowledge, unless it appear that they decided wrong as to those laws. State v. Rood, 12 Verm. 396.

In the trial of an action by jury, when the claim or defence of a party depends on the construction of a statute of another State, the question of the construction of the statute in that State is to be decided by the jury. Holman v. King, 7 Metcalf, 384.

A volume of the laws of another State, purporting to be published by its authority, and proved by a counsellor in that State to be cited and received in the courts there, is competent evidence. Lord v. Staples, 3 Foster, 448; Emery v Berry, 8 Foster, 473; Dixon v. Thatcher, 14 Arkansas, 141; Charlesworth v. Williams, 16 Illinois, 338; The State v. Abbey, 3 Williams, 60; Standford v. Pruet, 27 Georgia, 243; Yarborough v. Arnold, 20 Arkansas, 592; Memfield v. Robbins, 8 Gray, 150.

It is necessary that the seal of the State should be affixed to the exemplification of a statute. Wilson v. Lazier, 11 Grattan, 477; Sisk v. Woodruff, 15 Illinois, 15.

The national seal affixed to the exemplification of a foreign law or judicial proceeding, proves itself. Watson v. Walker, 3 Foster, 471.

The statute law of other States must be proved by the statute itself, and not by parol. The com-

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Nature of privilege.] We have already considered what questions may be put to a witness; every such question the witness is bound to answer, unless he can show that he is privileged from so doing, from some peculiarity in his situation.

There is a great difference between privilege and incompetency, though the difference has not always been kept in view. An incompetent witness cannot be examined, and, if examined inadvertently, his testimony is not legal evidence; but a privileged witness may always be examined, and his testimony is perfectly legal if the privilege be not insisted on.

It seems rather strange that if a witness be compelled to answer in cases where he claims and ought to have been allowed his privilege, that should be a ground for reversing a conviction, as the only person injured is the witness, but convictions have been constantly reversed on this ground.

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mon, customary, or unwritten law, may be proved by witnesses acquainted with the law. McNeill v. Arnold, 17 Arkansas, 154; Charlotte v. Chouteau, 25 Missouri, 465.

The testimony of an attorney-at-law of another State is not legal evidence of the statute law of that State. Smith v. Potter, 1 Williams, 304; Martin v. Payne, 11 Texas, 292.

If the statutes of a sister State need explanation, the testimony of one learned in the law can alone be received. The People v. Lambert, 5 Michigan, 349.

The practice and usage under the written law or statute of another State, may be proved by parol. Greason v. Davis, 9 Iowa, 219.

Statutes of sister States cannot be proved by parol, but as to the mode of proving foreign laws the court has a discretion. Line v. Mack, 14 Indiana, 330; Davis v. Rogers, Ibid. 424.

As to foreign laws, see Hooper v. Moore, 5 Jones's Law, 130; Drake v. Glover, 30 Alabama, 382.

Foreign laws are not judicially noticed, but presumed to be like our own. Woodrow v. O'Connor, 2 Williams, 776; Bear v. Briggs, 4 Iowa, 464.

The written or statute laws of a foreign government must be authenticated by the exemplification of a copy, under the great seal of state, or by a sworn copy. Unwritten laws may be shown by parol evidence. Witnesses to be competent to prove unwritten laws, must be instructed in them. Watson v. Walker, 3 Foster, 471; Pickard v. Bailey, 6 Ibid. 152.

In the absence of proof, the courts presume foreign laws to be the same as the laws of the forum. Rape v. Heaton, 9 Wisconsin, 328; Cox v. Morrow, 14 Arkansas, 603.

The unwritten law of another State to be proved by experts. Greason v. Davis, 9 Iowa, 219.

The courts of one State will not take judicial notice of the laws of a sister State, but they must be proved as facts. Taylor v. Boardman, 25 Vermont, 581. *Contra*, Herschfeld v. Dexel, 12 Georgia, 582.

Where the rights in controversy accrued in a State where the common law is in force, the court will take notice of the principles of the common law, including equity, which apply to the case. Nimmo v. Davis, 7 Texas, 26; Warren v. Lusk, 16 Missouri, 102.

The court will judicially presume that the common law is the rule of decision in other States, unless the contrary is shown. Reese v. Harris, 27 Alabama, 301; Thompson v. Monrow, 2 California, 99.

The legal presumption is that the common law of a sister State is similar to that of our own. Pomeroy v. Ainsworth, 22 Barbour, 118; Houghtaling v. Ball, 19 Missouri, 84. *Contra*, Bradshaw v. Mayfield, 18 Texas, 21.

The privilege of a witness arises in three ways: first, on the ground that to answer the question would expose him to consequences so injurious that he ought to be allowed to decline doing so; secondly, that to answer the question would be a breach of confidence, which he ought not to be forced to commit; thirdly, that to compel the witness to answer the questioon would be against public policy.

When the witness is privileged on the ground of injurious consequences of a civil kind.] It has generally been considered that a witness is privileged from answering [*138] any question, the answer to *which might directly subject him to forfeiture of estate.(1) And it is considered by Mr. Phillipps (Phill. Ev. 278), that the existence of this rule is impliedly recognized by the 46 Geo. 3, c. 87, which, after reciting that "doubts had arisen whether a witness could by law refuse to answer a question relevant to the matter in issue, the answering of which had no tendency to accuse himself, or to expose him to any *penalty or forfeiture*, but the answering of which might establish, or tend to establish, that he owed a debt, or is otherwise subject to a civil suit, at the instance of his majesty or of some other person or persons," it was declared and enacted, "that a witness cannot by law refuse to answer any question relevant to the matter in issue, the answering of which has no tendency to accuse himself and to expose him to a *penalty or forfeiture* of any nature whatsoever, by reason only or on the sole ground that the answering of such question may establish, or tend to establish, that he owes a debt, or is otherwise subject to a civil suit, either at the instance of his majesty or any other person or persons."

It will be seen that this statute also excepts cases where the witness is exposed to a *penalty*. A doubt might arise whether this exception extends to penalties to be recovered by a common informer, or otherwise in a civil manner. In none of the reported cases since the statute does the question seem to have arisen, nor is there any very clear indication of what was considered to be the law before the passing of the above statute; the question therefore remains yet to be discussed.

When witness is privileged on the ground of injurious consequences of an ecclesiastical kind.] Questions subjecting a witness to ecclesiastical penalties have been generally considered as coming within those which he is entitled to decline answering as under the 2 & 3 Edw. 6, c. 13, s. 2, for not setting out tithes: Jackson v. Benson, 1 Y. & J. 32; on a charge of simony: Brownswood v. Edwards, 2 Ves. Sen. 245; or incest: Chetwynd v. Lindon, Id. 450.

But there cannot be a doubt that a judge, in deciding whether or not a witness is entitled to the privilege, would consider whether the danger suggested by the witness was real and appreciable: R. v. Boyes, *infra*, p. 139; and the mere chance of

(1) A witness may be compelled to testify against his pecuniary interest. Quinlan v. Davis, 6 Whart. 169.

A witness may be compelled to give testimony, the tendency of which may be to subject him to pecuniary loss. Ward v. Sharp, 15 Verm. 115.

That a mere civil inability does not render the witness incompetent, see Gorham v. Carroll, 5 Litt. 221; Black v. Crouch, Id. 226; State v. McDonald, 1 Coxe, 332; Stoddart's Lessee v. Manning, 2 Har. & J. 147; Bull v. Loveland, 10 Pick. 9; Baird v. Cochran, 4 Serg. & Rawle, 397; Nass v. Swearingen, 4 Serg. & Rawle, 192; Copp v. Upham, 3 N. Hamp. 159; Hays v. Richardson, 1 Gill & J. 316; Naylor v. Simmes, 7 Id. 273; Commonwealth v. Thruston, 7 J. J. Marshall, 63; Taney v. Kemp, 4 Har. & John. 348; Planters' Bank v. George, 6 Mart. 679, *overruling* Navigation Co. v. New Orleans, 1 Mart. 23. *Contra*, Benjamin v. Hathaway, 3 Conn. 528; Storrs v. Wetmore, Kirby, 203; Starr v. Tracey et al., 2 Root, 528; Cook v. Corn, 1 Overton, 240; and see Maurau v. Lamb, 7 Cowen, 174.

A witness is compellable to produce a paper, though it may subject him to pecuniary loss. Bull v. Loveland, 10 Pick. 9.

an obsolete jurisdiction being set in motion, would very likely not be considered as entitling the witness to his privilege.

When witness is privileged on the ground of injurious consequences of a criminal kind.] That the witness will be subjected to a criminal charge, however punishable, is clearly a sufficient ground for claiming the protection.(1) Thus a person cannot be compelled to confess himself the father of a bastard child, as he is thereby subjected to the punishment inflicted by the 18 Eliz. c. 3, s. 2: R. v. St. Mary, Nottingham, 13 East, 58 (*n*). So a witness cannot be compelled to answer a question which subjects him to the criminal consequences of usury. Cates v. Hardacre, 3 Taunt. 424. But if the time limited for the recovery of the penalty have expired, the witness may be compelled to answer. Roberts v. Allatt, M. & M. 192: 22 E. C. L. R.

Whether or no a witness who has been pardoned is bound to answer questions which tend to show him guilty of the offence for which the pardon has been granted, is perhaps doubtful. The question appears to have been decided in the negative by North, C. J., in *R. v. Reading, 7 How. St. Tr. 226; but that case has been [*139] much doubted. See Moo. & M. N. P. C. 199 (*n*): 22 E. C. L. R.; and in R. v. Boyes, 9 W. R. 690, it was held by the Court of Queen's Bench that a pardon took away the privilege of the witness in such a case.

In the case last mentioned an objection was taken on behalf of the witness, that though a pardon under the great seal might be a protection in ordinary cases, yet that under the peculiar circumstances of that case it was not so. The prosecution was for bribery, and the question put to the witness was objected to by him, on the ground that its answer would tend to show that he had received a bribe. A pardon under the great seal was thereupon handed to him by the Solicitor-General, who was prosecuting for the crown, but the witness still refused to answer, on the ground that inasmuch as by the express provisions of the 12 & 13 Wm. 3, c. 2, the pardon would not be pleadable to an impeachment for bribery by the House of Commons, the privilege still existed; but the Court of Queen's Bench held that the danger to be apprehended must be real and appreciable, and that an impeachment by the House of Commons for bribery was, under the circumstances, too improbable a contingency to justify the witness in still refusing to answer on that ground.

Right to decline answering—how decided.] Of course the judge is to decide whether or not the witness is entitled to the privilege, subject to the correction of a superior court.(2) What inquiries he ought to make in order to satisfy himself upon

(1) United States v. Craig, 4 Wash. C. C. Rep. 229; Southard v. Rexford, 6 Cowen, 254; Grannis v. Brandon, 5 Day, 260; The People v. Herrick, 13 Johns. 82; Ward v. The People, 3 Hill, 395, 6 Hill, 144; Cloyes v. Thayer et al., 3 Hill, 564; Warner v. Lucas, 10 Ohio, 336; Low v. Mitchell, 18 Maine, 372; Poindexter v. Davis, 6 Grattan, 451; Janvrin v. Scammon, 9 Foster, 280; Coburn v. Odell, 10 Foster, 540; Pleasant v. The State, 15 Arkansas, 624; The State v. Bilansky, 3 Minnesota, 246; The People v. Kelley, 10 Smith, 74; Printz v. Cheeney, 11 Iowa, 469.

It is proper to ask a question, the answer to which may criminate the witness, as he may answer it, and the court will carefully instruct the jury that the refusal to answer gives rise to no inference of guilt. Newcomb v. The State, 37 Mississippi, 383.

When a witness was asked, on cross-examination, whether he had not been convicted and punished for an infamous crime, and the judge allowed the witness to elect whether he would answer, and he refused, it was *held*, that such refusal might be insisted on by counsel, in addressing the jury, as warranting the inference that he was unworthy of credit. The State v. Garrett, Bushee's Law N. C. 357. *Contra*, Phealing v. Kenderdine, 8 Harris, 354.

(2) The witness and not the court is the proper judge whether a question put to him has a tendency to criminate. State v. Edwards, 2 Nott & McCord, 13. The court will instruct him to enable him to determine, and if the answer form one link in a chain of testimony against him he is not bound to answer. Ibid.

The following principles were laid down by C. J. Marshall in Burr's Trial:

It is the province of the court to judge whether any direct answer to the questions which may be

this point has been the subject of considerable difference of opinion. In Fisher v. Ronalds, 12 C. B. 765, it was unnecessary to decide the point, but Maule, J., said, "It is for the witness to exercise his discretion, not the judge. The witness might be asked, 'Were you in London on such a day?' and though apparently a very simple question, he might have good reason to object to answer it, knowing that, if he admitted that he was in London on that day, his admission would complete a chain of evidence against him which would lead to his conviction. It is impossible that the judge can know anything about that. The privilege would be worthless, if the witness were required to point out how his answer would tend to criminate him." It was equally unnecessary to decide the point in Osborne v. The London Dock Company, 10 Ex. R. 701, but the question was a good deal discussed, the opinion of Parke, B., clearly inclining to the view that the witness ought to satisfy the court that the effect of the question will be to endanger him. The learned baron states that this was the opinion of the majority of the judges who considered the case of R. v. Garbett, 1 Den. C. C. 236, though they expressly refrained from deciding the point; and he also cites the opinion of Lord Truro, who, in the case of Short v. Mercier, 3 Mac. & Y. 205, said, "A defendant, in order to entitle himself to protection, is not bound to show to what extent the discovery sought might affect him, for to do that he might oftentimes of necessity deprive himself of the benefit he is seeking; but it will satisfy the rule if he states circumstances consistent on the face of them with the existence of the peril alleged, and which also render it extremely probable." In Sidebottom v. Atkings, 3 Jur. N. S. 631, Stuart, V. C., compelled a witness to answer questions, although he swore that he should thereby subject himself to a criminal prosecution. In Adams v. Lloyd, 3 Hurlst. & Nor. 351, Pollock, C. [*140] B., admits the right of the judge to use his *discretion, but seems to think that he ought to be satisfied by the oath of the witness, if there are no circumstances in the case which lead him to doubt the real necessity for protection. In the last case on the subject, R. v. Boyes, *supra*, p. 139, the Court of Queen's Bench, after consideration, held that "to entitle a party called as a witness to the privilege of silence, the court must see from the circumstances of the case, and the nature of the evidence which the witness is called upon to give, that there is reasonable ground to apprehend danger to the witness from his being compelled to answer."

It will thus be seen that in all cases where the point has directly arisen, it has been held that the bare oath of the witness, that he is endangered by being compelled to answer, is not to be considered as necessarily sufficient; but that the judge is to use

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proposed will furnish evidence against the prisoner. If such answer may disclose a fact which forms a necessary and essential link in the chain of testimony which would be sufficient to convict him of any crime, he is not bound to answer it so as to furnish matter for that conviction. In such a case the witness must himself judge what his answer will be, and if he say on oath he cannot answer without accusing himself, he cannot be compelled to answer. 1 Burr's Trial, 245; Parkhurst v. Lowton, 3 Swanst. 215.

The witness (with the instruction of the court when necessary) must decide when his answer will tend to criminate him, and his decision is upon oath and at the peril of perjury. Poole v. Perrit, 1 Spears, 128.

A witness who declines to answer, on the ground that the answer sought may tend to criminate him, must state under oath that he believes that would be the tendency of the answer. And after that answer it is for the court to decide whether the question will have that tendency. Kirschner v. The State, 9 Wisconsin, 140.

If a witness is exempt, by statute, from liability for any offence of which he is compelled to give evidence, or if the offence, as to him, is barred by the statute of limitations, he cannot claim the privilege of not answering ordinarily incident to such a case. Floyd v. The State, 7 Texas, 215.

If a statute provides that what a witness testifies shall not be given in evidence against him, his privilege is gone. The People v. Kelley, 10 Smith, 74.

One of two persons concerned in the commission of a crime may be compelled to testify against the other when a statute provided that "the testimony given by such witness shall in no instance be used against him in any criminal prosecution for the same offence." The State v. Quailes, 8 English, 307.

his discretion whether he will grant the privilege or not. Of course the witness must always pledge his oath that he will incur risk, and there are innumerable cases in which a judge would be properly satisfied with this without further inquiry, but, if he is not satisfied, he is not precluded from further investigation.(1)

Questions tending to degrade a witness.] It is submitted that there cannot, by any possibility, be any doubt as to the rule upon this subject. Every question must be answered by a witness, whether it tend to degrade him or not, if it be material to the issue, unless it tend to render him liable to penalties and punishment. As the credibility of a witness is always in issue, he must, therefore, answer questions which are in no other way material than as affecting his credibility. On the other hand, every question which is not material to the issue is improper; and it is not only improper, but unbecoming, to put questions to a witness, the very putting of which tends to degrade him, and which, not being material, he cannot be compelled to answer. And as every witness is entitled to the protection of the court in which he appears, any attempt to degrade him unnecessarily will immediately be repressed, without waiting for the witness to object to the question.(2)

Privilege of husband and wife.] A doubt has arisen whether the principle of law, which considers husband and wife as one person, extends to protect persons who stand in that relation to each other from answering questions which tend to criminate either, even although they are neither of them upon trial, or in a situation in which the evidence can be used against them. It was, indeed, at one time held, that a husband or wife was an incompetent witness to prove any fact which might have a tendency to criminate the other: R. v. Cliviger, 3 T. R. 268; but that decision is no longer law; all the subsequent cases, with one exception, treat the husband or wife as under such circumstances a competent witness. R. v. All Saints, Worcester, 6 M. & S. 194; R. v. Bathwick, 2 B. & Ad. 637: 22 E. C. L. R.; R. v. Williams, 8 C. & P. 284: 34 E. C. L. R. The case the other way is that of R.

(1) The rule that a witness is not obliged to criminate himself is well established. But this is a privilege which may be waived; and if the witness consents to testify in one matter tending to criminate himself, he must testify in all respects relating to that matter so far as material to the issue. If he waives the privilege, he does so fully in relation to that act; but he does not thereby waive his privilege of refusing to reveal other unlawful acts, wholly unconnected with the act of which he has spoken, even though they may be material to the issue. Low. v. Mitchell, 18 Maine, 372.

A witness is not bound to testify to any matter which will tend, in any manner, to show him guilty of a crime or liable to a penalty. Chamberlain v. Wilson, 12 Verm. 491. If the witness understandingly waive his privilege and begin to testify, he must submit to a full cross-examination if required. The witness must first determine whether he will claim the privilege, and if the privilege is claimed upon oath, the court cannot deny it, unless fully satisfied that the witness is mistaken, or acts in bad faith. Ibid. See The State v. R., 4 N. Hamp. 562.

If a witness, knowing that he is not bound to testify concerning a fact which may tend to criminate, voluntarily answers in part, he may be cross-examined as to the whole transaction. Foster v. Pierce, 11 Cushing, 437; The People v. Carroll, 3 Parker, C. R. 73; Commonwealth v. Howe, 13 Gray, 26.

It is the privilege of the witness, not of the party, that the witness need not testify to facts which will subject him to a criminal prosecution. If he waives his privilege and testifies to part of a transaction, in which he was criminally concerned, he is bound to state the whole. The State v. Foster, 3 Foster, 348; Floyd v. The State, 7 Texas, 215.

When a witness voluntarily testifies in chief on a particular subject, he may be cross-examined on the subject, even though his answers may criminate or disgrace him. Norfolk v. Gaylord, 28 Conn. 309.

(2) A witness is not bound to give answers which may stigmatize or disgrace him. State v. Bailey, 1 Pennington, 415; Vaughan v. Perine, 2 Id. 628; Baird v. Cochran, 4 Serg. & Rawle, 400; Resp. v. Gibbs, 3 Yeates, 429. 437; Galbraith v. Eichelberger, Id. 515; Bell's Case, 1 Browne, 376; Saltonstall's Case, 1 Rogers's Rec. 134; Stout v. Russell, 2 Yeates, 334; People v. Herrick, 13 Johns. 82.

A witness is not bound to answer any questions which may impeach his conduct as a public officer. Jackson v. Humphrey, 1 Johns. 498; Marbury v. Madison, 1 Cranch, 144.

A witness on cross-examination was asked, "Do your neighbors call you lying Josh?" held that the question was inadmissible. Nerson v. Henderson, 3 Foster, 498.

v. Gleed, 2 Russ. 983, in which, on a charge of stealing wheat, Taunton, J., after consulting Littledale, J., refused to allow a wife to be asked whether her husband, who had absconded, was not present when the wheat was stolen; but that case would hardly prevail against the two decisions of the Court of Queen's Bench, above referred to. In the well-known prosecution against Thurtell, Mrs. Roberts, whose husband [*141] *had been previously acquitted, was the principal witness, and the evidence does not even seem to have been objected to. See, per Alderson, B., in R. v. Williams, *ubi suprà*.

But though the husband or wife be competent, it seems to accord with principles of law and humanity that they should not be compelled to give evidence which tends to criminate each other; and in R. v. All Saints, Worcester, Bayley, J., said that if in that case the witness had thrown herself on the protection of the court, on the ground that her answer to the question put to her might criminate her husband, he thought she would have been entitled to the protection of the court. A similar opinion is expressed in 1 Phil. & Am. Ev. 73.

Of course, if the husband or wife have been already convicted, acquitted, or pardoned, there will be no ground for claiming the privilege. R. v. Williams, *supra*.

When the witness is privileged on the ground of confidence.] The matters with respect to which the privilege of secrecy exists on the ground of confidence are those which have come to the knowledge of the witness's professional legal adviser.(1) Wilson v. Rastall, 4 T. R. 758; Duchess of Kingston's Case, 20 How. St. Tr. 575. Other professional persons, whether physicians, surgeons, or clergymen, have no such privilege. Ibid.(2) Thus where the prisoner, being a Roman Catholic, made a confession, before a Protestant clergyman, that confession was permitted to be given in evidence at the trial, and he was convicted and executed. R. v. Sparke, cited Peake, N. P. C. 78. Upon this case being cited, Lord Kenyon observed, that he should have paused before he admitted the evidence; but there appears to be no ground for this doubt. In R. v. Gilham, Ry. & M. C. C. R. 198: 21 E. C. L. R., it was admitted by the counsel for the prisoner, that a clergyman is bound to disclose what has been revealed to him as matter of religious confession; and the prisoner in that case was convicted and executed.

A person who acts as interpreter between a client and his attorney, will not be permitted to divulge what passed; for what passed through the medium of an interpreter is equally in confidence as if said directly to the attorney; but it is otherwise with regard to conversation between the interpreter and the client in the absence of the attorney. Du Barré v. Livette, Peake, N. P. C. 77, 4 T. R. 756; 20 How. St. Tr. 575(*n*). So the agent of the attorney stands in the same situation as the attorney himself. Parkins v. Hawkshaw, 2 Stark. N. P. C. 239: 2 E. C. L. R.; Goodall v.

(1) Mills v. Griswold, 1 Root, 383; Id. 486; Holmes v. Comegys, 1 Dallas, 439; Corp v. Robinson, 2 Wash. C. C. Rep. 388; Hoffman et al. v. Smith, 1 Caines, 157; Calkins v. Lee, 2 Root, 363; Sherman v. Sherman, 1 Id. 486; Caveney v. Tannahill, 1 Hill, 33; 2 Stark. Ev. new ed. 229, n. 1.

To exclude the testimony of an attorney, it is not necessary that there should be a suit pending. Beltzhoover v. Blackstock, 3 Watts, 20. It is sufficient if the witness were consulted professionally and acted or advised as counsel. Ibid.; Foster v. Hall, 12 Pick. 89; Johnson v. Bank, 1 Harrington, 117; Rogers et al. v. Daw, Wright, 136.

What the law means by privileged communications, are instructions for conducting the cause, not any extraneous or impertinent communications. Riggs v. Denniston, 3 Johns. Cases, 198.

To exclude the communications of client to counsel from being given in evidence, it is not necessary that they should have been given under any injunction of secrecy. Wheeler v. Hill, 16 Maine, 329.

(2) A confession made to a Roman Catholic priest is not evidence. Smith's Case, 1 Rogers's Rec. 77. *Contra*, per Gibson, C. J., in Simons' Ex. v. Gratz, 2 Penna. Rep. 417. But confessions to a Protestant divine are not privileged. Smith's Case, *supra;* Commonwealth v. Drake, 15 Mass. 161. See Phillips's Case, Sampson's Roman Catholic Question in America, Pamphlet.

Little, 20 L. J. Ch. 132. So a clerk to the attorney. Taylor v. Foster, 2 C. & P. 195: 12 E. C. L. R.; R. v. Inhabitants of Upper Boddington, 8 D. & R. 732. So a barrister's clerk. Foote v. Hayne, Ry. & Moo. 165: 21 E. C. L. R.(1)

Although some doubt has been entertained, as to the extent to which matters communicated to a barrister or an attorney in his professional character are privileged, where they do not relate to a suit or controversy either pending or contemplated, and although the rule was attempted to be restricted, by Lord Tenterden, to the latter cases only: see Clark v. Clark, 1 Moody & Rob. 4; William v. Munday, Ry. & Moo. 34; yet it seems to be at length settled, that all such communications are privileged, whether made with reference to a pending or contemplated suit or not. See all the cases commented upon by the L C. in Greenough v. Gaskell, 1 Myl. & K. 100. See *also Walker v. Wildman, 6 Madd. 47; Mynn. v. Joliffe, 1 Moo. & Ry. 326: [*142] 21 E. C. L. R.; Moore v. Tyrrell, 4 B. & Ad. 870: 24 E. C. L. R.

A communication made to a solicitor, if confidential, is privileged in whatever form made, and equally when conveyed by means of sight instead of words. Thus an attorney cannot give evidence as to the destruction of an instrument, which he has been admitted in confidence to see destroyed. Robson v. Kemp, 5 Esp. 54. See *post.*

The rule applies not only to the professional advisers of the parties in the case, but also to the professional advisers of strangers to the inquiry. Thus an attorney is not at liberty to disclose what is communicated to him confidentially by his client, although the latter be not in any shape before the court. R. v. Wither, 2 Campb. 578.

A communication in writing is privileged, as well as a communication by parol; and deeds and other writings deposited with an attorney in his professional capacity, will not be allowed to be produced by him.

To prove the contents of a deed, the defendant's counsel offered a copy, which had been procured from the attorney of a party under whom the plaintiff claimed, but Bayley, J., refused to admit it. He said, "The attorney could not have given evidence of the contents of the deed, which had been intrusted to him; so neither could he furnish a copy. He ought not to have communicated to others what was deposited with him in confidence, whether it was written or a verbal communication. It is the privilege of his client, and continues from first to last." Fisher v. Heming, 1809, 1 Phill. Ev. 170, 9th ed. But see Cleave v. Jones, 21 L. J. Ex. 106, *supra*, and Lloyd v. Mostyn, 10 M. & W. 481, 482, where Parke, B., questions the correctness of the decision in Fisher v. Heming. In Volant v. Soyer, 13 C. B. 231: 76 E. C. L. R.; S. C. 12 Law J., C. P. 83, an attorney refused to produce a document, on the ground that it was his client's title-deed; he was then asked what the deed was, but the judge disallowed the question, and refused also to examine the deed; the court held that he was right. Nor where an attorney holds a document for a client can he be compelled to produce it, by a person who has an equal interest in it with his client.(2) Newton v. Chaplin, 10 C. B. 356: 10 E. C. L. R.

The information must have been obtained by the legal adviser in his professional capacity. Thus an attorney, who has witnessed a deed produced in a cause, may be examined as to the true time of execution; or if a question arise as to a rasure in a deed or bond, he may be asked whether he ever saw the instrument in any other state, that being a fact within his own knowledge; but he ought not to be permitted to discover any confession which his client may have made to him on that head. B.

(1) Jackson v. French, 2 Wend. 337; but not a student in his office. Andrews et al. v. Solomon et al., Peters C. C. Rep. 356.

(2) Anon., 8 Mass. 270; Brandt v. Klein, 17 Johns. 335; S. P., Jackson v. McVey, 18 Id. 330; The State v. Squires, 1 Tyler, 147; Lessee of Rhoades v. Selin, 4 Wash. C. C. Rep. 715.

N. P. 284. It has been said that the above case applies only where the attorney has his knowledge independently of any communication with his client.(1) Wheatley v. Williams, 1 M. & W. 533. It was there held that an attorney is not compellable to state whether a document shown to him by his client during a professional interview, was in the same state as when produced at the trial, namely, whether it was stamped or not. In Dwyer v. Collins, 7 Exch. 639, S. C. 21 L. J. Ex. 225, it was held, that the right of an attorney not to disclose matters with which he has become acquainted in the course of his employment, as such, does not extend to matters of fact which he [*143] knows by any other means than confidential *communication with his client, though, if he had not been employed as attorney, he probably would not have known them; and that upon this ground an attorney of a party to a suit is bound to answer on a trial, whether a particular document belonging to his client is in his possession, and is then in court. See also Coates v. Birch, 2 Q. B. 252: 42 E. C. L. R In R. v. Farley, 1 Den. C. C. 197, where the wife of a prisoner took a forged will to an attorney at the prisoner's request, and asked if he could advance her husband some money upon the mortgage of property mentioned in the will; it was held, that this was not a privileged communication. So where a forged will was put into an attorney's hands not in professional confidence, but that by finding it among the title-deeds of the deceased, which the prisoner sent with the will, he might be disposed to act upon it; it was held by all the judges, that the communication was not privileged. R. v. Jones, 1 Den. C. C. R. 166.

And the matter must also be one which is a subject of professional confidence. Thus the clerk of an attorney may be called to identify a party, though he has only become acquainted with him in his professional capicity; for it is a fact cognizable both by the witness and by others, without any confidence being reposed in him. Studdy v. Saunders, 2 Dow. & Ry. 347: 16 E. C. L. R.; though the contrary was, upon one occasion, ruled by Mr. Justice Holroyd. Parkins v. Hawkshaw, 2 Stark. N. P. C. 240: 3 E. C. L. R. So an attorney's clerk may be called to prove the receipt of a particular paper from the other party, for it is a mere fact. Eicke v. Nokes, Moo. & M. 304: 22 E. C. L. R. So an attorney conducting a cause may be called and asked who employed him, in order to let in the declarations of that person as the real party. Levy v. Pope, Moo. & M. 410. So he may prove that his client is in possession of a particular document, in order to let in secondary evidence of its contents. Bevan v. Waters, M. & M. 235. So to prove his client's handwriting, though his knowledge was obtained from witnessing the execution of the bail-bond in the action. Hurd v. Moring, 1 C. & P. 372: 12 E. C. L. R.; Robson v. Kemp, 5 Esp. 52.(2) So where an attorney is present when his client is sworn to an answer in chancery, on an indictment for perjury, he will, it is said, be a good witness to prove the fact of the taking of the oath, for it is not a matter of secrecy committed to him by his client. Bull, N. P. 214. But in R. v. Watkinson, 2 Str. 1122, where the solicitor on a similar indictment, was called to speak to the identity of the defendant's person, the Chief Justice would not compel him to be sworn. "*Quære tamen?*" says the reporter: "for it was a fact within his own knowledge." And Lord

(1) So if after the relation has ceased, the client voluntarily repeats to him what had been before communicated in his professional character. Jordan v. Hess, 13 Johns. 492.

(2) Husten v. Davis, 3 Yeates, 4; Johnson v. Daverne, 19 Johns. 134. So to prove the execution of a deed, and that it is in his possession, under a notice to produce it; but he is not compellable to produce it, nor to disclose its contents. Brandt v. Klein, 17 Johns. 335; Jackson v. McVey, 18 Id. 330. See Baker v. Arnold, 1 Caines, 258; McTavish v. Dunning, Anthon's N. P. C. 82; Phelps v. Riley, 3 Conn. 266; Caniff v. Meyers, 15 Johns. 246.

Brougham, in commenting upon this case, in Greenough v. Gaskell, 1 Myl. & K. 108, observes, that the putting in of the answer, so far from being a secret, was in its very nature a matter of publicity, and that the case cannot be considered as law at the present day.

There is no doubt that the privilege may be equally claimed, whether the client be the prisoner himself or any other person, or whether the subject of the confidence be the actual charge against the prisoner or any other professional communication. Thus in a prosecution for the forgery of a promissory note, the attorney who had the note in his possession refused to produce it. He stated that he had been consulted by the prisoner on the note in question, and that by his directions he had commenced an action against the person in whose name it was forged. The attorney was not employed *for the prosecution, and a demand of the note had been made [*144] upon him by the prisoner's attorney. Mr. Justice Holroyd refused to make an order upon the attorney to produce the note, or to give a copy of it to the clerk of arraigns, and a true bill having been found, he likewise held that the attorney was not bound to produce it on the trial. R. v. Smith, Derby Sun. Ass. 1822; 1 Phill. Ev. 171, 9th ed.

In the case of an indictment for forging a will, an attorney employed by a party to put out money on mortgage, was applied to by the prisoner to procure him money on mortgage, and the prisoner produced a forged will in proof of his title to certain freehold lands, upon the security of which the attorney's other client advanced the money, the mortgage deeds being prepared by the attorney; and the prisoner's counsel objected to the attorney being examined, and cited R. v. Smith, *supra:* Patteson, J., said he thought that case was not law, and that the attorney might be examined to show what was the transaction between the parties, and what led to that transaction; but said he would reserve the point for the consideration of the judges, if he should afterwards think it necessary to do so. The attorney was accordingly examined, and produced the will, which the learned judge thought he was bound to do. The prisoner was found guilty, but no sentence was passed, he having pleaded guilty to another indictment charging the transaction as a false pretence. R. v. Avery, 8 C. & P. 596: 34 E. C. L. R. But in R. v. Tuff, 1 Den. C. C. R. 334, Patteson, J., said, "The observations which I am reported to have made about R. v. Smith, seem too strong. I should have reserved the case of R. v. Avery, had not the prisoner pleaded guilty to another indictment, and so rendered it needless to press that farther." The distinction appears to be that if the information comes to the attorney in the course of his business, but before any relation of attorney and client is constituted, as in R. v. Jones, *supra*, then the evidence must be given. But if that relation is once constituted, all that passes is privileged, to whatever subject it may relate.

When the witness is privileged on the ground of public policy—persons in a judicial capacity.] In R. v. Watson, a witness was questioned by the prisoner's counsel, as to his having produced and read a certain writing before the grand jury. On this being objected to, Lord Ellenborough, C. J., said, "he had considerable doubts upon the subject: he remembered a case in which a witness was questioned as to what passed before the grand jury, and though it was a matter of considerable importance, he was permitted to answer." The question was not repeated. 32 How. St. Tr. 107. But it has since been held, that a witness for the prosecution in a case of felony, may be asked on cross-examination, whether he has not stated certain facts

before the grand jury, and that the witness is bound to answer the question. R. v. Gibson, Carr. & M. 672: 41 E. C. L. R. See also R. v. Russell, Carr. & M. 247.(1)

According to an old case, a clerk attending before a grand jury shall not be compelled to reveal what was given in evidence. Trials *per pais*, 220; 12 Vin. Ab. 38; Evidence (B. a. 5). Where a bill of indictment was preferred for perjury committed at the quarter sessions, and it was proposed to examine one of the grand jury, who [*145] had acted as chairman at such sessions, Patteson, J., *said, "This is a new point, but I should advise the grand jury not to examine him. He is the president of a court of record, and it would be dangerous to allow such an examination, as the judges of England might be called upon to state what occurred before them in court." R. v. Gazard, 8 C. & P. 595: 34 E. C. L. R. See as to incompetency, 120.

When the witness is privileged on the ground of public policy—disclosures by informers, &c.] Another class of privileged communications are those disclosures which are made by informers, or persons employed for the purpose, to the government, the magistracy, or the police, with the object of detecting and punishing offenders. The general rule on this subject is thus laid down by Eyre, C. J.: "It is perfectly right that all opportunities should be given to discuss the truth of the evidence given against a prisoner; but there is a rule, which has universally obtained, on account of its importance to the public for the detection of crimes, that those persons who are the channel by means of which that detection is made, should not be unnecessarily disclosed; if it can be made to appear that it is necessary to the investigation of the truth of the case, that the name of the person should be disclosed, I should be very unwilling to stop it; but it does not appear to me, that it is within the ordinary course to do it, or that there is any necessity for it in the present case." R. v. Hardy, 24 How. St. Tr. 808. It is not of course every communication made by an informer, to any person to whom he thinks fit to make it, that is privileged from being inquired into, but those only which are made to persons standing in a certain situation, and for the purposes of legal investigation or state inquiry. Communications made to government respecting treasonable matters are privileged, and a communication to a member of government is to be considered as a communication to government itself; and that person cannot be asked whether he has conveyed the information to government. R. v. Watson, 2 Stark. N. P. C. 136: 3 E. C. L. R. So a person employed by an officer of the executive government, to collect information at a meeting supposed to be held for treasonable purposes, was not allowed to disclose the name of his employer, or the nature of the connection between them. R. v. Hardy, 24 How. St. Tr. 753; R. v. Watson, Gurney's Rep. 159, 32 How. St. Tr. 100.

The protection extends to all communications made to officers of justice, or to persons who form links in the chain by which the information is conveyed to officers of justice (2) A witness who had given information, admitted on a trial for high

(1) See Low's Case, 4 Greenl. 439. A grand juror cannot be admitted to prove that a witness who has been examined swore differently before the grand jury. Imlay v. Rogers, 2 Halst. 347. But in action for a malicious prosecution one of the grand jury who returned the bill ignoramus, is a competent witness to prove who the prosecutor was. Huidehoper v. Cotton, 3 Watts, 56. The attorney for the Commonwealth cannot be called upon to testify to what passes in the grand jury room. Commonwealth v. Tilden, 2 Stark. Ev. new ed. 232, n. 1; McLetton v. Richardson, 13 Maine, 82. See *ante*, p. 120, n. 1.

(2) The officer who apprehended the prisoner is not bound to disclose the name of the person from whom he received the information which led to the prisoner's apprehension. United States v. Moses, 4 Wash C. C. Rep. 126. But a police officer will be compelled to answer at the instance of the Commonwealth. Mina's Case, Pamph. p. 9.

In the trial of an indictment for larceny, a witness from whom the property is charged to have been

treason that he had communicated what he knew to a friend, who had advised him to make a disclosure to another person. He was asked whether that friend was a magistrate, and on his answering in the negative, he was asked who was the friend? It was objected, that the person by whose advice the information was given to one standing in the situation of magistrate, was in fact the informer, and that his name could not be disclosed. The judges differed. Eyre, C. J., Hotham, B., and Grose, J., thought the question objectionable; Macdonald, C. B., and Buller, J., were of opinion it should be admitted. Eyre, C. J., said, "Those questions which tend to the discovery of the channels by which the disclosure was made to the officers of justice, are not permitted to be asked. Such matters cannot be disclosed, upon the general principle of the convenience of public justice. It is no more competent to ask who the person was that advised the witness to *make a disclosure, than [*146] it is to ask to whom he made the disclosure in consequence of that advice; or than it is to ask any other question, respecting the channel of information, or what was done under it." Hotham, B., said, that the disclosure was made under a persuasion, that through the friend it would be conveyed to a magistrate, and, that there was no distinction between a disclosure to the magistrate himself, and to a friend to communicate it to him. Macdonald, C. B., said, that if he were satisfied that the friend was a link in the chain of communication, he should agree that the rule applied, but that not being connected either with the magistracy or the executive government, the case did not appear to him to fall within the rule; and the opinion of Buller, J., was founded on the same reason. R. v. Hardy, 24 How. St. Tr. 811. The above cases were cited and considered in the Attorney-General v. Briant, 15 M. & W. 169, where the court decided, that upon the trial of an information for a breach of the revenue laws, a witness for the crown cannot be asked in cross-examination, "Did you give the information?"

When the witness is privileged on the ground of public policy—official communications.] It has always been held that official communications relating to matters which affect the interest of the community at large may be withheld; such as the communications between the governor and law officers of a colony, Wyatt v. Gore, Holt, N. P. C. 299: 3 E. C. L. R., between the governor of a colony and one of the secretaries of state, Anderson v. Hamilton, 2 Br. & Bingh. 156: 6 E. C. L. R., between a governor of a colony and a military officer, Cooke v. Maxwell, 2 Stark. 183, are privileged. So where, on a trial for high treason, Lord Grenville was called upon to produce a letter intercepted at the post-office, and which was supposed to have come to his hands, it was ruled that he could not be required to produce it, for that secrets of state were not to be taken out of the hands of his Majesty's confidential subjects. Case cited by Lord Ellenborough, Anderson v. Hamilton, 2 Br. & Bingh. 157 (*n*). What passes in Parliament is in the same manner privileged. Thus, on a trial for a libel upon Mr. Plunkett, a member of the Irish Parliament, the speaker of the Irish House of Commons being called and asked, whether he had heard Mr. Plunkett deliver his sentiments in Parliament on matters of a public nature, Lord Ellenborough said that the speaker was warranted in refusing to disclose what had taken place in a debate in the House of Commons. He *might* disclose what passed

stolen, is not bound to disclose the names of persons in his employment, who gave the information which induced him to take measures for the detection of the person indicted. State v. Saper, 16 Maine, 293.

The Secretary of State is not bound to disclose any official confidential communications. But the fact whether a commission has been in his office or not, he is bound to disclose. Marbury v. Madison, 1 Cranch, 142. See 1 Burr's Trial, 180; Gray v. Pentland, 2 Serg. & Rawle, 23.

there, and if he thought fit to do so, he should receive it as evidence. As to the fact of Mr. Plunkett having spoken in Parliament, or taken any part in the debate, he was bound to answer. That was *a fact* containing no improper disclosure of any matter. Plunkett v. Cobbett, 5 Esp. 136; 29 How. St. Tr. 71, 72, S. C. On the same ground, viz., that the interests of the state are concerned, an officer of the Tower of London was not allowed to prove that a plan of the Tower, produced on behalf of the prisoner, was accurate. R. v. Watson, 2 Stark. N. P. C. 148: 3 E. C. L. R.

In Dickson v. Lord Wilton, 1 F. &. F. 424, a clerk from the war office was sent with a paper which had been asked for, with instructions to object to its production and nothing more. Lord Campbell ordered it to be produced, not considering the mere objection of a subordinate officer sufficient. In Beatson v. Skene, 29 L. J. M. C. 430, the Secretary of State for the Home Department had been subpœnaed to [*147] produce certain documents written to him by an officer in *the army. He attended at the trial, but objected to produce the documents on the ground that his doing so would be injurious to the public service. Bramwell, B., thereupon refused to compel him to do so, and a new trial was moved for upon this amongst other grounds. It appeared on discussion that the documents, even if produced, would not have been admissible; but Pollock, C. B., in delivering the considered judgment of the Court of Exchequer, said that the majority of the court entirely concurred in the ruling of Mr. Baron Bramwell. He said: "We are of opinion that if the production of a state paper would be injurious to the public service, the general public interest must be considered paramount to the individual interest of a suitor in a court of justice; and the question then arises, how is this to be determined? It is manifest it must be determined either by the presiding judge, or by the responsible servant of the crown in whose custody the paper is. The judge would be unable to determine it without ascertaining what the document was, and why the publication would be injurious to the public service,—an inquiry which cannot take place in private, and which taking place in public may do all the mischief which it is proposed to guard against. It appears to us, therefore, that the question, whether the production of the document would be injurious to the public service, must be determined, not by the judge, but by the head of the department having the custody of the paper; and if he is in attendance and states that, in his opinion, the production of the document would be injurious to the public service, we think the judge ought not to compel the production of it. . . . . If, indeed, the head of the department does not attend personally, to say that the production will be injurious, but sends the document to be produced or not, as the judge may think proper, or, as was the case in Dickson v. Lord Wilton, where a subordinate was sent with the document, with instructions to object and *nothing more*, the case may be different."

Where, for revenue or other purposes, an oath of office has been taken not to divulge matters which have come to the knowledge of a party in his official capacity, he will not be allowed, where the interests of justice are concerned, to withhold his testimony. Thus, where the clerk to the commissioners of the property tax being called to produce the books containing the appointment of a party as collector, objected on the ground that he had been sworn not to disclose anything he should learn in his capacity of clerk, Lord Ellenborough clearly thought that the oath contained an implied exception of the evidence to be given in a court of justice, in obedience to a writ of *subpœna*. He added that the witness must produce the books, and answer all questions respecting the collection of the tax, as if no such oath had been administered to him. Lee q. t. v. Birrell, 3 Camp. 337.

Objection to answer how taken.] The mode of taking the objection depends on the person to whom the privilege belongs. If the objection be on the ground that the answer would expose the witness to penal consequences, then it belongs to the witness himself, and to him only, who may insist on or abandon it, as he thinks fit: Thomas v. Newton, M. & M. 48 (*n*): 22 E. C. L. R.; R. v. Adey, 1 Moo. & R. 84; in both of which cases Lord Tenterden said that counsel ought not to be allowed to argue the question in favor of the witness. And it seems still more improper for counsel interested in excluding the evidence to suggest the objection to the witness. Frequently, indeed, the court, especially *with an ignorant [*148] witness, will explain to him his position and the protection to which he is entitled, and the practice has been approved of. It has, indeed, sometimes, been asserted that a question tending to criminate a witness cannot be *put*, which is an obvious error, as, until put, it cannot be seen whether or no the witness will insist on his privilege. Of course, the court will not allow a witness to be attacked with questions which he obviously cannot be compelled to answer, merely for the purpose of insulting him, which explains how it is that sometimes the court has interfered without waiting for the witness to claim his privilege. (See *supra*, p. 140.)

If the privilege be claimed on the ground of professional confidence, then the privilege belongs to the party who reposes the confidence, who may insist upon or waive it at his pleasure. The rule seems to be that it will be assumed that the privilege is insisted on unless the contrary be shown, and that it is not, therefore, generally necessary that the client should be present and insist personally on his privilege. Tayl. Ev. 407; Doe d. Gilbert v. Ross, 7 M. & W. 102; Newton v. Chaplin, 10 C. B. 356: 70 E. C. L. R.; Phelps v. Prew, 3 E. & B. 430: 77 E. C. L. R. If the professional adviser chose to take upon himself the risk of answering the question, the court could hardly prevent him, though it might express its indignation at a manifest breach of professional confidence.

It was once thought that if the witness began to answer he must proceed; but in R. v. Garbett, 1 Den. C. C. 258, nine judges against six held that this was not so, and that the witness was entitled to his privilege at whatever stage of the inquiry he chose to claim it.

Effect of refusing to answer.] Where a witness is entitled to decline answering a question, and does decline, the rule is said by Holroyd, J., to be, that his not answering ought not to have any effect with the jury. R. v. Watson, 2 Stark. 157: 3 E. C. L. R. So where a witness demurred to answer a question, on the ground that he had been threatened with a prosecution respecting the matter, and the counsel in his address to the jury remarked upon the refusal, Abbott, C. J., interposed and said, that no inference was to be drawn from such refusal. Rose v. Blakemore, Ry. & Moo. N. P. C. 384: 21 E. C. L. R. A similar opinion was expressed by Lord Eldon. Lloyd v. Passingham, 16 Ves. 64; see the note Ry. & Moo. N. P. C. 385. And it was said by Bayley, J., in R. v. Watson, 2 Stark. 135: 3 E. C. L. R., "If the witness refuse to answer, it is not without its effect with the jury. If you ask a witness, whether he has committed a particular crime, it would perhaps be going too far to say, that you may discredit him if he refuse to answer; it is for the jury to draw what inferences they may."

Use which may be made of answer where privilege not claimed, or not allowed.] Answers given to questions to which the witness might have objected, but does not do so, are admissible against him as admissions. Smith v. Beadnell, 1 Camp. 33.

But not answers to questions to which he objects, but as to which is wrongly deprived of the benefit of this objection. R. v. Garbett, *ubi suprà*.

A bankrupt upon an examination, under 12 & 13 Vict. c. 106, s. 117, is especially bound to answer all questions touching matters relating to his trade, dealings, or estate, or which may tend to disclose any secret grant, conveyance, or concealment of his lands, tenements, goods, money, or debts, although his answers may criminate himself. In R. v. Scott, Dears. & B. C. C. 47, it was much discussed before the [*149] Court of *Criminal Appeal whether answers to questions, which the bankrupt had by virtue of this section been compelled to answer, could be given in evidence against him. It was held by Lord Campbell, C. J., Alderson, B., Willes, J., and Bramwell, B., that they might be; Coleridge, J., thought otherwise.

Most of the statutes (such as the 20 & 21 Vict. c. 54), which contain provisions for compelling a witness to give evidence, notwithstanding that his answers may criminate himself, also provide that such answers shall not be given in evidence against him on any criminal proceeding.

[*150] *DOCUMENTARY EVIDENCE.

The 8 & 9 Vict. c. 113, facilitating the admission of certain official and other documents, 150
The 14 & 15 Vict. c. 90, amending the law of evidence, ... 151
The 14 & 15 Vict. c. 100, for improving the administration of criminal justice, . . 154
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The 8 & 9 Vict. c. 113.] By this statute (E. & I.) for facilitating the admission in evidence of certain official and other documents, it is enacted (s. 1), "that whenever, by any act now in force, or hereafter to be in force, any certificate, official or public document, or document or proceeding of any corporation or joint-stock or other company, or any certified copy of any document, by-law, entry in any register or other book, or of any other proceeding, shall be receivable in evidence of any particular in any court of justice or before any legal tribunal, or either house of Parliament, or any committee of either house, or in any judicial proceeding: the same shall respectively be admitted in evidence, provided they respectively purport to be sealed or impressed with a stamp, or sealed and signed, or signed alone, as required, or im-

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pressed with a stamp and signed, as directed by the respective acts made or to be hereafter made, without any proof of the seal or stamp, where a seal or stamp is necessary, or of the signature or of the official character of the *person appear- [*151] ing to have signed the same, and without any further proof thereof in every case in which the original record could have been received in evidence."

By s. 2, "All courts, judges, justices, masters in chancery, masters of courts, commissioners judicially acting, and other judicial officers, shall henceforth take judicial notice of the signature of any of the equity or common law judges of the superior courts at Westminster, provided such signature be attached or appended to any decree, order, certificate, or other judicial or official document."

By s. 3, "All copies of private and local, and personal acts of Parliament, not public acts, if purported to be printed by the queen's printers, and all copies of the journals of either house of Parliament, and of royal proclamations, purporting to be printed by the printers to the crown, or by the printers to either house of Parliament, or by any or either of them, shall be admitted as evidence thereof by all courts, judges, justices, and others, without any proof being given that such copies were so printed."

Sec. 4, after enacting (see *post*, Forgery) that persons who forge such seals, stamps, or signatures, as above mentioned, or who print any private acts or journals of Parliament with false purport, are guilty of felony, further provides, "that whenever any such document as before-mentioned shall have been received in evidence by virtue of this act, the court, judge, commissioner, or other person officiating judicially, who shall have admitted the same, shall, on the request of any party against whom the same is so received, be authorized at its or at his own discretion, to direct that the same shall be impounded, and be kept in the custody of some officer of the court or other proper person, until further order touching the same shall be given, either by such court or the court to which such master or other officer belonged, or by the person or persons who constituted such court, or by some one of the equity or common-law judges of the superior courts at Westminster, on application being made for that purpose."

The 14 *&* 15 *Vict. c.* 99.] By this statute (E. & I.) it is enacted by s. 7, that "All proclamations, treaties, and other acts of state of any foreign state, or of any British colony, and all judgments, decrees, orders, and other judicial proceedings of any court of justice in any foreign state, or in any British colony, and all affidavits, pleadings, and other legal documents, filed or deposited in any such court, may be proved in any court of justice, or before any person having by law or by consent of parties authority to hear, receive, and examine evidence, either by examined copies or by copies authenticated as hereinafter mentioned: that is to say, if the document sought to be proved be a proclamation, treaty, or other act of state, the authenticated copy, to be admissible in evidence, must purport to be sealed with the seal of the foreign state or British colony to which the original document belongs; and if the document sought to be proved be a judgment, decree, order, or other judicial proceeding of any foreign or colonial court, or any affidavit, pleading, or other legal document, filed or deposited in any such court, the authenticated copy, to be admissible in evidence, must purport either to be sealed with the seal of the foreign or colonial court to which the original document belongs; or in the event of such court having no seal, to be signed by the judge; or if there be more than one *judge, by any [*152] one of the judges of the said court; and such judge shall attach to his signature a statement in writing on the said copy that the court whereof he is a judge has no seal; but if any of the aforesaid authenticated copies shall purport to be sealed or

signed, as hereinbefore respectively directed, the same shall respectively be admitted in evidence in every case in which the original document could have been received in evidence, without any proof of the seal, where a seal is necessary, or of the signature, or of the truth of the statement attached thereto, where such signature and statement are necessary, or of the judicial character of the person appearing to have made such signature and statement."

By s. 8, "Every certificate of the qualification of an apothecary, which shall purport to be under the common seal of the society of the art and mystery of apothecaries of the city of London, shall be received in evidence in any court of justice, and before any person having by law or by consent of parties authority to hear, receive, and examine evidence, without any proof of the said seal or of the authenticity of the said certificate, and shall be deemed sufficient proof that the person named therein has been, from the date of the said certificate, duly qualified to practise as an apothecary in any part of England or Wales."

By s. 9, "Every document which by any law now in force, or hereafter to be in force, is or shall be admissible in evidence of any particular in any court of justice in England or Wales, without proof of the seal, or stamp, or signature, authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purpose in any court of justice in Ireland, or before any person having in Ireland by law, or consent of parties, authority to hear, receive, and examine evidence, without proof of the seal, or stamp, or signature, authenticating the same, or of the judicial or official character of the person appearing to have signed the same."

By s. 10, "Every document which by any law now in force, or hereafter to be in force, is or shall be admissible in evidence of any particular in any court of justice in Ireland, without proof of the seal, or stamp, or signature, authenticating the same, or of the judicial or official character of the person appearing to have signed the same shall be admitted in evidence to the same extent and for the same purpose in any court of justice in England or Wales, or before any person having, in England or Wales by law, or by consent of parties, authority to hear, receive, and examine evidence, without proof of the seal, or stamp, or signature, authorizing the same, or of the judicial or official character of the person appearing to have signed the same."

By s. 11, "Every document which by any law now in force, or hereafter to be in force, is or shall be admissible in evidence of any particular in any court of justice in England or Wales, or Ireland, without proof of the seal, or stamp, or signature, authenticating the same, or of the judicial or official character of the person appearing to have signed the same, shall be admitted in evidence to the same extent and for the same purpose in any court of justice of any of the British colonies, or before any person having, in any such colonies by law or by consent of parties, authority to hear, receive, and examine evidence, without proof of the seal, or stamp, or signature, [*153] *authenticating the same, or of the judicial or official character of the person appearing to have signed the same."

And after reciting that it is expedient, as far as possible, to reduce the expense attending upon the proof of criminal proceedings, it is enacted:

By s. 13, "That whenever, in any proceedings whatever, it may be necessary to prove the trial and conviction or acquittal of any person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person, or a copy thereof, but it shall be sufficient that it be certified, or purport to be certified, under the hand of the clerk of the court or other officer having the custody of the records of the court where such conviction or acquittal took place,

or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction, and judgment or acquittal, as the case may be, omitting the formal parts thereof."

By s. 14, "Whenever any book or other document is of such public nature as to be admissible in evidence on its mere production from the proper custody, and no statute exists which renders its contents provable by means of a copy, any copy thereof, or extract therefrom, shall be admissible in evidence in any court of justice or before any person, now or hereafter, having by law, or by consent of parties, authority to hear, receive, and examine evidence; provided it be proved to be an examined copy or extract, or provided it purport to be signed and certified as a true copy or extract by the officer to whose custody the original is intrusted, and which officer is hereby required to furnish such certified copy or extract to any person applying at a reasonable time for the same, upon payment of a reasonable sum for the same, not exceeding fourpence for every folio of ninety words."

By s. 15, "If any officer authorized or required by this act to furnish any certified copies or extracts, shall wilfully certify any document as being a true copy or extract, knowing the same is not a true copy or extract, as the case may be, he shall be guilty of a misdemeanor, and be liable upon conviction to imprisonment for any term not exceeding eighteen months."

By s. 16, "Every court, judge, justice, officer, commissioner, arbitrator, or other person, now or hereafter having by law, or by consent of parties, authority to hear, receive, and examine evidence, is hereby empowered to administer an oath to all such witnesses as are legally called before them respectively."

By s. 17, "If any person shall forge the seal, stamp, or signature of any document in this act mentioned or referred to, or shall tender in evidence any such document with a false or counterfeit seal, stamp, or signature thereto, knowing the same to be false or counterfeit, he shall be guilty of felony, and shall upon conviction be liable to transportation for seven years, or to imprisonment for any term not exceeding three years, nor less than one year with hard labor, and whenever any such document shall have been admitted in evidence by virtue of this act, the court or the person who shall have admitted the same may, at the request of any party against whom the same is so admitted in evidence, direct that the same shall be impounded and be kept in the custody of some officer of the court, or other proper person, for such period, and subject to such conditions as the said court or person shall see meet; and every person who shall be charged with *committing any felony under this act, or [*154] under the act 8 & 9 Vict. c. 113, may be dealt with, indicted, tried, and if convicted, sentenced, and his offence may be laid and charged to have been committed in the county, district, or place in which he shall be apprehended or be in custody; and every accessory, before or after the fact, to any such offence, may be dealt with, indicted, tried, and if convicted, sentenced, and his offence laid and charged to have been committed in any county, district, or place in which the principal offender may be tried."

14 & 15 *Vict. c.* 100.] Sect. 22 of this statute enacts that "A certificate containing the substance and effect only (omitting the formal part) of the indictment and trial for any felony or misdemeanor, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court where such indictment was tried, or by the deputy of such clerk or other officer (for which certificate a fee of 6*s.* 8*d.*, and no more, shall be demanded or taken), shall upon the trial of any indictment for perjury, or subornation of perjury, be sufficient evidence of the trial of

such indictment for felony or misdemeanor, without proof of the signature or official character of the person appearing to have signed the same."

Proof of acts of Parliament, &c.] The courts will take notice of public acts of Parliament, without their being specially proved; but previously to the 8 & 9 Vict. c. 113, private acts of Parliament must have been proved by a copy examined with the Parliament roll, B. N. P. 225, unless the mode of proof were provided for by the act. Where there was a clause in the act, declaring that it should be taken to be a public act, and should be taken notice of as such by all judges, &c., without being specially pleaded, it was not necessary to prove a copy examined with a roll, or a copy printed by the king's printer, but it stood upon the same footing as a public act. Beaumont v. Mountain, 10 Bingh. 404: 25 E. C. L. R.; Woodward v. Cotton, 4 Tyr. 689; 1 C., M. & R. 44; see also Forman v. Dawes, Carr. & M. 127: 41 E. C. L. R. If for other purposes, however, as with regard to the recital of facts contained in it, such a clause did not give the statute the effect of a public act. Brett v. Beales, Moo. & M. 421: 22 E. C. L. R.

Every act of Parliament is now deemed to be a public act, and is to be judicially noticed as such, unless the contrary be expressly declared. 13 & 14 Vict. c. 21, s. 7.

By the 41 Geo. 3, c. 90, s. 9, the statutes of England and (since the union with Scotland) of Great Britain, printed by the king's printer, shall be received as conclusive evidence of the statutes enacted prior to the union of Great Britain and Ireland, in any court of civil or criminal jurisdiction in Ireland; and in like manner the copy of the statutes of the kingdom of Ireland, made in the Parliament of the same, printed by the king's printer, shall be received as conclusive evidence of the statutes enacted by the Parliament of Ireland prior to the union of Great Britain and Ireland, in any court of civil or criminal jurisdiction in Great Britain.

Formerly the journals of the Lords and Commons must have been proved by examined copies. R. v. Lord Melville, 24 How. St. Tr. 683; R. v. Lord G. Gordon, 2 Dougl. 593; but now see 8 & 9 Vict. c. 113, *ante*, p. 150.

[*155] *Proof of records.*] A record is not complete until delivered into *court in parchment. Thus the minutes made by the clerk of the peace at sessions, in his minute-book, are neither a record nor in the nature of a record so as to be admissible in evidence as proof of the names of the justices in attendance. R. v. Bellamy, Ry. & Moo. 172: 21 E. C. L. R. And where to prove an indictment for felony found by the grand jury, the indictment itself (which was in another court) indorsed "a true bill," was produced by the clerk of the peace, together with the minute-book of the proceedings of the sessions at which the indictment was found, the Court of King's Bench held, that in order to prove the indictment it was necessary to have the record regularly drawn up, and that it should be proved by an examined copy. R. v. Smith, 8 B. & C. 341: 15 E. C. L. R.; Cooke v. Maxwell, 2 Stark. 183: 3 E. C. L. R. So an allegation that the grand jury at sessions found a true bill, is not proved by the production of the bill itself with an indorsement upon it, but a record, regularly made up, must be produced. Porter v. Cooper, 6 C. & P. 354: 25 E. C. L. R.; 4 Tyr. 456; 1 C., M. & R. 388, S. C. So it has been ruled on an indictment for perjury, that in order to prove that an appeal came on to be heard at sessions, it must be shown that a record was regularly made upon parchment. R. v. Ward, 6 C. & P. 366; and see Reg. v. The Inhabitants of Pembridge, Carr. & M. 157: 41 E. C. L. R. But where the object of the evidence was merely to prove the fact of a former trial, it was held on an indictment for perjury committed at such trial

that the production by the officer of the court, of the caption, the indictment with the indorsement of the prisoner's plea, the verdict and the sentence of the court upon it, was sufficient, without the production of the record, or a certificate of the same, under 13 & 14 Vict. c. 99, s 3. R. v. Newman, 2 Den. C. C. R. 390; S. C. 21 L. J. M. C. 75. So a judgment on paper signed by the master is not evidence, for it is not yet become permanent. B. N. P. 228; Godefroy v. Jay, 1 M. & P. 236; 3 C. & P. 192: 14 E. C. L. R; S. C. In one case the minutes of the Lord Mayor's Court of London were allowed to be read as evidence of the proceedings there, the court assigning as a reason for not insisting rigidly upon the record being made up, that it was an inferior jurisdiction. Fisher v. Lane, 2 W. Bl. 834; 8 B. & C. 342: 15 E. C L. R.(1)

The mode of examination usually adopted is, for the person who is afterwards to prove it, to examine the copy while another person reads the original, and this has been held sufficient. Reid v. Margison, 1 Camp. 469; Gyles v. Hill, Id. 471 (*n*). It must appear that the original came from the proper place of deposit, or out of the hands of the officer in whose custody the records are kept. Adamthwaite v. Synge, 1 Stark. 183: 2 E. C. L. R.; 4 Campb. 572, S. C.

Where a record is lost, an old copy has been allowed to be given in evidence, without proof of its being a true copy. Anon. 1 Ventr. 256; B. N. P. 228.

With respect to the proof of records before courts of criminal justice, as where a prisoner pleads *autrefois acquit* to an indictment, he may remove the record by *certiorari* into chancery, and have it exemplified; but it seems to be the usual practice for the clerk of assize or clerk of the peace to make up the record without writ, or to attend with it at the trial. 2 Russ. by Grea. 806 (*n*); 1 Phill. Ev. 141, 9th ed.

Proof by office copies, and copies by authorized officers, &c.] An office copy is not evidence of the original, if the latter be in another court. Thus office copies of depositions in chancery are evidence in *chancery, but not at common law, [*156] without examination with the roll. B. N. P. 229; 5 M. & S. 38. In a court of common law, an office copy has been held sufficient in the same court, and in the same cause. Dean v. Fulford, 2 Burr. 1179. And so it seems that an issue out of chancery may be considered as a proceeding in that court, and an office copy would probably be held evidence there. See Highfield v. Peake, Moo. & Mal. 111: 22 E. C. L. R. There appears to be no reason for distinguishing between the effect of office copies in different causes in the same court, the principle of the admissibility being, that the court will give credit to the acts of its own officers; and accordingly it was held in one case, that an office copy made in another cause in the same court, was admissible. Wightwick v. Banks, Forrest, 154.

Where there is a known officer, whose duty it is to deliver out copies which form

(1) The exemplification of the judgment of a court of another State, to be admissible under the Act of Congress, 26 May, 1790, must be attested by the clerk under the seal of the court, with the certificate of the presiding judge that the attestation of the clerk is in due form. Wilburn v. Hall, 16 Missouri, 168: Ducommun v. Hysinger, 14 Illinois, 249; Thompson v. Manson, 1 California, 428; Stewart v. Gray, 1 Hemp. 94; Trigg v. Conway, 1 Hemp. 538; The State v. Hinchman, 3 Casey, 479; Case v. McGee. 8 Maryland, 9; Schoonmaker v. Lloyd, 9 Richardson's Law, 173; Tappan v. Norvell, 3 Sneed, 570; Ordway v. Conroe, 4 Wisc. 45; Draggoo v. Graham, 9 Indiana, 212; Washabaugh v. Entriken, 10 Casey, 74; Orman v. Neville, 14 Louisiana, 392; Norwood v. Cobb, 20 Texas, 588; Spencer v. Langden, 21 Illinois, 192.

Whenever it is the practice of the clerks to extend the judgments of the courts from the minutes and papers on file, the record thus extended is deemed by the court the original record; and no question will be allowed to be incidentally made, in relation either to the existence or the form of such record, when a copy duly authenticated is produced in proof. Willard v Harvey, 4 Foster, 344.

Writing done with a pencil is not admissible in public records, nor in papers drawn to be used in legal proceedings which must become public records. Meseroe v. Hicks, 4 Foster, 295.

part of the title of the parties receiving them, and whose duty is not performed till the copy is delivered, as in the case of the chirograph of a fine, and the enrolment of a deed, such copies are evidence, without proof of examination with the originals. See Appleton v. Lord Braybrooke, 6 M. & S. 37.

By the 5 & 6 Wm. 4, c. 82, the offices of chirographer, &c., are abolished, but the copies, &c., made by the officer of the C. P. now substituted, are by sect. 4 made as available in evidence as they would by law have been, if made by the former officers.

The certificate of the enrolment of a deed pursuant to the statute is a record and cannot be averred against. R. v. Hopper, 3 Price, 495. A copy of a judgment purporting to be examined by the clerk of the treasury (who is not intrusted to make copies), is not admissible without proof of examination with the original. B. N. P. 229. A judge's order may be proved by the production of the order itself, or by an office copy of the rule by which it has been made a rule of court. Hill v. Halford, 4 Campb. 17. Office copies of rules of court being made out by officers of the court in the execution of their duty, are sufficient evidence without being proved to have been examined. Selby v. Harris, 1 Ld. Raym. 745; Duncan v. Scott, 1 Campb. 102. And printed copies of the rules of a court for the direction of its officers, printed by the direction of the court, are evidence without examination with the original. Dance v. Robson, Moo. & M. 294. Copies of records, in the custody of the master of the rolls, under the 1 & 2 Vict. c. 94, purporting to be sealed and stamped with the seal of the record office, are, by s. 13, made evidence without further proof. As to the rejection of copies of accounts returned by the Supreme Court at Madras to the Q. B., see Reg. v. Douglas, 1 C. & K. 670. As to office copies being rejected for containing abbreviations, see Reg. v. Christian, Carr. & M. 388: 41 E. C. L. R.

Proof of inquisitions.] Inquisitions *post mortem* and other private offices cannot be read in evidence without proof of the commission upon which they are founded, unless, as it seems, the inquisition be old (Vin. Ab. Ev. A. b. 42); but in cases of more general concern, as the minister's return to the commission in Henry the Eighth's time to inquire into the value of livings, the commission is a thing of such public notoriety that it requires no proof. Per Hardw. C., in Sir H. Smithson's Case, B. N. P. 228. An ancient extent of crown lands, found in the proper office, and purporting to have been taken by a steward of the king's lands, and following the directions of the statute 4 Ed. 1, will be presumed to have been taken under a com- [*157] petent *authority, though the commission cannot be found. Rowe v. Brenton, 8 B. & C. 747: 15 E. C. L. R.

Proof of verdicts.] The mode of proving a verdict depends upon the purpose for which it is produced.(1) Where it is offered in evidence, merely to prove that such a cause came on for trial, the *postea* with the verdict indorsed is sufficient. Pitton v. Walker, 1 Str. 162. So it is sufficient to introduce an account of what a witness, who is since dead, swore at a trial. Per Pratt, C. J., Id. So upon an indictment for perjury, committed by a witness in a cause, the *postea*, with a minute by the officer, of the verdict having been given, is sufficient to prove that the cause came on for trial. R. v. Browne, Moo. & M. 315: 22 E. C. L. R. But without such minute, the *nisi*

(1) Ridgely et al. v. Spencer, 2 Binn. 70; Richardson's Lessee v. Parsons, 1 Har. & J. 253; Green v. Stone, Ibid. 405; Mahony v. Ashton, 4 Har. & McHen. 295; Rugan v. Kennedy, 1 Overton, 94; Donaldson v. Jude, 4 Bibb, 60; Hinch v. Carratt, 1 Const. Rep. 471; Fetter v. Mulliner, 2 Johns. 181.

prius record is no evidence of the case having come on for trial. Per Lord Tenterden, Id. In London and Westminster, it is not the practice for the officer to indorse the *postea* itself as in the country, but the minute is indorsed on the jury panel. Id.

But where it is necessary to prove not merely that a trial was had, but that a verdict was given, it must be shown that the verdict has been entered upon the record, and that judgment thereupon has also been entered on record, for otherwise it would not appear that the verdict had not been set aside or judgment arrested. Fisher v. Kitchenham, Willes, 368; Pitton v. Walker, 1 Str. 162; B. N. P. 243. In one case, indeed, Abbott, J., admitted the *postea* as evidence of the amount recovered by the verdict: Foster v. Compton, 2 Stark. 364; and Lord Kenyon also ruled that it was sufficient proof to support a plea of set-off to the extent of the verdict: Garland v. Schoones, 2 Esp. 648; but these decisions appear to be questionable. An allegation in an indictment for perjury that judgment was "entered up" in an action, is proved by the production of the book from the judgment office, in which the *incipitur* is entered. R. v. Gordon, Carr. & M. 410: 41 E. C. L. R. Where an indictment for perjury against A. alleged that B. was convicted on an indictment for perjury, upon the trial of which the perjury in question was alleged to have been committed, and it appeared by the record, when produced, that B. had been convicted, but the judgment against him had been reversed upon error, after the finding of the present indictment; it was held that the record produced supported the indictment. R. v. Meek, 9 C. & P. 513: 38 E. C. L. R. Where a writ is only inducement to the action, the taking out the writ may be proved without any copy of it, because, possibly, it might not be returned, and then it is no record; but where the writ itself is the gist of the action, a copy of the writ on record must be proved in the same manner as any other record. B. N. P. 234.

Proof of affidavits made in causes.] In what manner an affidavit filed in the course of a cause is to be proved, does not appear to be well settled. In an action for a malicious prosecution, an examined copy had been admitted. Crook v. Dowling, 3 Dougl. 72, but see Rees v. Bowen, McCl. & Y. 383. A distinction had been taken between cases where the copy is required to be proved in a civil suit, and where it forms the foundation of a criminal proceeding, as upon an indictment for perjury. In R. v. James, 1 Show. 327; Carth. 220, S. C., the defendant was convicted of perjury upon proof of a copy of an affidavit; it was urged that it was only a copy, and that *there was no proof that it had been made by the defendant; but it [*158] appearing that it had been made use of by the defendant in the course of the cause, the court held it sufficient. This case was, however, doubted in Crook v. Dowling, 3 Dougl. 77: 26 E. C. L. R., where Lord Mansfield said that on indictments for perjury he thought the original should be produced. Buller, J., also observed that wherever identity is in question, the original must be produced. Id. 77. The same rule is laid down with regard to the proof of answers in chancery upon indictments for perjury. *Vide infra.* It may be doubted how far the distinction in question has any foundation in principle, the rules of evidence with regard to the proof of documents being the same in civil and in criminal cases, and the *consequences* of the evidence not being a correct test of the *nature* of the evidence.

Proof of proceedings in equity.] A bill or answer in chancery, when produced in evidence for the purpose of showing that such proceedings have taken place, or for the purpose of proving the admissions made by the defendant in his answer, may be proved either by production of the original bill or answer, or by an examined copy,

with evidence of the identity of the parties. Hennell v. Lyon, 1 B. & A. 182; Ewer v. Ambrose, 4 B. & C. 25: 10 E. C. L. R. But a distinction is taken where the answer is offered in evidence in a criminal proceeding, as upon an indictment for perjury, in which case it has been said to be necessary, that the answer itself should be produced, and positive proof given by a witness acquainted with him, that the defendant was sworn to it. Chambers v. Robinson, B. N. P. 239; Lady Dartmouth v. Roberts, 16 East, 340. In order to prove that the answer was sworn by the defendant, it is sufficient to prove his signature to it, and that of the master in chancery before whom it purports to be sworn. R. v. Benson, 2 Camp. 508; R. v. Morris, B. N. P. 239; 2 Burr. 1189, S. C.

A decree in chancery may be proved by an exemplification, or by an examined copy, or by a decretal order in paper, with proof of the bill and answer, or without such proof, if the bill and answer be recited in the decretal order. B. N. P. 244; Com. Dig. Testm. (C. 1). With regard to the proof of the previous proceedings, the correct rule appears to be, that where a party intends to avail himself of the contents of a decree, and not merely to prove an extrinsic collateral fact (as that *a decree* was made by the court), he ought regularly to give in evidence the proceedings on which the decree is founded. Phill. Ev. 619, 8th ed. See Blower v. Hollis, 3 Tyr. 351; 1 C. & M. 393.

As to the admissibility of decrees in equity, see 6 M. & W. 234.

Proof of depositions.] The depositions of witnesses who are since dead, may, when admissible, be proved by the judge's notes, or by notes taken by any other person who can swear to their accuracy, or the former evidence may be proved by any person who will swear from his memory to its having been given. Per Mansfield, C. J., Mayor of Doncaster v. Day, 3 Taunt. 262.

Where depositions in chancery are offered in evidence, merely for the purpose of proving a fact admitted in them, or of contradicting a witness, it is not necessary to give evidence of the bill and answer. But where it is necessary to show that they were made in the course of a judicial proceeding, as upon an indictment for perjury [*159] in the *deponent, proof of the bill and answer will be required. But the judge only is to look at them for the purpose of determining whether the depositions sought to be put in are evidence. Chappell v. Purday, 14 M. & W. 303. Where the suit is so ancient that no bill or answer can be found, the depositions may be read without proof of them. Depositions taken by command of Queen Elizabeth upon petition without bill and answer, were upon a solemn hearing in chancery allowed to be read. Lord Hunsdon v. Lady Arundell, Hobb. 112, B. N. P. 240. So depositions taken in 1686 were allowed to be read without such proof: Byam v. Booth, 2 Price, 234; and answers to old interrogatories were searched for and not found. Rowe v. Brenton, 8 B & C. 765: 15 E. C. L. R. But, in general, depositions taken upon interrogatories under a commission cannot be read without proof of the commission. Bayley v. Wylie, 6 Esp. 85.

Proof of proceedings in bankruptcy.] Formerly proceedings on commissions of bankrupt were proved, either by producing the proceedings themselves duly enrolled (6 Geo. 4, c. 16, s. 96), or where the original instrument was filed in the office, or was officially in the custody of the secretary of the Lord Chancellor, by copies duly signed and attested. (6 Geo. 4, c. 16, s. 97.) Now, by the 24 & 25 Vict. c. 134, s. 203, "any petition for adjudication or arrangement, adjudication of bankruptcy, assignment, appointment of official or creditors' assignee, certificate, deposition, or

other proceeding or order in bankruptcy, or under any of the provisions of this act, appearing to be sealed with the seal of any court under this act, or any writing purporting to be a copy of any such document, and purporting to be so sealed, shall at all times, and on behalf of all persons, and whether for the purposes of this act or otherwise, be admitted in all courts whatever as evidence of such documents respectively, and of such proceedings and orders having respectively taken place, or been made, and be deemed respectively records of such court without any further proof thereof; and no such document or copy shall be receivable as evidence unless the same appear to be so sealed, except where otherwise specially provided." The only important documents not requiring a seal under this section are copies of declarations of insolvency and of minutes of resolutions where arrangements have been made between debtors and their creditors under the control of the court; and provided these documents respectively purport to be certified by the chief registrar of the court of bankruptcy, or any of his clerks, as true copies, they are receivable as evidence of such declarations or minutes of resolutions having been filed in the office of the Chief Registrar. (15 & 16 Vict. c. 77, ss. 2, 6.) If the declaration of insolvency has been filed, as it may be in a country district, a copy purporting to be certified by the registrar of the district is now receivable as evidence by virtue of the Bankruptcy Act, 1854 (17 & 18 Vict. c. 119, ss. 16, 17, 19). Taylor, Ev. 1198, 2d edit.

Proof of proceedings of the insolvent courts.] By the 1 & 2 Vict. c. 110, s. 46, a copy of the order of assignment of the insolvent's property to the provisional assignee, and of the appointment of the assignees of the estate and effects, made upon parchment, purporting to have the certificate of the provisional assignee, or his deputy *appointed for that purpose, indorsed upon it, and sealed with the seal of the [*160] court, is evidence of such order and appointment and of the title of the assignees in all courts and places.

By s. 105, a copy of the petition, schedule, order of adjudication, and other orders and proceedings purporting to be signed by the officer having the custody of them, or his deputy, certifying the same to be a true copy, and sealed with the seal of the court, is admissible in evidence in the same manner. And by the 5 & 6 Vict. c. 116, s. 11, the like evidence of the appointment of assignees under that act shall be received as sufficient to prove such appointments as is received by the laws now in force relating to bankrupts. By the 7 & 8 Vict. c. 96, s. 37, a petition for protection from process, and any proceeding in the matter of it, purporting to be signed by a commissioner of bankruptcy, or copies thereof, are receivable in evidence of such proceedings having taken place. By s. 23 of the Small Debts Act, 8 & 9 Vict. c. 127, the provisions of this act are made applicable to the latter statute.

The provisions of the foregoing acts do not take away the right to produce the original proceedings in evidence. Northam v. Latouche, 4 C. & P. 140: 19 E. C. L. R.; see also Jackson v. Thompson, 2 Q. B. 887: 42 E. C. L. R.; Doe d. Phillips v. Evans, Carr. & M. 450: 41 E. C. L. R.

Proof of judgments and proceedings of inferior courts.] The judgments and proceedings of inferior courts, not of record, may be proved by the minute-book in which the proceedings are entered, as in the case of a judgment in the county court. Chandler v. Roberts, Peake, Ev. 80, 5th ed. So an examined copy of the minutes will be sufficient.(1) Per Holt, C. J., Comb. 337; 12 Vin. Ab. Evid. A. pl. 26.

(1) Proceedings in civil suits before justices of the peace are within the rule, and sworn copies are evidence. Welsh v. Crawford, 14 Serg. & Rawle, 440.

The certificate of a clerk of an inferior court, in relation to any matter pertaining to his office, is

If the proceedings of the inferior court are not entered in the books, they may be proved by the officer of the court, or by some person conversant with the fact. See Dyson v. Wood, 3 B. & C. 451, 453 : 10 E. C. L. R.

Proof of records and proceedings in county courts.] It is enacted by the 9 & 10 Vict. c. 95, s. 111, "that the clerk of every court holden under this act shall cause a note of all plaints and summonses, and of all orders and of all judgments and executions and returns thereto, and of all fines, and of all other proceedings of the court, to be fairly entered from time to time in a book belonging to the court, which shall be kept at the office of the court; and such entries in the said book or a copy thereof bearing the seal of the court, and purporting to be signed and certified as a true copy by the clerk of the court, shall at all times be admitted in all courts and places whatsoever as evidence of such entries, and of the proceeding referred to by such entry or entries, and of the regularity of such proceeding without any further proof." Under this section it has been decided that such minutes of proceedings cannot be contradicted by the evidence of the judge. Dews v. Ryley, 20 L. J. C. P. 264. And the proceedings of the county court can be proved in no other way. R. v. Rowland, 1 F. & F. 72.

Proof of probates and letters of administration.] The probate of a will is proved by the production of the instrument itself; and proof of the seal of the court is not necessary. In order to prove the title of the executor to personal property, the pro- [*161] bate must be given in *evidence. Pinney v. Pinney, 8 B. & C. 335 : 15 E. C. L. R. When the probate is lost it is not the practice of the Ecclesiastical Court to grant a second probate, but only an exemplification, which will be evidence of the proving of the will. Shepherd v. Shorthose, 1 Str. 412. To prove the probate revoked, an entry of the revocation in the book of the Prerogative Court is good evidence. R. v. Ramsbotham, 1 Leach, 30 (*n*), 3d ed.

Administration is proved by the production of the letters of administration granted by the Ecclesiastical Court. Kempton v. Cross, Rep. Temp. Hardw. 108, B. N. P. 246. So the original book of acts of that court directing the granting of the letters is evidence. B. N. P. 246. And an examined copy of such act-book is also evidence. Davis v. Williams, 13 East, 232.

Proof of foreign laws.] The written law of a foreign state must be proved by a copy of the law properly authenticated. Boehtlink v. Schneider, 5 Esp. 58; Clegg v. Levy, 3 Campb. 166. It does not seem necessary that the copy should have been examined with the original. See cases *post*, tit. Bigamy. The unwritten law of a foreign state (having first been ascertained to be part of the unwritten law by witnesses professionally conversant with the laws of the state) may be proved by the parol evidence of witnesses possessing competent legal skill. Millar v. Heinrick, 4 Campb. 155. The witness to prove a foreign law must be a person *peritus virtute officii* or *virtute professionis*. A Roman Catholic bishop, who held in this country the office of a coadjutor to a vicar apostolic, and as such was authorized to decide on cases affected by the law of Rome, was therefore held, in virtue of his office, to be a witness admissible to prove the law of Rome as to marriage. *Sussex Peerage Case*, 11 Cla. & Fin. 85; 1 C. & K. 213. Such a witness may refer to foreign law-books

not competent evidence unless certified under his hand and seal of office, if there be one; if not, then under his private seal. Thomasson v. Drishell, 13 Georgia, 253.

to refresh his memory or to correct and confirm his opinion, but the law itself must be taken from his evidence.

A judgment duly verified by a seal proved to be that of the foreign court, is presumed to be regular and agreeable to the foreign law, until the contrary is shown. Alivon v. Furnival, 14 Tyr. 757; 1 C., M. & R. 277.(1)

Proof of public books and documents.] Wherever the contents of a public book or document are admissible in evidence, as such, examined copies are likewise evidence, as in the case of registers of marriages, deaths, &c.;(2) as are likewise *certified* copies under the 14 & 15 Vict. c. 99, s. 14; *ante*, p. 153. Thus, an examined copy of an order in council is sufficient without the production of the council books themselves. Eyre v. Palsgrave, 2 Campb. 606. So copies of the transfer books of the East India Company: Anon. 2 Dougl. 593 (*n*); and of the Bank of England: Marsh v. Collnett, 1 Esp. 665; Bretton v. Cope, Peake, N. P. C. 30; of a bank-note filed at the bank: Mann v. Carey, 3 Salk. 155; so the books of commissioners of land-tax: King's Case, 2 T. R. 234; or of excise: Fuller v. Fotch, Carth. 346; or of a poll-book at elections: Mead v. Robinson, Willes, 424. In one case the copy of an agreement contained in one of the books of the Bodleian Library (which cannot be removed) was allowed to be read in evidence. Downes v. Moreman, Bunb. 189; 2 Gwill, 659. The books of the King's Bench and Fleet prisons, when they are admissible, are not such public documents that a copy of them *may [*162] be given in evidence, for they are not kept by any public authority. Salte v. Thomas, 3 B. & P. 190.

Corporation books may be given in evidence, as public books, when they have been kept as such, the entries having been made by the proper officer, or by a third person, in his sickness or absence. Mothersell's Case, 1 Str. 93. But a book containing minutes of corporation proceedings, kept by a person not a member of the corporation, and not kept as a public book, is inadmissible. Id. An examined copy of a corporate book is evidence.(3) Brocas v. Mayor of London, 1 Str. 308; Gwyn's Case, 1 Str. 401. It is not settled whether the attesting witness of a corporation deed need be called. Doe v. Chambers, 4 A. & E. 410; 31 E. C. L. R.; or whether such a deed proves itself after thirty years. Rex v. Bathwick, 2 B. & Ad. 648: 29 E.

(1) See *ante*, p. 136, n. 2.

Reports of adjudged cases are not evidence of what is the law of the state or country in which they are pronounced. The written law of foreign countries should be proved by the law itself as written, and the common or customary or unwritten law, by witnesses acquainted with the law. Gardner v. Lewis, 7 Gill. 377.

By the common law, foreign judgments are authenticated,—first, by an exemplification under the great seal of the state; second, by a copy proved to be a true copy by a person who has examined and compared it with the original; third, by a certificate of the officer authorized by law to give a copy. Steward v. Swanzy, 1 Cushman (Miss.), 502.

The public seal of a State, affixed to the exemplification of a law, proves itself. Robinson et al. v. Gilman, 20 Maine, 299.

A copy of the laws published annually by the authority of the legislature, is evidence of the statutes contained in it, whether they be public or private. Gray v. The Monongahela Nav. Co., 2 Watts & Serg. 156.

The written laws of the other States of the Union cannot be proved here by parol evidence But the printed statute-books purporting to be published by authority are *prima facie* evidence here of the statutes they contain. Comparit v. Jernigan et al., 5 Blackf. 375.

(2) Official books and papers must be proved by producing an exemplified copy from the proper office; or if circumstances require that the originals should be produced, they must be brought from the office and verified by the officer who has the keeping of them, or his clerk, or some one specially authorized by him for that purpose. They cannot be verified by one who has no connection with the office, but who happens to know them. Hackenbury v. Carlisle, 1 Watts & Serg. 383.

(3) Owing v. Speed, 5 Wheat. 420. They are evidence in disputes between its members, but not against strangers. Commonwealth v. Woelper et al., 3 Serg. & Rawle, 29; Jackson v. Walsh, 3 Johns. 226. Must be kept by the proper officer. Highlands Turnpike Co. v. McKeen, 10 Johns. 154.

C. L. R. Inspection of corporation books and other public writings is granted in civil actions, but not in criminal cases, where it would have the effect of making a defendant furnish evidence to criminate himself. R. v. Heydon, 1 W. Bl. 351; R. v. Purnell, Id. 37; 1 Willes, 239; 2 Str. 1210.

Proof of public registers] Public registers, as of births, marriages, or deaths, are proved either by the production of the register itself or of an examined copy. B. N. P. 247. Parol evidence of the contents of a register has been admitted; yet the propriety of such evidence, says Buller, may well be doubted, because it is not the best evidence the nature of the case is capable of. B. N. P. 247. A copy of a record or of a public book is not, in fact, secondary evidence; and therefore the opinion of Mr. Justice Buller appears to be correct. A register is only one mode of proof of the fact which it records, and the fact may be proved without producing the register, by the evidence of persons who were present. Thus, upon an indictment for bigamy, it was held sufficient to prove the marriage, by the evidence of a person who was present at it, without proving the registration, license, or banns.(1) R. v. Alison, Russ. & Ry. 109.

In proving a register, some evidence of the identity of the parties must be given, as by proof of the handwriting, for which purpose it is not necessary to call the subscribing witnesses. Per Lord Mansfield, Birt v. Barlow, 1 Dougl. 174. The identity is usually established by calling the minister, clerk, or some other person who was present at the ceremony.

In R. v. Nash, 2 Den. C. C. R. 493, S. C. 21 L. J. M. C. 147, upon an indictment for forging and uttering a transfer of shares in a railway company, it was held that the register of shareholders, kept under the 8 & 9 Vict. c. 16, s. 9, was evidence to prove that the individual was a shareholder without any authentication of the seal, and that in order to sustain the indictment it was unnecessary to give further proof that such an individual was a shareholder of the company.

By the 52 Geo. 3, c. 146 (which is still in force for the registration of births and burials by clergymen of the church of England), it is provided that verified copies shall be annually sent to the registrar of the diocese. It seems that such verified copies being public documents, are evidence as well as the originals, and may be proved by examined copies. Per Alderson, B., Walker v. Beauchamp, 6 C. & P. 552: 25 E. C. L. R. But it is otherwise of the returns enjoined by the canons of 1603, which can only be used as secondary evidence. S. C. By the 6 & 7 Wm. 4, [*163] c. 86, s. 38, for registering births, marriages, and *deaths in England, certified copies of entries purporting to be sealed or stamped with the seal of the office of the registrar-general, shall be evidence of the birth, death, or marriage to which they relate, without further proof of such entries. By the 3 & 4 Vict. c. 92, certain non-parochial registers of births, marriages, and deaths, transferred to the general register office, or certified extracts therefrom, are made admissible in evidence; but in criminal cases the original registers must (by s. 17) be produced. And see further as to examined and certified copies, 14 & 15 Vict. c. 99, s. 14; *ante*, p. 153.

As to marriage registers in Ireland, see the 7 & 8 Vict. c. 81.

For the act amending the law of marriages, see *post*, Bigamy.

Proof of ancient documents, terriers, &c.] In many cases, ancient documents are admitted in evidence to establish facts which, had they been recently made, they

(1) Lessee of Hyam v. Edwards, 1 Dall. 2; Stoever v. Lessee of Whitman, 6 Binn. 416; Jacocks v. Gilliam, 2 Murphy, 47; Huntley v. Comstock, 2 Root, 99; Jackson v. Boneham, 15 Johns. 225; Sumner v. Sebee, 3 Greenl. 223.

would not have been allowed to prove. These documents prove themselves, provided it appear that they are produced out of the proper custody. The proper repository of ecclesiastical terriers or maps is the registry of the bishop or archdeacon of the diocese. Atkins v. Hatton, 2 Anst. 387; Potts v. Durant, 3 Anst. 795. On an issue to try the boundaries of two parishes, an old terrier or map of their limits, drawn in an inartificial manner, brought from a box of old papers relating to the parish, in the possession of the representatives of the rector, was rejected, not being signed by any person bearing a public character or office in the parish. Earl v. Lewis, 4 Esp. 3.

So also with regard to private ancient documents, it must appear that they came from the custody of some person connected with the property. Thus where, upon an issue to try a right of common, an old grant to a priory, brought from the Cottonian MSS. in the British Museum, was offered in evidence, it was rejected by Lawrence, J., the possession of it not being sufficiently accounted for, nor connected with any one who had an interest in the land. Swinnerton v. Marquis of Stafford, 3 Taunt. 91. So a grant to the Abbey of Glastonbury, contained in an ancient MS. deposited in the Bodleian Library, entitled Secretum Abbatis, was rejected as not coming from the proper repository. Mitchell v. Rabbets, cited Id.; see also R. v. Barber, 1 C. & K. 434: 47 E. C. L. R.

Proof of seals.] Where necessary, a seal must be proved by some one acquainted with it, but it is not requisite to call a witness who saw it affixed. Moises v. Thornton, 8 T. R. 307. Some seals, as that of London, require no proof. Doe v. Mason, 1 Esp. 53. So the seal of the superior ecclesiastical courts, and other superior courts, *ante*, p. 150. But the seal of a foreign court must be shown to be genuine. Henry v. Adey, 3 East, 221. So of the Bank of England. Semb., Doe v. Chambers, 4 A. & E. 410: 31 E. C. L. R. So of the Apothecaries' company.(1) Chadwick v. Bunning, R. & Moo. 306: 21 E. C. L. R.

For the provisions of the 8 & 9 Vict. c. 113, dispensing with proof of the seals of corporations, joint stock or other companies, further extended by 14 & 15 Vict. c. 99, see *ante*, p. 150.

Although the seal need not be shown to be affixed by the proper person, yet the deed may be invalidated by proof of the seal being affixed by a stranger, or without proper authority. Clark v. Imperial Gas Co., 4 B. & Ad. 315: 24 E. C. L. R.

**Proof of private documents—attesting witness.*] The execution of a pri- [*164] vate document, which has been attested by a witness subscribing it, must be proved by calling that witness, although the document may not be such as by law is required to have the attestation of a witness.(2) Thus, if a warrant of distress has been at-

(1) The seal of a private corporation must be proved. Den v. Vreelandt, 2 Halst. 352; Leazure v. Hillegas, 7 Serg. & Rawle, 313; Foster v. Shaw, Ibid. 156; Jackson v. Pratt, 10 Johns. 381.

(2) Upon the subject of proof by attesting witnesses, see 1 Stark. on Ev., new ed., 320, and notes.

In order to prove the execution of a paper by secondary evidence, it is only necessary for the party to show that he has neglected nothing which afforded a reasonable hope of procuring the testimony of the subscribing witness. Conrad v. Farrow, 5 Watts, 536.

The absence of a witness from the State, so far as it affects the admissibility of secondary testimony, has the same effect as his death. Allen v. Borghaus, 8 Watts, 77; Teall v. Van Wyck, 10 Barb. Sup. Ct. 376.

When there is other proof that the witness is dead or absent, it is unnecessary to take out a subpœna. Clark v. Boyd, 2 Ohio, 59.

In the absence of the instrumental witness, or of proof of the handwriting of the witnesses and parties, the next best evidence is the acknowledgment of the parties. Ringwood v. Bethlehem, 1 Green, 221.

The confession of a party that he executed a paper, has been held not to be secondary to proof of handwriting. Conrad v. Farrow, 5 Watts, 536.

In order to prove an attested deed, the subscribing witness must be called, if within the reach of

tested, the attesting witness must be produced. Higgs v. Dixon, 2 Stark. 180: 2 E. C. L. R.

Proof of private documents—attesting witness—when proof waived.] Where the attesting witness is dead: Anon. 12 Mod. 607; or blind: Wood v. Drury, 1 Lord Raym. 734; Pedley v. Paige, 1 Moo. & Rob. 258; or insane: Currie v. Child, 3 Camph. 283; or infamous (but now see the 6 & 7 Vict. c. 85, s. 1): Jones v. Mason, 2 Str. 833; or absent in a foreign country, or not amenable to the process of the superior courts: Prince v. Blackburn, 2 East, 252; as in Ireland: Hodnett v. Foreman, 1 Stark. 90; or where he cannot be found, after diligent inquiry: Cunliff v. Sefton, 2 East, 183; in all these cases evidence of the attesting witness's handwriting is admissible. Some evidence must be given in these cases of the identity of the executing party; and although there are cases to the contrary, it is now held that mere identity of name is not sufficient proof of the identity of the party. Whitelock v. Musgrave, 1 Crom. & Mee. 511; 3 Tyr. 541, S. C. The illness of a witness, although he lies without hope of recovery, is no sufficient ground for letting in evidence of his handwriting. Harrison v. Blades, 3 Camph. 457. Where the name of a fictitious witness is inserted: Fasset v. Brown, Peake, 23; or where the attesting witness denies all knowledge of the execution: Talbot v. Hodgson, 7 Taunt. 251: 2 E. C. L. R.; Fitzgerald v. Elsee, 2 Campb. 635; evidence of the handwriting of the party is sufficient proof of its execution. So where an attesting witness subscribes his name, without the knowledge or consent of the parties. McCraw v. Gentry, 3

process and in a situation to be sworn; and neither the testimony of the party to the instrument, nor his admissions out of court, can be received as a substitute. Hollenback v. Fleming, 6 Hill, 303.

If a subscribing witness to a bond be interested at the time of attestation, and dead at the time of the trial, evidence of his handwriting is not admissible to prove the execution of the bond. Amherst Bank v. Root, 2 Metcalf, 522.

Where it appeared that the subscribing witness to a bond had been clerk of the county court of a large, populous, and wealthy county, and had been dead only twenty-five years, it was held not to be sufficient for admitting testimony of the obligor's handwriting, to show, by one witness only, that he did not know the subscribing witness's handwriting, and did not know of any person who had such knowledge. McKinder v. Littlejohn, 1 Iredell's N. C. Law Rep. 66.

Where the subscribing witnesses to an instrument reside without the limits of the State, it is not necessary to produce their testimony. Emery v. Twombly, 17 Maine, 65.

If the attesting witness to a promissory note be called, and does not prove the handwriting of the name to be his, it is competent to prove it by the testimony of other witnesses. Quimby v. Buzzell, 16 Maine, 470.

Where an instrument is read in evidence on proof merely of the handwriting of a deceased attesting witness, the adverse party may give evidence of witness's bad character at the time of attesting, or show his subsequent declarations that the instrument was a forgery. So, the entries of a clerk, when resorted to as a substitute for his oath, may be impeached by proof of his bad character for honesty. Losee v. Losee, 2 Hill, 609.

The case of Jackson v. Phillips, 9 Cowen, 94, so far as it holds that one who affixes his name to an instrument after its execution, without being requested, is a good subscribing witness, disapproved. Hollenback v. Fleming, 6 Hill, 303.

Proof of the handwriting of deceased subscribing witnesses to a deed is not sufficient evidence of its execution to entitle it to be read to the jury, where the deed on its face excites suspicion of fraud. Brown v. Kimball, 25 Wend. 259.

It is not necessary to call more than one of the witnesses to an instrument of writing, in order to prove its execution. McAdams v. Stilwell, 13 Penna. State Rep. 90.

If a subscribing witness to an instrument merely makes his mark, instead of writing his name, the instrument is to be proved by adducing proof of the handwriting of the party executing it. Watts v. Kilburn, 7 Georgia, 356.

The fact that a subscribing witness had gone to sea, and had not been heard from for four years, is sufficient to let in secondary evidence of his handwriting; but a temporary absence from the State is not enough. Gaither v. Martin, 3 Maryland, 146.

When the subscribing witnesses to a writing reside out of the State, it is not necessary to produce them. Frazier v. Moore, 11 Texas, 755.

A subscribing witness to a written instrument must be produced, if he can be had, such being the best evidence of its execution. Foye v. Leighton, 4 Foster, 29.

Subscribing witnesses must be called or their absence accounted for. Story v. Lovett, 1 E. D. Smith, 153; Tinnen v. Price, 31 Mississippi, 422; McGowan v. Laughlin, 12 Louisiana, 242; Powell's Heirs v. Hendricks, 3 California, 427.

Campb. 232. Where there are two attesting witnesses, and one of them cannot be produced, being dead, &c., it is not sufficient to prove his handwriting, but the other witness must be called. Cunliffe v. Sefton, 2 East, 183; McCraw v. Gentry, 3 Campb. 232. But if neither can be produced, proof of the handwriting of one only is sufficient. Adam v. Kerr, 1 B & P. 360. In civil cases it is not necessary now to call the attesting witness in the case of any instrument to the validity of which attestation is not necessary. 17 & 18 Vict. c. 125, s. 26.

Proof of private documents—evidence of handwriting.] Where a party cannot sign his name, but makes his mark, that mark may be proved by a person who has seen him make the mark, and is acquainted with it. Per Tindal, C. J., *hæsit.*, George v. Surrey, Moo. & M. 516: 22 E. C. L. R. Where a witness had seen the party execute a bail-bond, but had never seen him write his name on any other occasion, and stated that the signature to the bond produced was like the handwriting which he saw subscribed, but that he had no belief on the subject, this was held to be evidence of the handwriting to go to the jury. Garrells v. Alexander, 4 Esp. 37. But it is otherwise where the witness has only seen the party write his name once, and then for the purpose of making the witness competent to give evidence in the suit. Stranger v. Searle, 1 Esp. 14. Where the witness stated that he had only seen the party upon one occasion sign his name to an instrument, to which he was attesting witness, and *that he was unable to form an opinion as to the handwriting, without in- [*165] specting that other instrument, his evidence was held inadmissible. Filliter v. Minchin, Mann. Index, 131. In another case, under similar circumstances, Dallas, J., allowed a witness to refresh his memory by referring to the original document, which he had formerly seen signed. Burr v. Harper, N. P. C. 420. It is sufficient if the witness has seen the party write his surname only. Lewis v. Sapio, Moo. & Mal. 39: 22 E. C. L. R.; overruling Powell v. Ford, 2 Stark. 164: 3 E. C. L R.

It is not essential to the proof of handwriting, that the witness should have seen the party write. There are various other modes in which he may become acquainted with the handwriting (1) Thus where a witness for the defendant stated that he had never seen the person in question write, but that his name was subscribed to an affidavit, which had been used by the plaintiff, and that he had examined that signa-

(1) Hammond's Case, 2 Greenl. 33; Russell v. Coffin, 8 Pick. 143. As when the witness has received promissory notes which the party has paid. Johnson v. Deverne, 19 Johns. 134 See Sharp v. Sharp et al., 2 Leigh, 249. So the officer of a bank in the habit of paying the party's checks. Coffey's Case, 4 Rogers's Rec. 52. A witness may testify from having seen the party write, from having carried on a correspondence with him, or from an acquaintance gained from having seen handwriting acknowledged or proved to be his. Page v. Hemans, 14 Maine, 478.

It must be shown that a witness who is called to prove the handwriting of a person, has had such means of knowledge as to furnish a reasonable presumption that he is qualified to form an opinion on the subject. Allen v. The State, 3 Humphreys, 367.

It is not necessary to give positive proof of handwriting, in order to submit the instrument to the jury. A qualified expression of belief that it is in his handwriting is sufficient. Watson v. Brewster, 1 Barr, 381.

As to a knowledge of handwriting derived from correspondence. McKonkey v. Gaylord, 1 Jones's Law, N. C. 94.

Witnesses who had frequently received and paid out bank notes, and one of whom had once carried a large number of them to the bank, which were all paid, but who had never seen either the president or cashier write, were allowed to prove a forgery. Commonwealth v. Carey, 2 Pick. 47.

A witness who had seen a party write but once, is competent to testify as to his handwriting. Bowman v. Sanborn, 5 Foster, 87.

The prosecutor in a criminal case, while it was pending, procured the defendant to write in his presence, to become acquainted with his handwriting: *held*, that his testimony as to the defendant's writing, thus obtained, was admissible at the trial. Reid v. The State, 20 Georgia, 681.

It is not competent, upon cross-examination of a witness called to impugn the genuineness of a signature, to show him other papers signed by the same name, but irrelevant to the case, in order to test the accuracy of the witness. Armstrong v. Thurston, 11 Maryland, 148.

ture, so as to form an opinion which enabled him to say he believed the handwriting in question was genuine, this was held by Park, J., to be sufficient. Smith v. Saisbury, 5 C. & P. 196: 24 E. C. L. R. So where letters are sent, directed to a particular person, and on particular business, and an answer is received in due course, a fair inference arises that the answer was sent by the person whose handwriting it purports to be. Per Lord Kenyon, Cary v. Pitt, Peake, Ev. App. 86. And in general, if a witness has received letters from the party in question, and has acted upon them, it is a sufficient ground for stating his belief as to the handwriting. Thorpe v. Giburne, 2 C. & P. 21: 12 E. C. L. R. And the receipt of letters, although the witness has never done any act upon them, has been held sufficient. Doe v. Wallinger, Mann. Index, 131. In general, a document cannot, in criminal cases, be proved by comparing the handwriting with other handwriting of the same party, admitted to be genuine.(1) See Burr v. Harper, Holt, 421: 3 E. C. L. R. But in the case of ancient documents, where it is impossible that the usual proof of handwriting can be given, the rule as to comparison of hands does not apply. B. N. P. 236. Thus authentic ancient writings may be put into the hands of a witness, and he may be asked whether, upon a comparison of those with the document in question, he believes the latter to be genuine. Doe v. Tarver, Ry. & Moo. N. P. C. 142: 21 E. C. L. R.; 7 East, 282.

(1) In criminal cases. United States v. Craig, 4 Wash. C. C. Rep. 729; Hutchins's Case, 4 Rogers's Rec. 119; Commonwealth v. Smith, 6 Serg. & Rawle, 571; Penna. v. McKee, Addisnn, 33, 35.

In civil cases. Jackson v. Phillips, 9 Cowen, 94; Root's Adm. v. Rile's Adm. 1 Leigh, 216; Martin v. Taylor, 1 Wash. C. C. Rep. 1; Pope v. Askew, 1 Iredell's N. C. Law Rep. 16.

It is admissible, however, where it goes in corroboration of other evidence. McCorkle v. Binns, 5 Binn. 349; Farmers' Bank v. Whitehill, 10 Serg. & Rawle, 110; Bank of Penna. v. Jacob's Adm., 1 Penna. Rep. 161; Boyd's Adm. v. Wilson, Id. 211; Myers v. Toscan, 3 N. Hamp. 47; Commonwealth v. Smith, 8 Serg. & Rawle, 571; Penna. v. McKee, Addis. 33, 35; Callan v. Gaylord, 3 Watts, 321; Moody v. Rowell, 17 Pick. 490; Richardson v. Newcomb, 21 Pick. 315. It will not invalidate the positive testimony of an unimpeached witness. Bell v. Norwood, 7 Louisiana, 95. So comparison of seals is not sufficient. Chew v. Keck et al., 4 Rawle, 163.

Mere unaided comparison of hands is not in general admissible. But after evidence has been given in support of a writing, it may be corroborated by comparing the writing in question with a writing concerning which there is no doubt. Baker v. Haines, 6 Whart. 284.

A witness having no previous knowledge of the handwriting of a party, cannot be permitted to testify as to its authenticity from a mere comparison of hands in court. Wilson v. Kirkland, 5 Hill, 182.

A witness is required to possess a knowledge of the person's handwriting, either from having seen him write, or from being familiar with his handwriting, before he can be allowed to testify to the genuineness of the signature, and he will not be allowed to testify from a comparison of handwriting. He must swear to the correspondence of the signatures with an example existing in his own mind. Kinney v. Flynn, 2 Rhode Island, 319; Hopkins v. Megguire, 35 Maine, 78.

A witness to handwriting may refresh his memory by inspecting genuine writing. But he is incompetent if such inspection enables him to speak only from comparing the two signatures. McNair v. The Commonwealth, 2 Casey, 388.

A comparison of a proposed writing with other writings proved to be of the same person cannot be allowed as the means of getting the proposed writing before the jury. Guffey v. Deeds, 5 Casey, 378.

When different instruments are properly in evidence for other purposes, the handwriting of such instruments may be compared by the jury, and genuineness or simulation be inferred from comparison; but other instruments or signatures are inadmissible for comparison only. Van Wyck v. McIntosh, 4 Kernan, 439; Bishop v. The State, 30 Alabama, 34.

When handwriting is to be proved by comparison, the test paper or standard must be proved by clear and undoubted evidence. Press copies or duplicates made by a copying machine cannot be made use of for that purpose. Com. v. Eastman, 1 Cush. 189.

Proof by comparison of hands generally is inadmissible. The People v. Spooner, 1 Denio, 343; Chandler v. Le Barron, 45 Maine, 534; Hoyt v. Stewart, 3 Bosworth, 447; Williams v. Drexel, 14 Maryland. 566; Jumpertz v. The People, 21 Illinois, 375; Power v. Frick, 2 Grant's Cases, 306; Clark v. Wyatt, 15 Indiana, 271.

An expert may compare papers already in the case for other purposes, whose genuineness is not disputed, with the handwriting in dispute, and give his opinion relative to the same; and this before any evidence of belief, founded upon the handwriting, is introduced. And in like cases the jury may also make the comparison. Bowman v. Sanborn, 5 Foster, 87; Outlaw v. Hurdle, 1 Jones's Law N. C. 150; Henderson v. Hackney, 16 Georgia, 521; Hawkins v. Grimes, 13 B. Monr. 258; The People v. Hewit, 2 Parker C. R. 20.

A witness skilled from long experience in detecting counnterfeit bank-bills, is a competent witness to prove certain notes to be counterfeit, though he does not know the signature of the officers, his judgment being based on the character of the engraving. Jones v. Finch, 37 Mississippi, 461.

The rule as to comparison of handwriting does not apply to the *court* or the *jury*, who may compare the two documents together, when they are properly in evidence, and from that comparison form a judgment upon the genuineness of the handwriting.(1) Griffiths v. Williams, 1 Cr. & J. 47; Solita v. Yarrow, 1 Moo. & R. 133. But the document with which the comparison is made must be one already in evidence in the case, and not produced merely for the purposes of the comparison. Thus where upon an indictment for sending a threatening letter, in order to prove the handwriting to it, it was proposed to put in a document undoubtedly written by the prisoner, but unconnected with the charge, in order that the jury might compare the writing with that of the letter, Bolland, B., after considering Griffiths v. Williams, rejected the evidence, observing that to say that a party might select and put in evidence particular letters, bearing a certain degree of resemblance or dissimilarity to the writing in question, was a different thing from allowing a jury to form a conclusion from inspecting a document put in for another purpose, and therefore free from the suspicion of having been so selected. R. v. Morgan, 1 Moo. & Rob. 134 (*n*). See also Bromage v. Rice, *7 C. & P. 548: 32 E. C. L. R.; Doe v. Newton, 5 A. [*166] & E. 514, 534: 31 E. C. L. R.; Griffiths v. Ivery, 11 A. & E. 322: 39 E. C. L. R.; Hughes v. Rogers, 8 M. & W. 123; and Young v. Honner, 1 C. & K. 751: 47 E. C. L. R.

Where a party to a deed directs another person to write his name for him, and he does so, that is a good execution by the party himself. R. v. Longnor, 4 B. & Ad. 647: 24 E. C. L. R. In such cases the subscription of the name by the agent and his authority to subscribe it must be proved.(2)

Whether the evidence of persons skilled in detecting forgeries is admissible, in order to prove that a particular handwriting is not genuine, is a point not well settled.(3) Such evidence was admitted in one case. Goodtitle v. Braham, 4 Tr. 497. But in a subsequent case, Lord Kenyon, who had presided in the case of Goodtitle

(1) Strother v. Lucas, 6 Peters, 763; Thomas v. Herlacker, 1 Dall. 14; Woodward et al. v. Spiller, 1 Dana, 180.

To prove handwriting, in general, a witness must know it by having seen the person write, or having corresponded with him; but in the case of ancient deeds or papers so old that no living witness can be produced, the genuineness of handwriting may be proved by an expert by comparison with papers where genuineness is acknowledged. West v. State, 2 Zabriskie, 212.

When handwriting is to be proved by comparison, the standard used for the purpose must be genuine and original writing, and must first be established by clear and undoubted proof. Impressions of writings taken by means of a press, and duplicates made by a copying machine, are not original, and cannot be used as standards of comparison. Commonwealth v. Eastman, 1 Cushing, 189.

When the antiquity of the writing makes it impossible for any living witness to swear that he ever saw the party write, comparison with documents known to be in his handwriting is admissible. Clark v. Wyatt, 15 Indiana, 271. *Contra*, Hutchins's Case, 4 Rogers's Rec. 119.

(2) But proof of his handwriting is not enough; he must be produced himself. McKee v. Myers's Ex'r, Addis. 32.

(3) An expert who speaks from skill is not competent to establish a forgery. Bank of Penna. v. Jacobs, 1 Penna. Rep. 161; Lodge v. Phipher, 11 Serg. & Rawle, 383. *Contra*, Hess v. The State, 5 Ohio, 6; State v. Candler, 3 Hawks, 393; Moody v. Rowell, 17 Pick. 490.

As to the testimony of experts in regard to handwriting: Hess v. The State, 5 Ohio, 5; Commonwealth v. Webster, 5 Cushing, 295; The People v. Spooner, 1 Denio, 343; The State v. Clark, 12 Iredell, 151; Luning v. The State, 1 Chandler, 178; The State v. Smith, 32 Maine, 369; Wither v. Rowe, 45 Maine, 571; Bacon v. Williams, 13 Gray, 525; Fulton v. Hood, 10 Casey, 365; Hyde v. Woolfolk, 1 Clarke, 159.

Experts may be called to prove that the signature to a note, alleged to be forged, is not simulated. The People v. Hewit, 2 Parker C. R. 20.

A witness, who was clerk in Chancery, and who testified that he had been accustomed to examine signatures as to their being genuine, cannot be permitted to give an opinion as a person skilled in detecting forgeries. The People v. Spooner, 1 Denio, 343.

Not only cashiers and officers of banks, but merchants, brokers, and others who habitually receive and pass the notes of a bank for a long course, may be received as experts to give their opinion. The State v. Check, 13 Iredell, 114.

When the witness is an officer in a bank, whose business has been for many years to examine papers, with the view of detecting alterations, erasures, and spurious signatures, he may be asked his opinion. Pat v. The People, 3 Gilman, 644.

v. Braham, rejected similar evidence. Cary v. Pitt, Peake, Ev. App. lxxxv. It was admitted again by Hotham, B. (R. v. Cator, 4 Esp. 117); and again rejected in Gurney v. Langlands, 5 B. & A. 330: 7 E. C. L. R. Upon the point coming before the Court of K. B., in the last-cited case, they refused to disturb the verdict, on the ground of the evidence having been rejected. In a recent case the Court of K. B. was equally divided on the question whether, after the witness had sworn to the genuineness of his signature, another witness (a bank inspector) could be called to prove that in his judgment the signature was not genuine, such judgment being solely founded on a comparison pending the trial with other signatures admitted to be those of the attesting witness. Doe v. Suckermore, 5 A. & E. 703: 31 E. C. L. R.; 2 N. & P. 16.

Proof of execution when dispensed with.] When a deed is thirty years old it proves itself, and no evidence of its execution is necessary (1) B. N. P. 255; Doe v. Burdett, 4 A. & E. 19: 31 E. C. L. R. And so with regard to a steward's books of account if they come from the proper custody: Wynne v. Tyrwhitt, 4 B. & A. 376: 6 E. C. L. R.; letters: Beer v. Ward, Phill. Ev. 652. 8th ed.; a will produced from the ecclesiastical court: Doe v. Lloyd, Peake, Ev. App. 91; a bond: Chelsea W. W. v. Cooper, 1 Esp. 275; and other old writings: Fry v. Wood, Selw. N. P. 517 (*n*). Even it appear that the attesting witness is alive, and capable of being produced, it is unnecessary to call him where the deed is thirty years old. Doe v. Woolley, 8 B. & C. 22: 15 E. C. L. R. If there is any rasure or interlineation in an old deed, it ought to be proved in the regular manner by the witness, if living, or by proof of his handwriting, and that of the party, if dead. B. N. P. 255. But perhaps this in strictness is only necessary where the alteration on the face of it is material or suspicious. Where an old deed is offered in evidence without proof of execution, some account ought to be given of its custody: B. N. P. 255; or it should be shown that possession has accompanied it. Gilb. Ev. 97.

Where a party producing a deed upon a notice to produce, claims a beneficial interest under it, the party calling for the deed need not prove its execution. Pearce v. Hooper, 3 Taunt. 62. As where assignees produce the assignment of the bankrupt's effects. Orr v. Morice, 3 B. & B. 139: 7 E. C. L. R. See also Carr v. Burdiss, 5 Tyrwh. 136; 1 C., M. & R. 782; Doe v. Wainwright, 5 A. & E. 520: 31 E. C. L. R. But it must be an interest in the subject-matter of the cause: Rearden v. Minter, 5 M. & Gr. 204: 44 E. C. L. R.; Collins v. Bayntum, 1 Q. B. 117: 41 E. C. L. R.; and it must be still subsisting at the time of the trial. Fuller v. [*167] Patrick, 18 L. J. Q. B. 236. So in an action against a vendor of an estate *to recover a deposit in a contract for the purchase, if the defendant on notice produces the contract, Lord Tenterden, C. J., held that the plaintiff need not prove its execution. Bradshaw v. Bennett, 1 Moo. & M. 143: 22 E. C. L. R. So where in an action by a pitman against the owners of a colliery for wages due to him under an agreement usually called a pit bond, the defendants produced the agreement upon notice, Cresswell, J., held that it was unnecessary for the plaintiff to call the attesting witness. Bell v. Chaytor, Durham Summ. Ass. 1843, MS.; 1 Carr. & K. 162: 47 E. C. L. R.

Where, however, a defendant, to prove that he had been in partnership with the plaintiffs, offered in evidence a written contract purporting to be made by the plain-

(1) An agreement or deed under which land has been occupied and claimed for upwards of thirty years, may be given in evidence without proof of its execution by the subscribing witnesses. Zeigler v. Houtz, 1 Watts & Serg. 533.

tiffs and the defendant as partners with K., a builder, for work to be done by K. upon the premises, where the plaintiffs carried on the business in which the defendant alleged himself to have been a partner, and the document was in the plaintiffs' custody, produced by them on notice, it was held that the contract was not admissible as an instrument under which the plaintiffs claimed an interest without proof of the execution. Collins v. Bayntum, 1 Q. B. 117: 41 E. C. L. R.

But where the party producing the deed does not claim an interest under it, the party calling for it must prove it in the regular manner. Gordon v. Secretan, 8 East, 548; Doe v. Cleveland, 9 B. & C. 864: 17 E. C. L. R. See further, 17 Rosc. N. P. Ev. 94, 5th ed.

Stamps.] Formerly, in criminal as well as in civil cases, a document, which by law is required to be stamped, could not be given in evidence without a stamp, unless, as in the cases after mentioned, the instrument itself were the subject-matter of the offence. Thus, where upon an indictment for embezzlement, in order to prove the receipt of the money, evidence was tendered of an unstamped receipt for it, given by the prisoner, it was rejected by Bailey, J.; Hall's Case, 3 Stark. N. P. C. 67: 3 E. C. L. R. But now, by the 17 & 18 Vict. c. 83, s. 37, "every instrument liable to stamp duty shall be admitted in evidence in any criminal proceeding, although it may not have the stamp required by law impressed thereon or affixed thereto."

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What offences admit of accessories] WITH regard to the particular offences which admit of accessories, it is held that in high treason there can be no accessories, but all are principals, every act of incitement, aid, or protection, which in felony would render a man an accessory before or after the fact, in the case of high treason (whether by common law or by statute), making him a principal. Foster, 341; 4 Bl. Com. 35. So in all offences below felony there can be no accessories.(1) 1 Hale, P. C.

(1) State v. Westfield, 1 Bailey, 132; 4 J. J. Marsh, 182; Carlin v. The State, 4 Yerger, 143.
There are no accessories in petit larceny; but all concerned in the commission of the offence are principals. Ward v. The People, 3 Hill, 395; 6 Hill, 144.
One who incites others to commit an assault and battery is guilty and may be punished as a principal, if the offence be actually committed, although he did not otherwise participate in it. Whatsoever will make a man an accessory before the fact in felony, will make him a principal in treason, petit larceny, and misdemeanors. The State v. Lymburn, 1 Brevard, 397.
Evidence that a party is present aiding and abetting a murder will support an indictment charging him with having committed the act with his own hand. The Commonwealth v. Chapman, 11 Cushing, 422. See generally as to principals and accessories, State v. Rand, 33 N. Hamp. 216; Hately v. The State, 15 Georgia, 346; McCarty v. The State, 26 Mississippi, 299; Brennan v. The People, 15 Illinois, 511.

613; 4 Bl. Com. 36; R. v. Greenwood, 2 Den. C. C. 453; S. C. 21 L. J. M. C. 127. Also in manslaughter there can be no accessories before the fact, for the offence is sudden and unpremeditated; and therefore, if A. be indicted for murder, and B. as accessory, if the jury find A. guilty of manslaughter, they must acquit B. 1 Hale, 616, referring to R. v. Bibithe, 4 Rep. 43 (*b*). But in R. v. Gaylor, Dears. & B. C. C. 288, where the prisoner was indicted for manslaughter, and the evidence showed that the prisoner had given his wife a drug with intent to procure abortion, from the effects of which she died, Erle, J., asked the opinion of the Court of Criminal Appeal, whether, if the husband was an accessory to the felony, an indictment for manslaughter could be supported. In the argument for the prisoner the above passage in Lord Hale's treatise was relied on, but Erle, J., said, "If the manslaughter be *per infortunium*, or *se defendendo*, there is no accessory; but there are other cases in which there may be accessories." The conviction was upheld, but no judgment was delivered. It is said in the older books that in forgery all are principals (see 2 East, P. C. 973); but this must be understood of forgery at common law, which is a misdemeanor. Id.

Aiders and abettors, or principals in the second degree in felonies.] Aiding and abetting a person to commit a felony is in itself a substantive felony, whether the felony be such at common law or by statute. R. v. Tattersall, 1 Russ. by Gr. 27. An aider and abettor is also called a principal in the second degree. R. v. Coalheaver, 1 Lea. 66; Fost. 428.(1)

[*169] *To make a man principal in the second degree he must be *present* at the commission of the felony. R. v. Soare, Russ. & Ry. 25; R. v. Davis, Id. 113; R. v. Badcock, Id. 249, and other cases in the same report. By presence is meant such contiguity as will enable the party to render assistance to the main design.(2)

With regard to what will constitute such a presence as to render a man a principal in the second degree, it is said by Mr. Justice Foster, that if several persons set out together, or in small parties, upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, and each takes the part assigned him; some to commit the act, others to watch at proper distances, to prevent a surprise or to favor, if need be, the escape of those who are more immediately engaged, they are all, provided the act be committed, in the eye of the law present at it. Foster, 350. Thus, where A. waits under a window, while B. steals articles in the house, which he throws through the window to A., the latter is a principal in the offence. R. v. Owen, 1 Moody, C. C. 96, stated *post*. There must be a participation in the act, for although a man be present whilst a felony is committed, if he take no part in it and do not act in concert with those who commit it, he will not be a principal in the second degree, merely because he did not endeavor to prevent the felony, or apprehend the felon. 1 Hale, 439; Foster, 350. So a mere participation in the act, without a felonious participation in the design, will not be sufficient. 1 East, P. C.

(1) The State v. McGregor, 41 N. Hamp. 407; Brown v. Perkins, 1 Allen, 89.

(2) The abettor must be in a situation actually to render aid, not merely where the perpetrator supposed he might.

Proof of a prior conspiracy is not *legal presumption* of having aided, but only evidence.

But if a conspiracy be proved, and a presence in a situation to render aid, it is a *legal presumption* that such presence was with a view to render aid, and it lies on the party to rebut it, by showing that he was there for a purpose unconnected with the conspiracy. Commonwealth v. Knapp, 9 Pick. 496.

One who is present and sees that a felony is about to be committed, and does in no manner interfere, does not thereby participate in the felony committed. It is necessary, in order to make him an aider or abettor, that he should do or say something showing his consent to the felonious purpose, and contributing to its execution. State v. Hildreth, 9 N. Carolina, 440.

257; R. v. Plumer, Kel. 109. Thus, if a master assault another with malice prepense, and the servant, ignorant of his master's felonious design, take part with him, and kill the other, it is manslaughter in the servant, and murder in the master. 1 Hale, 466.

Where several persons are in company together, engaged in one common purpose, lawful or unlawful, and one of them, without the knowledge or consent of the others, commits an offence, the others will not be involved in his guilt, unless the act done was in some manner in furtherance of the common intention. Several soldiers employed by the messenger of the secretary of state to assist in the apprehension of a person, unlawfully broke open the door of a house where the person was supposed to be. Having done so, some of the soldiers began to plunder, and stole some goods. The question was, whether this was felony at all. Holt, C. J., observing upon this case, says, that they were all engaged in an unlawful act is plain; for they could not justify the breaking of a man's house without first making a demand. Yet all those who were not guilty of stealing were acquitted, notwithstanding their being engaged in an unlawful act of breaking the door; for this reason, because they knew not of any such intent, but it was a chance of opportunity of stealing, whereupon some of them did lay hands. Anon., 1 Leach, 7 (*n*); 1 Russell by Grea. 29: 14 E. C. L. R. See also R. v. White, R. & R. 99; R. V. Hawkin, 3 C. & P. 392, *post*.

Where several are present, aiding and abetting, and the punishment of principals in the first and second degree is the same, an indictment may lay the fact generally as being done by all: 2 Hawk. c. 25, s. 4; even, as in cases of rape, where from the nature of the offence only one can be a principal in the first degree. And as in almost every case the punishment of all principals is the same, this is the course that is usually followed.

*It has long been settled, that all those who are present, aiding and abet- [*170] ting when a felony is committed, are principals in the second degree, and may be arraigned and tried before the principal in the first degree has been found guilty: 2 Hale, 223; and may be convicted, though the party charged as principal in the first degree is acquitted. R. v. Taylor, 1 Leach, 360; Benson v. Offley, 2 Shaw. 510; 3 Mod. 121; R. v. Wallis, Salk. 334; R. v. Towle, R. & R. 314; 3 Price, 145; 2 Marsh. 465.

Accessories before the fact in felonies.] An accessory before the fact is defined by Lord Hale to be one who, being absent at the time of the offence committed, does yet procure, counsel, command, or abet another to commit a felony.(1) 1 Hale, P. C. 615. The bare concealment of a felony to be committed will not make the party concealing it an accessory before the fact. 2 Hawk. c. 29, s. 23. So words amounting to a bare permission will not render a man an accessory, as if A. says he will kill J. S., and B. says, "You may do your pleasure for me." Hawk. P. C. b. 2, c. 29, s. 16. The procurement must be continuing; for if before the commission of the offence by the principal the accessory countermands him, and yet the principal proceeds to the commission of the offence, he who commanded him will not be guilty as accessory. 1 Hale, P. C. 618. If the party was *present* when the offence was committed, he is not an accessory. R. v. Gordon, 1 Leach, 515; 1 East, P. C. 352. Several persons may be convicted on a joint charge against them as accessories before the fact

(1) When an offence is committed in one State by means of an innocent agent, the employer is guilty as a principal, though he did not act in that State, and was at the time the offence was committed in another. Adams v. The People, 1 Comstock, 173.

to a particular felony, though the only evidence against them is of separate acts done by each at separate times and places. R. v. Barber, 1 C. & K. 442: 47 E. C. L. R.

Accessories before the fact in felonies—by the intervention of a third person.] A person may render himself an accessory by the intervention of a third person, without any direct communication between himself and the principal. Thus if A bids his servant to hire somebody to murder B., and furnishes him with money for that purpose, and the servant hires C, a person whom A. never saw or heard of, who commits the murder, A. is an accessory before the fact. R. v. Macdaniel, Fost. 125; Hawk. P. C. b. 2, c. 29, ss. 1, 11; 1 Russ. by Grea. 32; R. v. Cooper, 5 C. & P. 535: 24 E. C. L. R.

Accessories before the fact in felonies—degree of incitement.] Upon the subject of the degree of incitement and the force of persuasion used, no rule is laid down. That it was sufficient to effectuate the evil purpose is proved by the result. On principle, it seems that any degree of direct incitement with the actual intent to procure the consummation of the illegal object, is sufficient to constitute the guilt of the accessory; and therefore that it is unnecessary to show that the crime was effected in consequence of such incitement, and that it would be no defence to show that the offence would have been committed, although the incitement had never taken place. 2 Stark. Ev. 8, 2d ed.

Accessories before the fact in felonies—principal varying from orders given to him.] With regard to those cases where the principal varies, in committing the offence, from the command or advice of the accessory, the following rules are laid down by Sir [*171] Michael Foster. If the *principal totally and substantially varies; if, being solicited to commit a felony of one kind, he *wilfully and knowingly* commits a felony of another, he will stand single in that offence, and the person soliciting will not be involved in his guilt. But if the principal *in substance* complies with the command, varying only in the circumstances of time, or place, or manner of execution, in these cases the person soliciting to the offence will, if absent, be an accessory before the fact, or, if present, a principal. A. commands B. to murder C. by poison; B. does it by sword or other weapon, or by some other means; A. is accessory to this murder, for the murder of C. was the principal object, and that object is effected. So where the principal goes beyond the terms of the solicitation, *if in the event the felony committed was a probable consequence of what was ordered or advised*, the person giving such order or advice will be an accessory to that felony. A., upon some affront given by B, orders his servant to waylay him and beat him. The servant does so, and B. dies of the beating; A. is accessory to this murder. A. solicits B to burn the house of C.; he does so, and the flames catching the house of D., that also is burnt. A. is an accessory to this felony. The principle in all these cases is, that though the event might be beyond the original intention of the accessory, yet as in the ordinary course of things, that event was the probable consequence of what was done under his influence, and at his instigation, he is in law answerable for the offence. Foster, 369, 370: see also 1 Hale, P. C. 617; Hawk. P. C. b. 2, c. 29, s. 18. Where the principal *wilfully* commits a different crime from that which he is commanded or advised to commit, the party counselling him will not, as above stated, be guilty as accessory. But whether, where the principal *by mistake* commits a different crime, the party commanding or advising him shall stand excused, has been the subject of much discussion. It is said by Lord Hale, that if A. command B.

to kill C., and B. by mistake kills D., or else in striking at C. kills D., but misses C., A. is not accessory to the murder of D., because it differs in the person. 1 Hale, P. C. 617, citing 3 Inst. 51; R. v. Saunders, Plow. Com. 475. The circumstances of Saunders' case, cited by Lord Hale, were these: Saunders, with the intention of destroying his wife, by the advice of one Archer, mixed poison in a roasted apple, and gave it to her to eat, and the wife having eaten a small part of it, and given the remainder to their child, Saunders making only a faint attempt to save the child, whom he loved and would not have destroyed, stood by and saw it eat the poison, of which it soon afterwards died. It was held that though Saunders was clearly guilty of the murder of the child, yet Archer was not accessory to the murder.

Upon the law as laid down by Lord Hale, and upon R. v. Saunders, Mr. Justice Foster has made the following observations, and has suggested this case: B. is an utter stranger to the person of C., and A. therefore takes upon himself to describe him by his stature, dress, &c., and acquaints B. when and where he may probably be met with. B. is punctual at the time and place, and D., a person in the opinion of B. answering the description, unhappily coming by, is murdered under a strong belief on the part of B. that he is the man marked out for destruction. Who is answerable? Undoubtedly A.: the malice on his part *egreditur personam*. The pit which he, with a murderous intention, dug for C., D. fell into and perished. Through his guilt, B., not knowing the person of C., had no other *guide to lead him to [*172] his prey than the description of A., and in following this guide he fell into a mistake, which it is great odds any man in his circumstances might have fallen into. "I, therefore," continues the learned writer, "as at present advised, conceive that A. was answerable for the consequences of the flagitious orders he gave, since that consequence appears in the ordinary course of things to have been highly probable." Foster, 370. With regard to Archer's case, the same learned author observes, that the judges did not think it advisable to deliver him in the ordinary course of justice by judgment of acquittal, but for example's sake kept him in prison by frequent reprieves from session to session, till he had procured a pardon from the crown. Ibid. 371. Mr. Justice Foster then proposes the following *criteria*, as explaining the grounds upon which the several cases falling under this head will be found to rest. Did the principal commit the felony he stands charged with, under the flagitious advice, and was the event, in the ordinary course of things, a probable consequence of that felony? Or did he, following the suggestions of his own wicked heart, wilfully and knowingly commit a felony of another kind or upon a different subject? Foster, 372. See also Hawk. P. C. b. 2, c. 29, s. 22.

Accessories before the fact in felonies—how indicted.] Before the 7 Geo. 4, c. 64, accessories could not, except by their own consent, be punished until the guilt of the principal offender was established.(1) It was necessary, therefore, either to try them

(1) Commonwealth v. Andrews, 3 Mass 136; State v. Groff, 1 Murph. 270. An accessory in a felony cannot be put upon his trial if the principal be dead without conviction. Commonwealth v. Phillips, 16 Mass. 423. See Russell on C. & M. 21, n. A.

Where the principal and accessory are joined in one indictment, but are tried separately, the record of the conviction of the principal is *prima facie* evidence of his guilt, upon the trial of the accessory, and the burden of proof rests on the accessory, not merely that it is questionable whether the principal ought to have been convicted, but that he clearly ought not to have been convicted. Commonwealth v. Knapp, 10 Pick. 477. See also State v. Crank, 2 Bailey, 66. It is not necessary to set out the conviction of the principal in the indictment. Ibid. The court may in its discretion permit an accessory to be tried separately from the principal. State v. Yancey, 1 Const. Rep. 237. An accessory cannot be put on his trial before the conviction of the principal, unless he consent thereto, or be put on his trial with his principal. State v. Pybuss, 4 Hump. 442; Whitehead v. The State, 16

after the principal had been convicted, or upon the same indictment with him, and the latter was the usual course. 1 Russell by Grea. 38. This statute is now repealed, and by the 24 & 25 Vict. c. 94, s. 1, it is enacted that, "whosoever shall become an accessory before the fact to any felony, whether the same be a felony at common law or by virtue of any act passed or to be passed, may be indicted, tried, convicted, and punished in all respects as if he were a principal felon." By s. 2, "whosoever shall counsel, procure or command any other person to commit any felony, whether the same be a felony at common law, or by virtue of any act passed or to be passed, shall be guilty of felony, and may be indicted and convicted, either as an accessory before the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon, or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in the same manner as an accessory before the fact to the same felony, if convicted as an accessory, may be punished."

It was decided upon the 11 & 12 Vict. c. 46, s. 1 (which is in the same terms as the 24 & 25 Vict. c. 94, s. 1, and was passed to remedy a defect in the 7 Geo. 4, c. 64), that a person charged as an accessory before the fact may be convicted even though the principal be acquitted. R. v. Hughes, Bell, C. C. 242. The two first counts charged A. and B. with stealing, and the third count charged B. with receiving. No evidence was offered against A., who was acquitted and called as a witness. The evidence went to show that B. was an accessory *before* the fact, and the jury found a general verdict of guilty. It was held that the conviction was good. Erle, J., said, "We consider that being an accessory before the fact now stands as a substantive felony, and that now the conviction of an accessory would stand good, and [*173] *no wrong be done him, though he should be tried before the principal."

By the 24 & 25 Vict. c. 24, s. 5, "If any principal offender shall be in anywise convicted of any felony, it shall be lawful to proceed against any accessory either before or after the fact, in the same manner as if such principal felon had been attainted thereof, notwithstanding such principal shall die or be pardoned, or otherwise delivered before attainder; and every such accessory shall, upon conviction, suffer the same punishment as he would have suffered if the principal had been attainted." By the 24 & 25 Vict. c. 94, s. 5 (replacing the 14 & 15 Vict. c. 100, s. 15), "any number of accessories at different times to any felony, and any number of receivers at different times of property stolen at one time, may be charged with substantive felonies in the same indictment, and may be tried together, notwithstanding the principal felon shall not be included in the same indictment, or shall not be in custody or amenable to justice."

Accessories after the fact in felonies.] An accessory after the fact, says Lord Hale, is where a person knowing the felony to be committed by another, receives, relieves, comforts, or assists the felon: 1 Hale, P. C 618; whether he be a principal, or an accessory before the fact. 2 Hawk. c. 29, s. 1; 3 P. Wms. 475. But a *feme*

Mass. 278; Commonwealth v. Woodward, Thacher's Crim. Cas. 63; Sampson v. The Commonwealth, 5 Watts & Serg. 385.

The record is *conclusive* evidence of the conviction of the principal, and *prima facie* evidence of his guilt. Studstill v. The State, 7 Georgia, 2; The State v. Duncan, 6 Iredell, 236

Though the accessory may be convicted before the principal, yet the offence of the principal must be alleged: Ulmer v. The State, 14 Indiana, 52; and proved: Ogden v. The State, 12 Wisconsin, 532.

An accessory may be indicted without the conviction of the principal being averred, but his guilt must be averred, and the evidence must show that his guilt was legally established before the trial of the accessory. Holmes v. The Commonwealth, 1 Casey, 221.

covert does not become an accessory by receiving her husband. This, however, is the only relationship which will excuse such an act, the husband being liable for receiving the wife. 1 Hale, P. C. 621. So if a master receives his servant, or a servant his master, or a brother his brother, they are accessories, in the same manner as a stranger would be. Hawk. P. C. b. 2, c. 29, s. 34. If a husband and wife knowingly receive a felon, it shall be deemed to be the act of the husband only. 1 Hale, P. C. 621. But if the wife alone, the husband being ignorant of it, receive any other person being a felon, the wife is accessory, and not the husband. Id.

With regard to the acts which will render a man guilty as an accessory after the fact, it is laid down, that generally any assistance whatever, given to a person known to be a felon, in order to hinder his being apprehended or tried, or suffering the punishment to which he is condemned, is a sufficient receipt for this purpose; as where a person assists him with a horse to ride away with, or with money or victuals to support him in his escape; or where any one harbors and conceals in his house a felon under pursuit, in consequence of which his pursuers cannot find him; and much more, where the party harbors a felon, and the pursuers dare not take him. Hawk. P. C. b. 2, c. 29, s. 26. See R. v. Lee, 6 C. & P. 536: 25 E. C. L. R. So a man who employs another person to harbor the principal may be convicted as an accessory after the fact, although he himself did no act to relieve or assist the principal. R. v. Jarvis, 2 Moo. & R. 40. So it appears to be settled that whoever rescues a felon imprisoned for the felony, or voluntarily suffers him to escape, is guilty as accessory. Hawk. P. C. b. 2, c. 29, s. 27. In the same manner conveying instruments to a felon, to enable him to break gaol, or to bribe the gaoler to let him escape, make the party an accessory. But to relieve a felon in gaol with clothes or other necessaries is no offence, for the crime imputable to this species of accessory is the hindrance of public justice, by assisting the felon to escape the vengeance of the law. 4 Bl. Com. 38.

*Merely suffering the principal to escape will not make the party an [*174] accessory after the fact, for it amounts at most but to a mere omission. 6 H. 4, s. 1; 1 Hale, 619. So if a person speak or write, in order to obtain a felon's pardon or deliverance: 26 Ass. 47; or advise his friends to write to the witnesses not to appear against him at his trial, and they write accordingly: 3 Inst. 139; 1 Hale, 620; or even if he himself agree for money not to give evidence against the felon: Moo. 8; or know of the felony and do not discover it: 1 Hale, 371, 618; none of these acts will make a party an accessory after the fact.

The felony must be complete at the time of the assistance given, else it makes not the assistant an accessory. As if one wounded another mortally, and after the wound given, but before death ensued, a person assisted or removed the delinquent, this did not, at common law, make him accessory to the homicide, for till death ensued, there was no felony committed. Hawk. P. C. b. 2, c. 29, s. 35; 4 Bl. Com. 38.

In order to render a man guilty as accessory, he must have notice, either express or implied, of the principal having committed a felony. Hawk. P. C. b. 2, c. 29, s. 32. It was formerly considered, that the attainder of a felon was a notice to all persons in the same county of the felony committed, but the justice of this rule has been denied. Hawk. P. C. b. 2, c. 29, s. 83. It was observed by Lord Hardwicke, that though this may be some evidence to a jury, of notice to an accessory in the same county, yet it cannot, with any reason or justice, create an absolute presumption of notice. R. v. Burridge, 3 P. Wms. 495. In order to support a charge of receiving, harboring, comforting, assisting, and maintaining a felon, there must be some act proved to have been done to assist the felon personally; it is not enough to

prove possession of various sums of money derived from the disposal of the property stolen. R. v. Chapple, 9 C. & P. 355: 38 E. C. L. R.

Accessories after the fact in felonies—how indicted.] With regard to the trial of accessories after the fact, the 24 & 25 Vict. c. 99, s. 3, enacts that "whosoever shall become an accessory after the fact to any felony, whether the same be a felony at common law, or by virtue of any act passed or to be passed, may be indicted and convicted either as an accessory after the fact to the principal felony, together with the principal felon, or after the conviction of the principal felon; or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in like manner as any accessory after the fact to the same felony, if convicted as an accessory, may be punished."

Sections 5 and 6 of the 24 & 25 Vict. c. 94, *supra*, p. 173, apply to accessories *after* as well as *before* the fact.

By the 24 & 25 Vict. c 94, s. 8, "every accessory after the fact to any felony (except where it is otherwise specially provided), whether the same be a felony at common law or by virtue of any act passed or to be passed, shall be liable (at the discretion of the court) to be imprisoned in the common gaol or house of correction for any term not exceeding two years, with or without hard labor; and it shall be lawful for the court, if it shall think fit, to require the offender to enter into his own [*175] recognizances and to find sureties, both or either, *for keeping the peace, in addition to such punishment; provided that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year."

An accessory may avail himself of every matter, both of law and fact, to counteract the guilt of his principal.(1) Foster, 365; 1 Russ. by Grea. 42; and see *post*, Receiving Stolen Goods.

Aiders and abettors as principals in the second degree in misdemeanors.] Aiding and abetting in the commission of a misdemeanor is itself a misdemeanor. But it has always been the custom to indict principals in the second degree in misdemeanors, the same way as principals in the first degree. And now by the 24 & 25 Vict. c. 94, s. 8, it is enacted that "whosoever shall aid, abet, counsel, or procure the commission of any misdemeanor, whether the same be a misdemeanor at common law or by virtue of any act passed or to be passed, shall be liable to be tried, indicted, and punished as a principal offender." The same provision is repeated in the several new statutes.

Accessories in misdemeanors.] In misdemeanors all are principals, and there are no accessories in the technical sense of that term. Some difficulty about this was created by the cases of R. v. Else, Russ. & Ry. 42, and R. v. Page, 1 Russ. & Gr. 82; but the law was set right by R. v. Greenwood, 2 Den. C. C. 453; S. C. 21 L. J. M. C. 127.

Venue and jurisdiction.] By 24 & 25 Vict. c. 94, s. 7, "where any felony shall have been wholly committed in England or Ireland, the offence of any person who shall be an accessory, either before or after the fact, to any such felony, may be dealt with, inquired of, tried, determined, and punished by any court which shall have jurisdiction to try the principal felony, or any felonies committed in any county or place in which the act, by reason whereof such person shall have become accessory,

(1) United States v. Wood, 4 Wash. C. C. Rep. 440; S. C. 3 Wheeler's C. C. 325.

shall have been committed; and in every other case the offence of any person who shall be an accessory either before or after the fact to any felony, may be dealt with, inquired of, tried, determined, and punished by any court which shall have jurisdiction to try the principal felony, or any felonies committed in any county or place in which such person shall be apprehended or be in custody, whether the principal felony shall have been committed on the sea or on the land, or begun on the sea and completed on the land, or begun on the land and completed on the sea, and whether within her majesty's dominions or without, or partly within her majesty's dominions and partly without."(1)

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*PRACTICE. [*176]

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Preferring and finding bills of indictment.] BEFORE the passage of the 19 & 20 Vict. c. 54, it was necessary to swear the witnesses in *open court before they [*177]

(1) An accessory before the fact to a felony procured in another State to be committed within New Hampshire, cannot be tried for the offence of procuring its commission, in the county in New Hampshire within which the principal offence is committed. The State v. Moore, 6 Foster, 448.

Where the offence of a principal is committed in one county, and that of the accessory in another, the accessory may be tried in the county where he performed the act which made him an accessory. Baron v. The People, 1 Parker C. R. 246.

could give evidence before the grand jury; but now, by s. 1, of that act, it is made "lawful for the foreman of every grand jury in England and Wales, and he is authorized and required to administer an oath to all persons whomsoever, who shall appear before such grand jury to give evidence in support of any bill of indictment, and all such persons attending before any grand jury to give evidence may be sworn and examined on oath by such grand jury touching the matters in question; and every person taking any oath or affirmation in support of any bill of indictment who shall wilfully swear or affirm falsely shall be deemed guilty of perjury; and the name of every witness examined, or intended to be so examined, shall be indorsed on such bill of indictment; and the foreman of such grand jury shall write his initials against the name of each witness so sworn and examined touching such bill of indictment." By s. 3, "the word 'foreman' shall include any member of such grand jury who may for the time being act on behalf of such foreman in the examination of witnesses."

Two indictments for the same offence, one for the felony under a statute, and the other for the misdemeanor at common law, ought not to be preferred or found at the same time. R. v. Doran, 1 Leach, 538; R. v. Smith, 3 C. & P. 413: 14 E. C. L. R. But where two indictments had been found, one for stealing and another for a misdemeanor, and it was sworn that they were for the same identical offence, the Q. B. (into which court the indictments had been removed by *certiorari*), refused to grant a rule for quashing one or both of such indictments. R. v. Stockley, 3 Q. B. 328: 43 E. C. L. R.

The grand jury are not usually very strict as to evidence, as they only require that a *primâ facie* case should be established; they often admit copies where the originals alone are evidence; and sometimes even evidence by parol of a matter which should be proved by written evidence. But as they may insist upon the same strictness of proof as must be observed at the trial, it may be prudent in all cases to be provided, at the time the bill is preferred, with the same evidence which is intended afterwards to support the indictment.

Where the grand jury found, upon a bill preferred against A. and B. for murder, a true bill against A. for murder, and against B. for manslaughter, Campbell, C. J., held that the finding against A. was good, and that against B. a nullity, and directed that a fresh bill should be preferred against B. for manslaughter. R. v. Bubb, 4 Cox, C. C. 455. Where the grand jury have found a bill, the judge before whom the case comes on to be tried ought not to inquire whether the witnesses were properly sworn previously to their going before the jury; and it seems that an improper mode of swearing them will not vitiate the indictment, as the grand jury are at liberty to find a bill upon their own knowledge only. R. v. Russell, Carr. & M. 247: 47 E. C. L. R.

As to the grand jury in Ireland, see the 1 & 2 Vict. c. 37; also O'Connell v. Reg., 11 C. & F. 155.

If the bill be not found, a fresh bill may afterwards be preferred to a subsequent grand jury. 4 Bla. Comm. 305. And it would seem from Bacon's Abridgment, Indictment D., that where a bill for one offence, such as murder, is ignored by the grand jury, another bill against the same party, relating to the same subject-matter, but charging another offence, such as manslaughter, may be preferred to and found by the same grand jury; and this course is frequently adopted in practice.

[*178] *But if the grand jury at the assizes or sessions have ignored a bill, they cannot find another bill at the same assizes or sessions, against the same person for precisely the same offence, and if such other bill be sent before them they should

take no notice of it. R. v. Humphreys, Carr. & M. 601 : 47 E. C. L. R. ; Acc. R. v. Austin, 4 Cox, C. C. 386.

Where a true bill has been found by the grand jury at quarter sessions for a rape, the person against whom the bill is found may be tried upon it at the assizes. R. v. Allum, 2 Cox, C. C. 62.

A grand jury ought not to ignore a bill on the ground of insanity, but if they believe that the acts done, if committed by a sane person, would have amounted to the offence charged, it is their duty to find the bill, otherwise the court cannot order the party to be detained in custody under the 39 & 40 Geo. 4, c. 94, s. 2 (*infra*, p. 183). R. v. Hodges, 8 C. & P. 195 : 34 E. C. L. R.

By the 22 & 23 Vict. c. 17, s. 1, "no indictment for perjury, subornation of perjury, conspiracy, obtaining by false pretences, keeping a gambling house, keeping a disorderly house, or an indecent assault, is to be presented to, or found by any grand jury, unless the person presenting it has been bound by recognizance to prosecute or give evidence against the accused, or unless the accused has been committed to, or detained in custody, or bound by recognizance to appear and answer to the indictment, or unless the indictment be preferred by the direction or with the consent in writing of a judge of one of the superior courts of law at Westminster, or of her Majesty's attorney or solicitor-general, or (in the case of an indictment for perjury) by the direction of any court, judge, or public functionary authorized by the 14 & 15 Vict. c. 100, so to direct."

If the indictment were to include, besides the charges with respect to which the proper preliminary steps had been taken, other charges, with respect to which those steps were necessary under the above act, but had not been taken, probably advantage could be taken of the objection under the general issue, or the defendant might move to have the indictment quashed.

Copy of indictment.] A prisoner is not entitled as of right to a copy of the indictment in order to draw up his plea, but the court will direct the indictment to be read over slowly, in order that it may be taken down. R. v. Parry, 7 C. & P. 836 : 32 E. C. L. R. But the counsel for the prosecution may give a copy of the indictment with a view of saving time. Ib. See also R. v. Newton, 1 C. & K. 469 : 47 E. C. L. R. In the case of an acquittal on a prosecution for felony, a copy of the indictment cannot be regularly obtained without an order from the court. The rule is confined to cases of felony. In prosecuting for misdemeanors the defendant is entitled to a copy of the record as a matter of right, without a previous application to the court. Morrison v. Kelly, 1 Blackst. 385; Evans v. Phillips, MS.; 2 Selw. N. P. 952; 2 Phill. Ev. 176. See further 2 Russ. by Grea. 812, 813.

Particulars.] With respect to the general law relating to the delivery of particulars in criminal cases, very little is to be found in the books. Now that the indictment is in many cases perfectly general, it seems to be a matter of right that the prisoner should have some information as to the particular charges intended to be brought against him. Carr. Supp. p. 321. Those offences in which the right of the accused to particulars has been recognized, and in *which they are most com- [*179] monly required, are barratry, nuisance, offences relating to highways, conspiracy, and embezzlement. The law so far as it relates to each of these classes will be found under those titles. See especially, as to barratry, Carr. Supp. 321. The learned author of this work, in speaking of the generality allowed in indictments for larceny and embezzlement, says, "Under these circumstances, it is hardly possible for an

innocent man to know what charges he has to meet, because all of them may be included in one indictment; and, when there, they are wholly indefinite as to time, place, sum, and person, and from whom the money was received. It is true that the prisoner may, in his defence, say, that if he had had a knowledge of what particular sums he was charged with embezzling, he could have procured the attendance of witnesses to show that he had applied those moneys to his master's use, and not to his own; but as this may be as easily said by the most guilty man as by the most innocent, it would not be much attended to by the jury."

It seems that the proper course is for the defendant to apply to the prosecutor in the first instance for particulars of the offence; and, if they are refused, to apply to the court or a judge, upon an affidavit of that fact, and that the accused is unable to understand the precise charge intended. R. v. Bootyman, 5 C. & P. 300: 24 E. C. L. R.; R. v. Hodgson, 3 C. & P. 422: 14 E. C. L. R.; R. v. Marquis of Downshire, 4 A. & E. 699: 31 E. C. L. R. The application may be made to the judge at the assizes: R. v. Hodgson, *supra*, where Vaughan, B., said he would, if necessary, put off the trial in order that particulars might be delivered. In barratry, however, it seems to be necessary to give particulars without any demand. 1 Curw. Hawk. 476, s. 13; Carr. Supp., *ubi suprà*.

If particulars have been delivered, the prosecutor will not be allowed to go into other charges than those contained therein. If particulars have been ordered, but not delivered, it seems that the prosecutor cannot be precluded from giving evidence on that account. R. v. Esdaile, 1 F. & F. 213–227. The proper course is to apply to put off the trial.

Jurisdiction.] So far as *locality* is concerned, the jurisdiction of the court generally depends upon the venue; that is, the venue must be laid within the area over which the court has jurisdiction; and this venue must be that indicated by the place where the offence is actually committed, unless there be some rule or statute which permits any other venue. These are very numerous, and the whole subject will be found discussed under a separate chapter. See tit. Venue.

So far as *power* is concerned, the only distinction to which it is necessary here to advert is that relating to courts of quarter sessions. The jurisdiction of these courts is now regulated by the 5 & 6 Vict. c. 31, which enacts that, after the passing of that act, "neither the justices of the peace acting in and for any county, riding, division, or liberty, nor the recorder of any borough, shall, at any session of the peace, or any adjournment thereof, try any person or persons for any treason, murder, or capital felony, or for any felony which, when committed by a person not previously convicted of felony, is punishable by transportation beyond the seas for life, or for any of the following offences: 1, misprision of treason; 2, offences against the Queen's title, prerogative, person, or government, or against either house of Parliament; 3, offences subject to the penalties of præmunire; 4, blasphemy and offences against religion; 5, administering and taking unlawful oaths; 6, perjury and subornation of perjury; 7, [*180] making *or suborning any other person to make a false oath, affirmation, or declaration, punishable as perjury, or as a misdemeanor; 8, forgery; 9, unlawfully and maliciously setting fire to crops of corn, grain, or pulse, or to any part of a wood, coppice, or plantation of trees, or to any heath, gorze, furze, or fern; 10, bigamy and offences against the laws relating to marriage; 11, abduction of women and girls; 12, endeavoring to conceal the birth of a child; 13, offences against any provision of the laws relating to bankrupts and insolvents; 14, composing, printing, or publishing blasphemous, seditious, or defamatory libels; 15, bribery; 16, unlawful combinations

and conspiracies, except conspiracies or combinations to commit any offence which such justices or recorder respectively have or has jurisdiction to try when committed by one person; 17, stealing, or fraudulently taking, or injuring, or destroying records, or documents belonging to any court of law or equity, or relating to any proceeding therein; 18, stealing, or fraudulently destroying, or concealing wills, or testamentary papers, or any document, or written instruments, being, or containing evidence of the title to any real estate, or any interest in lands, tenements, or hereditaments."

By the 24 & 25 Vict. c. 96, s. 87, offences mentioned in the twelve previous sections (see p. 254) are not triable at any quarter sessions.

In Smith v. Reg., 18 L. J. M. C. 207, it was held that the jurisdiction of a recorder of a borough was not suspended by the arrival of the judges of assize in the same county, and that this would apply equally to the jurisdiction of the quarter sessions of the county. But Coleridge, J., said it was better for the quarter sessions not to proceed with the trial of prisoners after the business of the assizes had commenced. 9 C. & P. 90: 38 E. C. L. R.

If the court have not jurisdiction, the defendant may take advantage of it either by a plea to the jurisdiction, or, if it appear on the record, by demurrer, or, as it seems, by motion in arrest of judgment, or by a writ of error. R. v. Hewitt, R. & R. 58. But the objection may also be taken under the general issue, and this is by far the most usual course.

Certiorari.] Any proceeding in a criminal court may be removed by a writ of *certiorari* into the Court of Queen's Bench, which writ is issued by that court. It is demandable as of right by the crown: R. v. Eaton, 2 T. R. 89; and issues, as of course, where the attorney-general or other officer of the crown applies for it, either as prosecutor, or as prosecuting the defence on behalf of the crown: Id.; R. v. Lewis, 4 Burr, 2458; and this, even though the *certiorari* is expressly taken away by statute; for unless named, the crown is not bound. By analogy, the *certiorari* was formerly granted, almost of course, to private prosecutors, who were said to represent the crown. But now by the 5 & 6 Wm. 4, c. 33, s. 1, no writ of *certiorari* can issue from the Court of Q. B. at the instance of any one, except the attorney-general, without motion first made in court, or to a judge in chambers, and leave obtained, in the same manner as if the application were made by the defendant. By the 16 & 17 Vict. c. 30, s. 4, after reciting that by reason of the establishment of a Court of Criminal Appeal, the removal of indictments by writ of *certiorari* is seldom necessary for the decision of questions of law, but is nevertheless sometimes resorted to for the purpose of expense and delay, it is enacted, "that no indictment, except indictments *against bodies corporate not authorized to appear by attorney in the court in [*181] which the indictment is preferred, shall be removed into the Court of Q. B., or into the Central Criminal Court by writ of *certiorari*, either at the instance of the prosecutor or of the defendant (other than the attorney-general acting on behalf of the crown), unless it be made to appear to the court from which the writ is to issue, by the party applying for the same, that a fair and impartial trial of the case cannot be had in the court below, or that some question of law of more than usual difficulty and importance is likely to arise upon the trial, or that a view of the premises in respect whereof any indictment is preferred, or a special jury, may be required for the satisfactory trial of the same." By s. 5, no *certiorari* is to issue unless recognizance is given for the payment of costs. See R. v. Wilkes, 5 E. & B. 690: 85 E. C. L. R.; R. v. Jewell, 7 E. &. B. 140: 90 E. C. L. R; R. v. Mayor of Manchester, Id. 453.

It has been held that the mere necessity for a special jury was not alone sufficient

ground for granting the writ: R. v. Green, 1 Wil. Wol. & Hod. 35. A much stronger case of difficulty would have to be made out now than formerly: see R. v. Wartnaby, 2 Ad. & E. 435: 29 E. C. L. R.; R. v. Duchess of Kingston, Cowp. 283. The rule has been granted on the ground of a reasonable probability or partiality in the jurisdiction within which the indictment would otherwise be tried, in cases where the charge had been made the subject of much public discussion: R. v. Mead, 3 D. & R. 301; R. v. Lever, 1 Wil. Wol. & Hod. 35; where the person accused is a person of influence in the court below: Reban v. Trevor, 4 Jur. 292; R. v. Grover, 8 Dowl. P. C. 325; R. v. Jones, 2 Har. & W. 293; where the prosecutor or his attorney is sheriff, or undersheriff: R. v. Webb. 2 For. 1068; R. v. Knatchbull, 1 Selw. 150. The affidavit on which the application is made should state the particular facts relied on very explicitly. R. v. Green, *ubi suprà;* R. v. Jowle, 5 Ad. & E. 539: 31 E. C. L. R.

By the 60 Geo. 3 & 1 Geo. 4, c. 4, s. 4, the *certiorari* may be applied for before the indictment is found for a misdemeanor. The same is the case in felony, for it removes any record that shall come within its description before its return. 2 Hawk. c. 27, s. 23. Where there are several defendants, all should concur either on their own behalf, or on behalf of the applicant. R. v. Hunt, 2 Chit. Rep. 130.

If the defendant remove an indictment by *certiorari* he will, if convicted, be liable for costs to the prosecutor or party grieved, on the counts on which he is convicted. 5 & 6 W. & M. c. 11, s. 3; R. v. Hawdon, 11 Ad. & E. 1430: 37 E. C. L. R. See 1 Burn's Jus. by Chitty, 624; Arch C. L. 68, 16th ed.

As to writs of *certiorari*, to remove trials to and from the Central Criminal Court, see the 4 & 5 Wm. 4, c. 36, s. 16; 9 & 10 Vict. c. 24, s. 3; 19 & 20 Vict. c. 16; *post*, p. 237.

As to the practice relating to writs of *certiorari* generally, see Corner's Crown Practice.

Arraignment in general.] A person indicted for felony must in all cases appear in person and be arraigned, but this does not apply to misdemeanors. 1 Chitt. C. L. 414; 4 Bl. C. 375. On an indictment or information for a crime *less than felony*, the defendant may, by favor of the court, appear by attorney, and this he may do as [*182] well before plea pleaded as afterwards unto conviction. R. v. Bacon, *1 Lev. 146; Keilw. 165. In all cases of felony, the prisoner must take his place within the dock. R. v. Douglas, Carr. & M. 193: 41 E. C. L. R.; and see also R. v. Zulueta, 1 C. & K. 215: 47 E. C. L. R.

Formerly where a prisoner was charged in one count with a subsequent offence, and in another with a previous conviction, it was the practice to arraign him on the whole indictment; but if, at the request of his counsel, he was arraigned on that count charging the subsequent offence only, it was held that he might afterwards be arraigned and legally convicted on the count charging a previous conviction. R. v. McEwin, 1 Bell, C. C. 20.

Now by the 24 & 25 Vict. c. 96, s. 116, in any indictment for any offence punishable under that act (larceny and offences connected therewith), "the offender shall, in the first instance, be arraigned upon so much of the indictment as charges the subsequent offence;" and after the inquiry into the subsequent offence is concluded, "he shall then, and not before, be asked whether he had previously been convicted as alleged in the indictment, and if he answer that he had been so previously convicted, the court may proceed to sentence him accordingly; but if he deny that he had been so previously convicted, or stand mute of malice, or will not answer directly to such question, the jury shall then be charged," &c.

The 24 & 25 Vict. c. 99, s. 37, contains a precisely similar provision with respect to offences relating to the coin.

There is no provision for the arraignment on a charge of a previous conviction in other cases.

By both of the above sections it is specially provided, that "if upon the trial of any person for any such subsequent offence such person shall give evidence of his good character, it shall be lawful for the prosecutor, in answer thereto, to give evidence of the conviction of such person for the previous offence or offences before such verdict of guilty shall be returned, and the jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence."

The arraignment consists of three parts: the calling of the prisoner to hold up his hand, the reading over of the indictment to him, and the asking him whether he is guilty or not guilty. 2 Hale, 219. If the prisoner upon his arraignment refuse to answer, it becomes a question whether it is of malice, or whether he is mute by the visitation of God. The court will in such case direct a jury to be impanelled, who are immediately returned, R. v. Jones, 1 Leach, 102, from amongst the bystanders. 1 Chitty, C. L. 424 The prisoner's counsel may address the jury and call witnesses, for the affirmative of the issue is on him. R. v. Roberts, Carr. C. L. 57. Where a verdict of *mute by the visitation of God* is returned, the court will order the trial to proceed, if the prisoner is of competent intellect, and can be made to understand the nature of the proceedings against himself. Thus where it appeared that a prisoner, who was found mute, had been in the habit of communicating by means of signs, and a witness was called who stated that he was capable of understanding her by means of signs, he was arraigned, put upon his trial, convicted of simple larceny, and received sentence of transportation. R. v. Jones, 1 Leach, 102; 1 Russ. by Grea. 7. So where a prisoner, who was found mute, could read and write, the indictment was handed to him with the usual questions written upon paper. After he had pleaded, and stated in writing that he had no objection to *any of the jury, the trial [*183] proceeded. The judge's note of the evidence was handed to him after the examination of each witness, and he was asked, in writing, if he had any question to put. The proof on the part of the prosecution being insufficient, he was acquitted without being called upon for his defence. R. v. Thompson, 2 Lew. C. C. 137. So the jury having found that the prisoner was mute by visitation of God, and then, being sworn to try whether he was of sound mind, found that he was, his counsel pleaded not guilty for him, and the trial proceeded in the usual manner, and the evidence was not interpreted to the defendant. R. v. Whitfield, 3 C. & K. 121, *coram* Williams, J.

But where a prisoner is deaf and dumb, and cannot be made to comprehend the nature of the proceedings and the details of the evidence, the proper course seems to be, after the jury have found him mute by the visitation of God, to reswear the jury to inquire whether he is able to plead to the indictment; and if that be found in the negative, then to swear them again to inquire if the prisoner be sane or not; and if the jury find him to be insane, the judge will order him to be confined under the 39 & 40 Geo. 3, c. 94, s. 2, *post*. "There are three points to be inquired into: 1st. Whether the prisoner is mute of malice or not. 2d. Whether he can plead to the indictment or not. 3d. Whether he is of sufficient intellect to comprehend the course of proceedings at the trial, so as to make a proper defence." Per Alderson, B., R. v. Pritchard, 7 C. & P. 303: 32 E. C. L. R.; see also R. v. Dyson, Ibid. 305 (*n*).

If the prisoner stands mute of malice, or will not answer directly to the indictment, or information (for treason, felony, piracy, or misdemeanor), it is enacted by the 7 &

8 Geo. 4, c. 28, s. 2, that in every such case it shall be lawful for the court, if it shall so think fit, to order the proper officer to enter a plea of "not guilty," on behalf of such person, and the plea so entered shall have the same effect as if such person had actually pleaded the same.(1) And where the prisoner, who was indicted for murder, remained mute of malice, Erle, J., refused to assign counsel for his defence, as the prisoner's assent could not, under the circumstances, be given. R. v. Yscuado, 6 Cox, C. C. 386.

Where the prisoner refused to plead, on the ground that he had already pleaded to an indictment for the same offence (which had been tried before a court not having jurisdiction), it was held that the court might order a plea of "not guilty" to be entered for him under the above statute. R. v. Bitton, 6 C. & P. 92 : 25 E. C. L. R.

In cases of insanity it is enacted by the 39 & 40 Geo. 3, c. 94, s. 2, that if a person indicted for any offence appears insane, the court may, on his arraignment, order a jury to be impanelled to try the sanity; and if they find him insane, may order the finding to be recorded, and the insane person to be kept in custody till his majesty's pleasure be known.

The latter section applies to misdemeanors, as well as to felonies. R. v. Little, Russ. & Ry. 430.

When a jury is impanelled to try the sanity of a prisoner under this section, the counsel for the prosecution begins and calls his witnesses to prove the sanity of the prisoner. Per Williams, J., R. v. Davis, 3 C. & K. 328.

Similar provisions in the case of insane persons being indicted are made with regard to Ireland by the 1 & 2 Geo. 4, c. 33, ss. 16, 17.

[*184] *Where a party was indicted for a misdemeanor in uttering seditious words, and upon his arraignment refused to plead, and showed symptoms of insanity, and an inquest was forthwith taken under the above statute to try whether he was insane or not, it was held: 1st. That the jury might form their own judgment of the present state of the defendant's mind, from his demeanor while the inquest was being taken, and might thereupon find him to be insane, without any evidence being given as to his present state. 2dly. That upon the prisoner showing strong symptoms of insanity in court during the taking of the inquest, it became necessary to ask him whether he would cross-examine the witnesses on the inquest or would offer any remarks on evidence. R. v. Goode, 7 A. & E. 536 : 34 E. C. L. R.

See further as to the mode of dealing with prisoners found to be insane, *post*, tit. Insanity.

Postponing the trial.] No traverse is allowed in a case of felony, but where the courts deem it necessary for the purpose of justice, they will postpone the trial until the next assizes or sessions. And now misdemeanors are put on the same footing in this respect as felonies, the 14 & 15 Vict. c. 100, s. 27, enacting that "no person prosecuted shall be entitled to traverse or postpone the trial of *any* indictment found against him at any session of the peace, session of oyer and terminer, and general gaol delivery: provided always, that if the court, upon the application of the person so indicted or otherwise, shall be of opinion that he ought to be allowed a further term, either to prepare for his defence or otherwise, such court may adjourn the trial of such person to the next subsequent session, upon such terms, as to bail or otherwise, as to such court shall seem meet, and may respite the recognizances of the prosecutor and witnesses accordingly; in which case the prosecutor and witnesses

(1) United States v. Hare, 3 Wheeler's C. C. 285.

shall be bound to attend to prosecute and give evidence at such subsequent session, without entering into any fresh recognizance for that purpose."

Instances have occurred in which a principal witness has been of such tender years and so ignorant as not to understand the nature and obligation of an oath, that the judge has ordered the trial to be put off until the next assizes, and directed the child in the meantime to be instructed in religion. *Ante*, p. 107. Also where it appears, by affidavit, that a necessary witness for the prisoner is ill: R. v. Hunter, 3 C. & P. 591; or that a witness for the prosecution is ill (see *ante*, p. 66), or unavoidably absent, or is kept out of the way by the contrivance or at the instigation of the prisoner, the court will postpone the trial, unless it appear that the requirements of justice can be satisfied by reading the witness's depositions before a magistrate.

If it is moved on the part of the prosecution, in a case of felony, to put off the trial on the ground of the absence of a material witness, the judge will require an affidavit stating the points which the witness is expected to prove, in order to form a judgment whether the witness is a material one or not. R. v. Savage, 1 C. & K. 75: 47 E. C. L. R. An affidavit of a surgeon that the witness is the mother of an unweaned child, afflicted with an inflammation of the lungs, who could neither be brought to the assize town nor separated from the mother, without danger to life, is a sufficient ground on which to found a motion to postpone the trial. Ib. Where a prisoner's counsel moved to postpone a trial for murder, on an affidavit which stated that one of the witnesses for the prosecution, who had been bound over to appear at *the assizes, was absent, and that on cross-examination this witness could [*185] give material evidence for the prisoner, Cresswell, J., after consulting Patteson, J., held that this was a sufficient ground for postponing the trial, without showing that the prisoner had at all endeavored to procure the witness's attendance, as the prisoner might reasonably expect, from the witness having been bound over, that he would appear. R. v. Macarthy, Carr. & M. 625: 41 E. C. L. R. In R. v. Palmer, 6 C. & P. 652: 25 E. C. L. R., the judges of the Central Criminal Court postponed, until the next session, the presentment of a bill for a capital offence to the grand jury, upon the affidavit of the attorney for the prosecution, that a witness, whose evidence was sworn to be material, was too ill to attend, and they refused to refer to the deposition of the witness to ascertain whether he deposed to material facts. Where, in a case of murder, committed in Newcastle-upon-Tyne, which had created great excitement, a newspaper, published in the town, had spoken of the prisoner as the murderer, and several journals, down to the time of the assizes, had published paragraphs implying or tending to show his guilt, and it appeared that the jurors at such assizes were chosen from within a circle of fifteen miles round Newcastle, where such papers were chiefly circulated, but that at the summer assizes they would be taken from the more distant parts of the county of Northumberland (into which the indictment had been removed), Alderson and Parke, BB., postponed the trial until the following assizes. Alderson, B., however, said, "I yield to the peculiar circumstances of the case, wishing it to be understood that I am by no means disposed to encourage a precedent of this sort." R. v. Bolam, Newcastle Spring Ass., 1839, MS.; 2 Moo. & R. 192; see also R. v. Joliffe, 4 T. R. 285. And in R. v. Johnson, 2 C. & K. 354: 61 E. C. L. R., the same learned judge refused to postpone the trial of a prisoner charged with murder, on the ground that an opportunity might be thereby afforded of investigating the evidence and character of certain witnesses who had not been examined before the committing magistrate, but who were to be called for the prosecution to prove previous attempts by the prisoner on the life of the deceased.

In no instance will a trial be put off on account of the absence of witnesses to character. R. v. Jones, 8 East, 34.

Where the prisoner applies to postpone the trial, he will be remanded and detained in custody till the next assizes or sessions, or will be admitted to bail, but he is never required to pay the costs of the prosecutor. R. v. Hunter, 3 C. & P. 591: 14 E. C. L. R. Where the application is by the prosecutor, the court in its discretion will either detain the prisoner in custody, or admit him to bail, or discharge him on his own recognizances. R. v. Beardmore, 7 C. & P. 407: 32 E. C. L. R.; R. v. Parish, Id. 782; R. v. Osborne, Id. 799; see also R. v. Crowe, 4 C. & P. 251: 19 E. C. L. R. A motion to put off a trial on an indictment for felony made on behalf of the prisoner, cannot be entertained until after plea pleaded. R. v. Bolam, 2 Moo. & R. 192. Previous to the spring assizes A. was committed to take his trial for shooting B. The trial was postponed till the summer assizes, on the ground that B. (who shortly afterwards died) was too ill from his wounds to attend to give evidence. At the summer assizes a true bill was found against A. for the murder of B., and an application was made to put off the trial until the following spring assizes, on account of the illness of a material witness. Williams, J., granted the application, and held [*186] that A. was *not entitled to his discharge under the seventh section of the *habeas corpus* act. R. v. Bowen, 9 C. & P. 509: 38 E. C. L. R.; see 8 C. & P. 558: 34 E. C. L. R.

The application should be made before the prisoner is given in charge to the jury, as it is very doubtful whether, if the adjournment of the trial involved a discharge of the jury, it would be granted. See *post*, p. 210.

Plea.] There are several kinds of pleas in criminal cases, but the only ones that are at all likely to occur in ordinary practice are the three special pleas, *autrefois acquit*, *autrefois convict*, and *pardon*, and the general issue of *not guilty*.

Special pleas.] The mode in which the first two of these pleas are pleaded is regulated by the 14 & 15 Vict. c. 100, s. 28, which provides that in any plea of *autrefois convict* or *autrefois acquit*, it shall be sufficient for any defendant to state that he has been lawfully convicted or acquitted, as the case may be, of the offence charged in the indictment. They may be pleaded *ore tenus*. If the plea be found against the prisoner he will then, if he have not already done so, be allowed to plead over to the felony. R. v. Birchenough, 7 C. & P. 575: 32 E. C. L. R. But in misdemeanors either plea must be pleaded alone, and the defendant cannot plead over. R. v. Taylor, 3 B. & C. 502: 10 E. C. L. R.

The onus of proving these pleas lies upon the defendant. By the 14 & 15 Vict. c. 99, s. 13, it is enacted that, "whenever in any proceeding whatever it may be necessary to prove the trial and conviction or acquittal of any person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of any such person or a copy thereof, but it shall be sufficient that it be certified, or purport to be certified under the hand of the clerk of the court or other officer having the custody of the records of the court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction, and judgment, or acquittal, as the case may be, omitting the formal parts thereof." If the record has not been made up, the court will postpone the case in order that it may be done: R. v. Bowman, 6 C. & P. 337: 25 E. C. L. R.; and the Court of Queen's Bench will, if necessary, grant a *mandamus* for that purpose. R. v. JJ. of Middlesex, 5 B. & Ad. 1113:

27 E. C. L. R. When the second indictment is preferred at the same assizes as the first, the original indictment and minutes of the verdict are receivable in evidence in support of the plea without a record being drawn up. R. v. Parry, 7 C. & P. 836: 32 E. C. L. R.

The jury have to try these pleas as a matter of fact. In *autrefois acquit* it is necessary to prove that the prisoner could have been convicted on the first indictment of the offence charged in the second.(1) This appears by the record, but, as was pointed out by Parke, B., in R. v. Bird, 2 Den. C. C. 94–98, something more is necessary; because, as the language of an indictment describing any offence is in general not material as to the date, or place, or many other circumstances, the indictment would be equally descriptive of many offences of the same character, and an acquittal of the offence charged on one indictment, describing it in proper terms sufficient in point of law, would be an acquittal of every offence of the same sort, and against the same person. The learned Baron then says, "This being *clearly [*187] the rule, there would not be much difficulty in applying it to an ordinary charge of felony—larceny, for instance, of the goods of A. B., or an ordinary charge of assault upon A. B. The prisoner charged on such an indictment would have to satisfy the court, first, that the former indictment, on which an acquittal took place, was sufficient in point of law, so that he was in jeopardy upon it; and secondly that in that indictment the same offence was charged, for the indictment is in such a form as to apply equally to several different offences. To prove the identity of the offence may not always be easy. If more or less evidence is gone into on the first trial the difficulty is little; if none is offered and the acquittal takes place, it is still an acquittal, entitling the prisoner to an exemption from any subsequent trial for the same offence. In such a case there is more difficulty in showing what the offence charged was, but it may be proved by the testimony of witnesses who were subpœnaed to go, and did go before the grand jury, by the proof of what they swore, or perhaps by a grand juryman himself, or by the evidence of the prosecutor, or by proof how the case was opened by the counsel for him; in short, by any evidence which would show what crime was the subject of the inquiry, and would identify the charge, and limit and confine the generality of the indictment to a particular case."

The difficulties pointed out by the learned Baron have not been removed by decided cases; on the other hand they have been increased by statutes which provide that on an indictment which charges one crime, the prisoner may be convicted of another crime of a similar nature, and other statutes which provide that a man may be convicted on an indictment which charges one crime, though the facts show that the crime was somewhat different. Thus by the 14 & 15 Vict. c. 100, s. 9, *supra*, p. 90, on the trial of an indictment for felony or misdemeanor, the jury may find the person charged guilty of an attempt to commit the same; by the 24 & 25 Vict. c. 96, s. 41, on the trial of an indictment for robbery the jury may convict of an assault with intent to rob; by sect. 12, if upon the trial of any person for any misdemeanor it shall appear that the facts in evidence amount in law to a felony, such person shall

(1) Wilson v. The State, 24 Conn. 57; Hassell v. Nutt, 14 Texas, 260.

When the verdict of a jury amounts to an acquittal from the offence specifically charged in the indictment it will bar another prosecution for the same offence. Morman v. The State, 24 Mississippi, 54.

The plea of *autrefois convict* is sufficient when the evidence necessary to support the second indictment would have sustained the first, and also whenever the proof shows the second case to be the same transaction with the first. Roberts v. The State, 14 Georgia, 8.

Double pleading is not allowable in criminal cases. Therefore if a party pleads a former conviction, and also not guilty, the latter plea should be treated as a nullity. The State v. Copeland, 2 Swan, 626.

not be entitled to be acquitted of the misdemeanor; by sect. 72, a person indicted for embezzlement may be convicted of larceny, and *vice versâ;* by sect. 88, a person indicted for obtaining property by false pretences is not to be acquitted if the facts show that he was guilty of larceny; by sect. 94, on an indictment against several for jointly receiving, any one, or more, may be convicted for separately receiving. So by the 24 & 25 Vict. c. 94, accessories may be indicted as if they were principal felons. So by 4 Geo. 4, c. 31, s. 14, a woman tried for the murder of her child may be found guilty of endeavoring to conceal its birth. In most of these cases it is provided, that the person who might have been convicted on the first indictment shall not be liable to be tried again for the offence for which, though not indicted, he might have been convicted.

As to when the prisoner is entitled to plead the plea of *autrefois convict* or *autrefois acquit* is frequently a question of considerable difficulty. The prisoner must have received judgment of death, imprisonment, or the like, if he be convicted, or, if acquitted *quod eat sine die.* 2 Stark. Crim. Plead. 311. But a judgment reversed by a court of error is the same as no judgment, and in that case, therefore, the plea is not available. R. v. Drury, 3 C. & K. 193; S. C. 18 L. J. M. C. 189. Until [*188] reversed, however, judgment upon an *erroneous record is good. Id. In this case, Coleridge, J., gave an elaborate considered judgment. And in R. v. Charlesworth, 30 L. J. M. C. 25, the court appears to take the same view.

A prisoner will not be considered to have been in jeopardy where the prosecution fails by reason of a defect in the indictment which might have been amended.(1) R. v. Green, Dears. & B., C. C. 113.

In R. v. Walker, 2 Moo. & R. 446, it was held that a prisoner, who had been convicted summarily of a common assault before two justices, could plead *autrefois convict* to an indictment for feloniously stabbing under 9 Geo. 4, c. 31, the circumstances out of which the charge arose being the same in both cases. On the other hand, in R. v. Vandercomb, 2 Leach, 708, S. C. 2 East, P. C. 59, it was held that a prisoner, indicted for burglary in breaking and entering a dwelling-house with intent to steal, cannot plead in bar an acquittal upon an indictment for burglary in the same dwelling-house on the same occasion, which charged a breaking and entering the same dwelling-house and stealing there. In R. v. Champneys, 2 Moo. & R. 26, Patteson, J., held that an acquittal on an indictment against an insolvent debtor for omitting certain goods out of his schedule was no bar to a second indictment for the same offence in which the same goods and some others were specified; but the learned judge said that, except under very peculiar circumstances, such a course ought not to be pursued. Formerly by the 7 Wm. 4 & 1 Vict. c. 85, s. 11, on the trial of any person, for any felony whatever, where the crime charged included an assault against the person, it was lawful for the jury to acquit of the felony and to find a verdict of assault against the person indicted, but that section is repealed by the 14 & 15 Vict. c. 100, s. 10, so that now on an indictment for the assault the acquittal on the previous charge of felony could not be pleaded. Where an offence is triable in more than one county, an acquittal in one county would be a good bar to a second indictment in another county; but where the offence is triable in one county only, an acquittal in the wrong county would be no bar. 2 Hawk. P. C. c. 45, s. 3; 1 Russ. Cr. 838, note. An acquittal of murder before a court of competent jurisdiction, in

(1) If an indictment is bad, and no valid judgment of guilty can be entered upon the finding of a jury, it is a mistrial, and such a trial does not preclude another. The State v. Williams, 5 Maryland, 82; The State v. Thomas, 8 Richardson, 295; Heikes v. The Commonwealth, 2 Casey, 513; Cochran v. The State, 6 Maryland, 400; Pritchett v. The State, 2 Sneed, 295.

a foreign country, is a good bar to an indictment for the same murder in this country. R. v. Roche, 1 Leach, 184; R. v. Hutchinson, 3 Keb. 785; 3 Russ. Cr. 839, note.

A pardon must be specially pleaded, unless it be by statute: R. v. Louis, 2 Keb. 25; otherwise it is waived.

Formerly a pardon could only be pleaded under the great seal: Bullock v. Dodds, 2 B. & Ald. 258; but now by the 7 & 8 Geo. 4, c. 28, s. 13, where the sovereign by warrant under the sign manual, countersigned by one of the principal secretaries of state, grants a free or conditional pardon, the discharge of such offender out of custody in the case of a free pardon, and the performance of the condition in the case of a conditional pardon, has the effect of a pardon under the great seal. See R. v. Harrod, 2 C. & K. 294: 61 E. C. L. R.

General issue.] By the 7 & 8 Geo. 4, c. 28, s. 1, "If any person not having the privilege of peerage, being arraigned upon an indictment for treason, felony, or piracy, shall plead thereto a plea of not guilty, he shall by such plea, without any further form, be deemed to have put himself upon the country for trial, and the court shall in the usual manner order a jury for the trial of such person accordingly."

As has already been stated, if the person charged with the offence *stand [*189] mute of malice, or will not answer directly to the indictment, a plea of *not guilty* will be entered for him.

Pleading over.] If the defendant demur, in misdemeanor, the judgment is final; but, by the permission of the court, the defendant may plead over. R v. Birmingham & Gloucester Railway Co., 3 Q. B. 224: 43 E. C. L. R. As to felonies the question has been much doubted, but in R. v. Faderman, 1 Den. C. C. 565, it was held by Alderson, B., Cresswell, and Vaughan Williams, JJ., that on a *general* demurrer judgment for the crown was final, inasmuch as the prisoner thereby confesses all the material facts charged against him in the indictment. In cases of demurrer of a *special* nature, usually called demurrer in abatement, they thought it might be otherwise, and they intimated that the various *dicta* which appeared in the books, in opposition to the above ruling, were probably to be accounted for by this distinction not having been sufficiently attended to. See R. v. Duffy, 4 Cox, C. C. 24, and the cases collected in 1 Den. C. C. 293, a. Whether the defendant in felony might plead over by the leave of the court is, perhaps, doubtful: see R. v. Straham, 7 Cox, C. C. 85, 86, per Alderson, B.

If the defendant plead a special plea in misdemeanor, the judgment is final. Per Holt, C. J., R. v. Goddard, 2 Lord Raym. 920. But in treason and felony it is not so. Id. 2 Hale, P. C. 257. Whether in misdemeanor the defendant might plead over by leave of the court does not seem to have been decided: see R. v. Strahan, *ubi suprà.*(1)

Joinder of distinct offences in the indictment—election.] If two offences be charged in the same count of an indictment it is bad, but, even before the passing of the 14 & 15 Vict. c. 100, there was no objection in point of law to the insertion in *separate* counts of the same indictment of distinct felonies of the same degree and committed by the same offender: 2 Hale, 173; 1 Leach, 1103; and it is not a ground for arrest of judgment: Id.; 1 Chit. C. L. 253; 3 T. R. 98; R. v. Hinley, 2 Moo. &

(1) In indictments for misdemeanors, if a demurrer be overruled, judgment is against the defendant, otherwise in capital cases and felonies, where it is *respondeat ouster*. The State v. Merrill, 37 Maine, 329.

R. 524; O'Connell v. Reg. 11 C. & F. 155; nor is it any ground for arrest of judgment, after a prisoner has been convicted of felony, that the indictment contains a count for a misdemeanor. R. v. Ferguson, 1 Dear. C. C. R. 427; S. C. 24 L. J. M. C. 61. In practice, where a prisoner was charged with several felonies in one indictment, and the party had pleaded, or the jury were charged, the court in its discretion would quash the indictment; or if not found out till after the jury were charged, would compel the prosecutor to elect on which charge he would proceed. R. v. Young, 3 T. R. 106; 2 East, P. C. 515; 2 Campb. 131; 3 Campb. 133; 2 M. & S. 539. Now, by the 24 & 25 Vict. c. 96, s. 5 (replacing the 14 & 15 Vict. c. 100, s. 16), it is enacted "that it shall be lawful to insert several counts in the same indictment against the same person for any number of distinct acts of stealing not exceeding three which may have been committed by him against the same person within the space of six calendar months from the first to the last of such acts, and to proceed thereon for all or any of them." And by s. 6, "if upon the trial of any indictment for larceny, it shall appear that the property alleged in such indictment to have been stolen at one time, was taken at different times, the prosecutor shall not by reason thereof be required to elect upon which taking he will proceed, unless it shall appear that there were more than three takings, or that more than [*190] the *space of six calendar months elapsed between the first and the last of such takings; and in either of such last-mentioned cases the prosecutor shall be required to elect to proceed for such number of takings, not exceeding three, as appear to have taken place within the period of six calendar months from the first to the last of such takings." The same act contains a similar provision as to embezzlement (s. 71).

With respect to joining a count for stealing along with a count for receiving in the same indictment, the practice of doing so was condemned by the judges in R. v. Galloway, 1 Moo. C. C. 234. But now it is enacted, by the 24 & 25 Vict. c. 96, s. 92 (replacing the 11 & 12 Vict. c. 46, s. 3), that "in any indictment containing a charge of feloniously stealing any property, it shall be lawful to add a count or several counts for feloniously receiving the same or any part or parts thereof knowing the same to have been stolen," and *vice versa*; "and where any such indictment shall have been preferred and found against any person, the prosecutor shall not be put to his election, but it shall be lawful for the jury who shall try the same to find a verdict of guilty, either of stealing the property, or of receiving the same or any part or parts thereof knowing the same to have been stolen; and if such indictment shall have been preferred and found against two or more persons, it shall be lawful for the jury who shall try the same to find all or any of the said persons guilty either of stealing the property, or of receiving the same or any part or parts thereof knowing the same to have been stolen, or to find one or more of the said persons guilty of stealing the property, and the other or others of them guilty of receiving the same or any part or parts thereof knowing the same to have been stolen."

With respect to offences not provided for by the above enactments: where the prisoners were charged, in one count with robbing, and in a second with an assault with intent to rob, Park, J., seemed to think that the two counts ought not to be joined in the same indictment, and called upon the prosecutor to elect on which he would go to the jury. R. v. Gough, 1 Moo. & R. 71. Where however the defendant was indicted under the 7 Wm. 4, and 1 Vict. c. 85, ss. 2, 4, in several counts for stabbing with intent to murder, with intent to maim and disable, and with intent to do some grievous bodily harm, it was held that the prosecutor was not bound to elect on which count he would proceed, notwithstanding the judgment is different, being

in the first count capital, and in the other transportation. R. v. Strange, 8 C. & P. 172: 34 E. C. L. R. See also R. v. Jones, 2 Moo. C. C. 94; 8 C. & P. 776. Where an indictment for arson contained five counts, each of which charged the firing of a house of a different party, and it was opened that the five houses were in a row, and that one fire burnt them all, Erskine, J., refused, upon this opening, to put the prosecutor to his election, as it was all one transaction. R. v. Trueman, 8 C. & P. 727.

Counts for distinct misdemeanors may be included in the same indictment, provided the judgment be the same for each offence. R. v. Young, 3 T. R. 98, 106; R. v. Towle, 2 Marsh. 466; R. v. Johnson, 3 M. & S. 539; R. v. Jones, 2 Campb. 130. Where, however, two defendants were indicted for a conspiracy, and also for a libel, and at the close of the case for the prosecution there was evidence against both as to the conspiracy, but no evidence against one as to the libel; Coleridge, J., put the prosecutor to his election, on which charge he would proceed, before the counsel for the defendants *entered upon their defence. R. v. Murphy, 8 C. [*191] & P. 297: 34 E. C. L. R. A prosecutor cannot maintain two indictments for misdemeanor for the same transaction, and he must elect to proceed with the one and abandon the other. R. v. Britton, 1 Moo. & R. 297.

The application by a prisoner to compel the prosecutor to elect is an application to the discretion of the court, founded on the supposition that the case extends to more than one charge, and may therefore be likely to embarrass the prisoner in his defence. R. v. Trueman, 8 C. & P. 727; R. v. Hinley, 2 Moo. & R. 524. It is not usual to put the prosecutor to his election immediately upon the case being opened. R. v. Wriggleworth, cor. Alderson, J., Hindmarch's Suppl. to Deacon's C. L. 1583. And *semble*, that the reason for putting a prosecutor to his election, being that the prisoner may not have his attention divided between two charges, the election ought to be made, not merely before the case goes to the jury, as it is sometimes laid down, but before the prisoner is called on for his defence at the latest. Id.(1)

Quashing indictments.] Where an indictment cannot be amended, and is so defective that, in case of conviction, no judgment could be given, the court would in general quash it on the application being made on the part of the prosecution. Indictments have been quashed because the facts stated in them did not amount to an offence punishable by law. R. v. Burkett, Andr. 230; R. v. Sermon, 1 Burr, 516, 543; R. v. Philpott, 1 C. & K. 112: 47 E. C. L. R.

Where the application is on the part of the defendant, the courts have almost uniformly refused to quash an indictment when it was preferred for some great crime, such as treason or felony: Com. Dig. Indictment (H); and see R. v. Johnson, 1 Wils. 325; forgery, perjury, or subornation of perjury: R. v. Belton, 1 Salk. 372; 1 Sid. 54; 1 Vent. 370; R. v. Thomas, 3 D. & R. 621: 16 E. C. L. R. They have also refused to quash indictments for cheating: R. v. Orbell, 1 Mod. 42; for selling flour by false weights: R. v. Crooke, 3 Burr. 1841; and for other minor offences. If the application is made on behalf of the defendant, the court will not grant it, unless the defect is very clear and obvious, but will leave him to take objection in some other form. 1 Chitty, C. L. 299.

Where the prosecution is by the attorney-general, an application to quash the indictment is never made, because he may enter a *nolle prosequi*, which will have the

(1) The prosecution on the trial of an indictment containing several counts, in which the same offence is charged in different forms, cannot be required to elect on which count it will proceed. The People v. Austin, 1 Parker C. R. 154.

same effect. R. v. Stratton, 1 Doug. 239, 240. See also R. v. Bumby, 5 Q. B. 348 : 48 E. C. L. R

The application to quash must be made to the court in which the bill is found, except in cases of indictments at sessions, and in other inferior courts, in which cases the application is made to the Court of Queen's Bench, the record being previously removed there by *certiorari*. But it has been recently held that a court of quarter sessions has itself authority to quash an indictment found there before plea pleaded; and that the Court of Queen's Bench would not inquire on *certiorari* whether the indictment was properly quashed, but that the proper way of raising such a question was by writ of error. R. v. Wilson, 6 Q. B. 620 : 51 E. C. L. R.

The application, if made on the part of the defendant, must be before plea pleaded. Fost. 231; R. v. Rockwood, 4 How. St. Tr. 684. Where the indictment had, upon the application of the defendant, been removed into the Court of King's Bench, by [*192] *certiorari*, the *court refused to entertain a motion by the defendant to quash the indictment after a forfeiture of his recognizance, but not having carried the record down to trial. Anon. 1 Salk. 380.

And now by the 14 & 15 Vict. c. 100, s. 25, "every objection to any indictment for any formal defect apparent on the face thereof, shall be taken by demurrer or motion to quash such indictment before the jury shall be sworn, and not afterwards; and every court before which any such objection shall be taken for any formal defect may, if it be thought necessary, cause the indictment to be forthwith amended in such particular by some officer of the court or other person, and thereupon the trial shall proceed as if no such defect had appeared." It is no ground for an application to quash an indictment that another indictment has been prepared for the same alleged offence. R. v. Stockley, 3 Q. B. 238 : 43 E. C. L. R.

But if the application be on the part of the prosecution, it seems it may be made at any time before the defendant has been actually tried upon the indictment. R. v. Webb, 3 Burr. 1468. Before an application of this kind on the part of the prosecution is granted, a new bill for the same offence must have been preferred against the defendant and found. R. v. Wynn, 2 East, 226. And when the court orders the former indictment to be quashed, it is usually upon terms, namely, that the prosecutor shall pay to the defendant such costs as he may have incurred by reason of such former indictment: R. v. Webb, 3 Burr. 1469; that the second indictment shall stand in the same plight and condition to all intents and purposes that the first would have done if it had not been quashed: R. v. Glen, 3 B. & Ald. 373 : 5 E. C. L. R.; R. v. Webb, 3 Burr. 1468; 1 W. Bl. 460; and (particularly where there has been any vexatious delay on the part of the prosecution, 3 Burr. 1458), that the name of the prosecutor be disclosed. R. v. Glen, *supra*. A. was indicted for perjury at the spring assizes, 1843, and entered into recognizances to try at the summer assizes, 1844. It being discovered that the indictment was defective, another indictment was prepared and found at the latter assizes, on which the prosecutor wished the defendant to be tried. Wightman, J., held that the defendant was entitled to have the first indictment disposed of before he could be tried on the second, but quashed the first indictment upon the terms of the prosecutor paying the defendant his costs of the traverse and recognizances, and the defendant proceeded to trial on the second indictment without traversing. R. v. Dunn, 1 C. & K. 730 : 47 E. C. L. R.

Amendment.] The power of amendment in criminal cases was first conferred by the 9 Geo. 4, c. 15, but was confined to cases of misdemeanor, and the power was only conferred on courts of oyer and terminer and general gaol delivery. It was at

first considered that the power ought to be very sparingly exercised: R. v. Cooke, 7 C. & P. 559: 32 E. C. L. R.; it being considered that one objection to an amendment was that the presentment on oath of the grand jury was thereby altered. R. v. Hewins, 9 C. & P. 786: 38 E. C. L. R. But the legislature does not appear to have had any such scruples, for by the 11 & 12 Vict. c. 46, s. 4, the power of amendment was extended to cases of felony; and this enactment was again replaced by the more sweeping provision of the 14 & 15 Vict. c. 100, s. 1, by which, after reciting that "offenders frequently escape conviction on their trials by reason of the technical strictness of criminal proceedings in matters not material to the *merits of the case, and that such technical strictness may safely be re- [*193] laxed in many instances so as to insure the punishment of the guilty, without depriving the accused of any just means of defence, and that a failure of justice often takes place on the trial of persons charged *with felony and misdemeanor*, by reason of variances between the statement in the indictment on which the trial is had and the proof of names, dates, matters, and circumstances therein mentioned, not material to the merits of the case, and by the misstatement whereof the person on trial cannot have been prejudiced in his defence," it is enacted that "whenever on the trial of any indictment for any felony or misdemeanor there shall appear to be any variance between the statement in such indictment and the evidence offered in proof thereof, in the name of any county, riding, division, city, borough, town corporate, parish, township, or place mentioned or described in any such indictment, or in the name or description of any person or persons, or body politic or corporate, therein stated or alleged to be the owner or owners of any property, real or personal, which shall form the subject of any offence charged therein, or in the name or description of any person or persons, body politic or corporate, therein stated or alleged to be injured or damaged, or intended to be injured or damaged by the commission of such offence, or in the christian name or surname, or both christian name and surname or other description whatsoever of any person whomsoever therein named or described, or in the name or description of any matter or thing whatsoever therein named or described, or in the ownership of any property named or described therein, it shall be lawful for the court before which the trial shall be had, if it shall consider such variance not material to the merits of the case, and that the defendant cannot be prejudiced thereby in his defence on such merits, to order such indictment to be amended, according to the proof, by some officer of the court or other person, both in that part of the indictment wherein such variance occurs, and in every other part of the indictment which it may become necessary to amend, on such terms as to postponing the trial to be had before the same or another jury, as such court shall think reasonable; and after such amendment the trial shall proceed, whenever the same shall be proceeded with, in the same manner in all respects, and with the same consequences, both with respect to the liability of witnesses to be indicted for perjury and otherwise, as if no such variance had occurred."

In R. v. Frost, 1 Dears. C. C. R. 427; S. C. 24 L. J. M. C. 61, the prisoners were charged in an indictment with having by night in pursuit of game entered the lands of George William Frederick Charles Duke of Cambridge; on the trial a witness proved that George William were two of the duke's christian names, and that he had others; no proof was given what they were. The prosecutor prayed an amendment of the indictment by striking out the names "Frederick Charles." This the court refused, and left the case to the jury, who being satisfied as to the identity of the duke, convicted the prisoners. On a case reserved, the Court of Criminal Appeal quashed the conviction. Parke, B., said, "The court of quarter

sessions have a power of amending given them by the statute 14 & 15 Vict. c. 100, s. 1, but they have a discretion; they are not bound to allow an amendment. Having omitted to amend at the trial, they cannot amend now. If they had asked us whether [*194] *they ought to have done so, it is clear that upon the evidence before them they were perfectly right in refusing to make the amendment prayed for; but that they would have been equally wrong in refusing to amend, had the amendment asked for been to strike out all the christian names of the Duke of Cambridge: who was described in the indictment as George William Frederick Charles Duke of Cambridge. According to the usual rule the prosecutor must prove all matter of description alleged, though it was not necessary to allege it. The proper course would have been for them to have found that the person mentioned was a person who had the title of the Duke of Cambridge, and to have omitted all the christian names." An indictment charged D. T. as a receiver of stolen goods, "he, the said A. B. knowing them to have been stolen;" upon verdict of guilty he moved in arrest of judgment, but the court of quarter sessions struck out the words "A. B.," and substituted "D T." It was held by the Court of Criminal Appeal that the court had no power to amend after verdict, so as to alter the finding of the jury, and that the prisoner was entitled to move in arrest of judgment. R. v. Larkin, Dear. C. C. 365; S. C. 23 L. J. M. C. 125. On an indictment against the defendant for obstructing a footway leading from A. to G., it appeared that the so-called footway was for half a mile from its commencement, as described in the indictment, a carriage-way; the obstruction was in the part beyond. The Court of Queen's Bench held that this was a misdescription, which ought to be amended under the 14 & 15 Vict. c. 100, s. 1. R. v. Sturge, 3 E. & B. 734: 77 E. C. L. R.; S. C. 23 L. J. M. C. 172.

It probably was not intended by section 25 (*supra*, p. 192) to increase the power of amendment given by s. 1 (*supra*, p. 143), but merely to prevent formal defects apparent on the face of the indictment being taken advantage of after verdict, by motion in arrest of judgment, or otherwise. The term "formal defect apparent on the face of the indictment" is rather indefinite; probably it would be held to mean such formal defects as may be amended by virtue of s. 1.

As to the amendment of the record after judgment, see Reg. v. Gregory, 4 D. & L. 777; Gregory v. Reg., *infra*, p. 206; Bowers v. Nixon, 12 Q. B. 546: 64 E. C. L. R.

Jury de medietate linguæ.] By the 28 Ed. 3, c. 13, s. 2, it is provided, "that in all manner of proofs which be to be taken or made amongst aliens or denizens, be they merchants or other, as well before the mayor of the staple, or before any other justices or ministers, although the king be party, the one half of the inquest or proof shall be denizens, and the other half aliens, if so many aliens and foreigners be in the town or place where such inquest or proof is to be taken that be not parties, nor with the parties in contracts, pleas, or other quarrels, whereof such inquests or proofs ought to be taken; and if there be not so many aliens, then there shall be put in such inquests or proofs as many aliens as shall be found in the same towns or places which be not thereto parties, nor with the parties, as afore is said, and the remanent of denizens, which be good men, and not suspicious to the one party nor to that other." By the 6 Geo. 4, c. 50, s. 47, it is provided that nothing in that act contained "shall extend, or be construed to extend, to deprive any alien indicted, or impeached of [*195] any felony, or misdemeanor, of the right of being tried *by a jury *de medietate linguæ:* but, on the prayer of every alien so indicted or impeached, the sheriff, or other proper minister, shall, by command of the court, return for one-half of the

jury a competent number of aliens, if so many there be in the town or place where the trial is had, and if not, then so many aliens as shall be found in the same town or place, if any; and that no such alien juror shall be liable to be challenged for want of freehold or of any other qualification required by this act; but any such alien may be challenged for any other cause, in like manner if he were qualified by this act."

It was considered that the statute of Ed. 3 did not extend to treasons: 2 Hawk. P. C. 420; 2 Hale, P. C. 271; nor to offences committed by gipsies under the 22 Hen. 8, c. 10; 4 Bl. Com. 352. A female alien who has married a natural-born subject of this country is, by virtue of the 7 & 8 Vict. c. 66, s. 16, naturalized, and is not entitled to be tried by a jury *de medietate linguæ*. R. v. Manning, 1 Den. C. C. 467. Whether an alien who is indicted jointly with a British subject thereby loses his privilege has been doubted; see R. v. Swinsden, 14 St. Tr. 559; R. v. Barrè, Moore, 557; R. v. Manning, *ubi supra*.

It has been said that if such a jury be not returned, it will, on an indictment against an alien or denizen, be ground for a challenge to the array by the defendant. But this is much doubted, and the proper mode of proceeding seems to be, for the accused to state, when he is arraigned, that he is an alien, and pray that a venire *de medietate linguæ* may be returned; this is entered on the record, as a suggestion, with the order of the court. See Rast. Entr. 204; 2 Dy. 144, b; 2 Hawk. P. C. 43; 2 Hale, P. C. 271; R. v. D'Eon, 1 Bla. 517; R. v. Manning, 1 Den. C. C. 467. After the jury are sworn, it is too late to take this objection. 2 Hale, P. C. 271; 2 Rol. 643; 1 Dy. 28 a; 2 Dy. 144, 145 a.

Challenges.] Challenges are either to the *array* or to the *polls;* they are also either *peremptory* or *for cause.*

Time and mode of taking them.] When one or more defendants have pleaded the general issue, they are informed by the officer of the court that the person whose names he is about to call will form the jury which is to try them, and that they are at liberty to challenge any who may be called, as they come to be sworn. The practice as to the mode of getting a jury together is not very clearly defined, and probably differs considerably in different parts of the country. It is difficult to understand whether the rule laid down in Vicars v. Langham, Hob. 235, that there can be no challenge either to the array or to the polls until a full jury appear, is of perfectly general application. It is repeated, and no limits indicated, in R. v. Edmonds, 4 B. & Ald. 471: 6 E. C. L. R.; Burn, Just., ed. 29, p. 697; and Joy on Confessions and Challenges, s. 10. It is probably stated somewhat too broadly, and what is meant is, that before the prisoner is put to his challenges, he has a right to have the whole panel called over to see who does, and who does not appear. Fost. Cr. Ca., fol. ed., p. 7; R. v. Frost, 9 C. & P. 135: 38 E. C. L. R. However this may be, it is the constant practice in some counties to swear the first juryman who answers as soon as he enters the box, without any further inquiry. In other places it is the practice to get a full jury into the box and then to commence swearing them; then if any one is rejected, to call *another in his place, and so on, *toties quoties*. [*196] If there is a defect of jurors, and either party pray a *tales*, he does not thereby lose his right to challenge: Vicars v. Langham, *supra;* Bull. N. P. 307; but Hawkins doubts whether a *tales* can be prayed for by the prosecutor, upon an indictment or criminal information, without a warrant from the attorney-general. Hawk. P. C. c. 41, s. 18. On the other hand, it is said by Blackstone, that "if by reason of chal-

lenges, or defaults of jurors, a sufficient number cannot be had of the original panel, a *tales* may be awarded as in civil causes, till the number of twelve is sworn." Bl. Comm. 355. See 14 Eliz. c. 9; 2 B. & C. 104; Arch. Cr. L., 13th ed., p. 143. But, inasmuch as, if the panel is exhausted, and no *tales* prayed, the court may, of its own accord, order the sheriff or other officer to return a fresh panel *instanter* (1 Hale, P. C. 28, 260), the point is not of very great importance.

There is no doubt that the time for the prisoner to challenge the polls is, as each juryman comes to the book to be sworn; that is, after the juryman has been called for the purpose of being sworn, and before the oath has commenced. It seems that the formal delivery of the book into the hands of a juryman is the commencement of the oath: R. v. Frost, 9 C. & P. 137: 38 E. C. L. R.; R. v. Brandreth, 32 St. Tr. 770; but if the juryman, of his own accord, takes the book into his hands, his doing so not being directed by the court, or sanctioned by the court, that does not take away the right of challenge. R. v. Frost, *supra*.

It is not absolutely necessary that the names should be called in the order in which they stand on the panel, but that order may be departed from if convenience requires it. Mansell v. Reg., Dear. & B. C. C. 375.

The challenge to the array must, of course, be before any juryman is sworn.

Where the indictment charged a subsequent felony in one count, and a previous conviction in another, and the prisoner, at the request of his counsel, was arraigned separately on the subsequent felony, and afterwards on the previous conviction, it was doubted if it was necessary to reswear the jury, and give the prisoner his challenges. R. v. Key, 3 C. & K. 371. But an express provision for separate arraignment without reswearing the jury is now made in most cases. See p. 206.

Challenges to the array.] The learning on this subject has to be sought out of old books; and there is great difficulty in deriving from them any precise rules. It is, however, quite clear that any partiality in the sheriff, under sheriff, or other officer, who is concerned in the return of the jury, is a good cause of challenge to the array. And that this partiality will be assumed to exist, if the sheriff or other officer be of kindred or affinity to either party; or if any dispute be pending between the sheriff and either party which would be likely to influence the sheriff; or if the sheriff or other officer have been concerned for either party in the same matter, either as counsel, attorney, or the like. Co. Litt. 156 a; Bac. Abr. tit. Juries (E).

There can be no challenge to the array on the ground of the partiality of the master of the crown office, in a case where he is the officer by whom the jury is to be nominated under a rule of court, according to the statute 3 Geo. 2, c. 25, s. 15. R. v. [*197] Edmonds, 4 B. *& Ald. 471: 6 E. C. L. R. The only remedy in such a case is to apply to the court to appoint another officer to nominate the jury.

By the 6 Geo. 4, c. 50, s. 13, the want of four hundredors in the panel is declared to be no cause of challenge; and by s. 28, the same is declared with respect to the want of a knight.

Whether there is the same right in a subject as in the crown to challenge for favor has been doubted: see 2 Hawk. P. C. c. 44, s. 32. But that doubt is obsolete.

A challenge to the array should be in writing, so that it may be put upon the record, and the other party may plead or demur to it; and the cause of challenge must be stated specifically. R. v. Hughes, 1 C. & K. 235: 47 E. C. L. R.

When the opposite party pleads to the challenge, two triers are appointed by the court; either two coroners, two attorneys, or two of the jury, or indeed any two indif-

ferent persons. If the array be quashed against the sheriff, a *venire facias* is then directed *instanter* to the coroner; if it be further quashed against the coroner, it is then awarded to two persons, called *elisors*, chosen at the discretion of the court; and it cannot be afterwards quashed. Co. Litt. 158 *a*.

It has been said that there is some distinction between trying challenges; those that are manifest or principal challenges as they are called, being tried by the court without the appointment of any triers. See Co. Litt. 156 *a;* Bac. Abr., tit. Juries, E. 12; but triers would probably now be appointed in all cases.

The truth of the matter alleged as cause of challenge must be made out by witnesses to the satisfaction of the triers. The challenging party first addresses the triers, and calls his witnesses; then the opposite party addresses them, and calls witnesses, if he thinks fit; in which case the challenger has a reply. The judge then sums up to the triers, who give their decision. See R. v. Dolby, 2 B. & C. 104; 9 E. C. L. R.

If a challenge to the array be found against the party, he may afterwards, notwithstanding, challenge to the polls.

Challenges to the polls.] Challenges to the polls are either peremptory or for cause. By the common law, the king or the prosecutor who represented him might challenge peremptorily any number of jurors; simply alleging *quod non boni sunt pro rege;* but by the 33 Ed. I, st. 4, this right is taken away, and the king is bound to assign the cause of his challenge; and this enactment is repeated in the same words in the 6 Geo. 4, c. 50, s. 29.

A practice, however, which has continued uniformly from the time of Ed. 1 to the present, enables the prosecutor to exercise practically the right of peremptory challenge; because, when a man is called, the juror will, on his request, be ordered to stand by; and it is only when the panel has been exhausted, that is, when it appears that, if the jurors ordered to stand by are excluded, there will be a defect of jurors, that the prosecutor is compelled to show his cause of objection. Mansell v. Reg., Dear. & B. C. C. 375. When it appears that, in consequence of the peremptory challenges by the defendant, and the jurymen ordered to stand by at the request of the prosecutor, a full jury cannot be obtained, then the proper course is to call over the whole panel again, only omitting those that have been peremptorily challenged by the defendant. R. v. Geach, 9 Car. *& P. 499; 38 E. C. L. R. And even [*198] on the second reading over of the panel, a juryman may be ordered to stand by at the request of the prosecutor, if it reasonably appears that sufficient jurymen may yet appear. Mansell v. Reg., *supra.*

The defendant has, in cases of felony, twenty peremptory challenges and no more: 6 Geo. 4, c. 50, s. 29; and the right exists whether the felony be capital or not. Gray v. Reg., 11 Cl. & Fin. 427. The number in cases of high treason is thirty-five, but this is reduced to twenty in such cases of treason as are, by the 39 & 40 Geo. 3, c. 93, and the 5 & 6 Vict. c. 57, directed to be tried in the same manner as charges of murder; these are cases where the overt act alleged in the indictment is assassination of the king, or any attempt against his person, whether direct, or by compassing and imagining only. In cases of misdemeanor there is no right of peremptory challenge. Co. Litt. 156. But the defendant is generally allowed to object to jurors as they are called, without showing any cause till the panel is exhausted; and that practice was approved of by Williams, J., in R. v. Blackman, 3 C. & K. 97. If the panel be thus exhausted, the list must be gone through again, and then no challenge allowed except for cause.

If a juror be challenged for cause before any juror sworn, two triers are appointed

by the court; and if he be found indifferent and sworn, he and the two triers shall try the next challenges; and if he be tried and found indifferent, then the two first triers shall be discharged, and the two first jurors tried and found indifferent shall try the rest. Co. Litt. 158; 2 Hale, P. C. 275; Bac. Abr., tit. Juries, E. 12.

The trial proceeds in the same manner as a challenge to the array. The juror challenged may be himself examined as to any cause of unfitness. Bac. Abr., *ubi supra.*

A juror may be challenged on the ground that he is not *liber et legalis homo;* and this would hold good against outlaws, aliens, minors, villeins, and females. He may also be challenged on the ground of infamy; which ground is said not to be removed by pardon: Bac. Abr., tit. Juries, E. 2; or that he is not fit to serve from age or some other personal defect; or that he is not qualified. The qualification of jurors is fixed by the 6 Geo. 4, c. 50, s. 1, which provides, that "all persons between the ages of twenty-one and sixty years, residing in any county in England, who shall have in his own name or in trust for him, within the same county, ten pounds by the year above reprizes, in lands or tenements, whether of freehold, copyhold, or customary tenure, or of ancient demesne, or of rents issuing out of any such lands or tenements, or in any such lands, tenements, and rents taken together, in fee simple, fee tail, or for the life of himself or some other person; or who shall have within the same county twenty pounds by the year above reprizes in lands or tenements, held by lease or leases for the absolute term of twenty-one years, or some longer term, or for any term of years determinable on any life or lives, or who, being a householder, shall be rated or assessed to the poor-rate, or to the inhabited house duty in the county of Middlesex; on a value of not less than thirty pounds, or in any other county on a value of not less than twenty pounds, or who shall occupy a house containing not less than fifteen "windows, shall be qualified to serve on juries on all issues in all the superior courts, both civil and criminal, and in all courts of assizes, nisi prius, oyer [*199] and terminer, and *gaol delivery, and in all issues joined in courts of sessions of the peace, such issues being respectively in the county in which every man so qualified respectively shall reside." And every man, being between the aforesaid ages, "residing in any county in Wales, and being there qualified to the extent of three-fifths of any of the foregoing qualifications," shall be qualified to serve on juries in all issues joined in the courts of great sessions, and in courts of sessions of the peace, in every county in Wales, in which every man so qualified shall reside. By the 5 & 6 Wm. 4, c. 76, s. 121, in boroughs having separate courts of quarter sessions, the same persons are qualified, provided they be burgesses of the borough. By s. 122 of the same act, members of the council, justices of the peace, the town clerk, and treasurer within the borough, are disqualified.

A juror may also be challenged on the ground that he is not indifferent. The same circumstances which would support a challenge to the array for indifferency in the sheriff, would support a challenge to the poll for the same defect in a juryman. It is no cause of challenge of a juror by the prosecutor that the juror is a client of the prisoner, who is an attorney: R. v. Geach, 9 C. & P. 499: 38 E. C. L. R.; nor that the juror has visited the prisoner as a friend since he has been in custody. Id. It is not allowable to ask a juryman if he has not previously to the trial expressed himself hostilely to the prisoner, in order to found a challenge, but such expressions must be proved by some other evidence. R. v. Edmonds, 4 B. & Ald. 471: 6 E. C. L. R; R. v. Cooke, 13 How. St. Tr. 333. And they must amount to something more than an expression of opinion, in order to constitute a good cause of challenge; they must lead directly to the conclusion that the juryman is not likely to act impartially after

he has heard the evidence. Joy on Confessions and Challenges, p. 189. On the trial of an indictment for a riot, it is ground for challenge by the prosecution that the juror challenged is an inhabitant of the town where the riot took place, and that he took an active part in the matter which led to it. Per Coleridge, J., R. v. Swain, 2 Moo. & R. 112.

After the prisoner has challenged twenty jurors peremptorily, he may still challenge others for cause. R. v. Geach, 9 Car. & P. 499 : 38 E. C. L. R.

As in a challenge to the array, the ground of challenge should be specifically stated in writing, in order that it may be placed on the record, with the judgment thereon. R. v. Hughes, 1 C. & K. 235 : 47 E. C. L. R.

Challenges improperly allowed or disallowed.] It is said that if a challenge be overruled without demurrer, the ruling may be made the subject of a bill of exceptions. R. v. City of Worcester, Skin. 101. If there is a demurrer and judgment thereon, there would be matter of error on the record. See R. v. Edmonds, 4 B. & Ald. 471 : 6 E. C. L. R. If a challenge be improperly allowed, it is doubtful whether there is any matter for error. See Mansell v. Reg., Dear. & B. C. C. 375.

Persons unfit to serve not challenged.] A juror who is not qualified may object to serve, though not challenged; and, if upon examination on oath, he be found not to be so, he will be ordered to retire. 4 Harg. St. Tr. 740. A juryman, on being called to serve on a trial for murder, stated that he had conscientious scruples to capital punishment. Upon this the judge ordered him to withdraw, although the counsel for the prisoner demanded that he should serve. The *Court of Queen's [*200] Bench, on a writ of error, without stating whether they considered that this was the right course, said that they wished it to be understood that they by no means acquiesced in the doctrine contended for on the authority of an anonymous case in Brownlow & Gold. Rep. 41, that a judge, on the trial of a criminal case, has no authority, if there be no challenge on either side, to excuse a juryman on the panel when he is called, or to order him to withdraw, if he be palpably unfit, by physical or mental infirmity, to do his duty in the jury-box. Mansell v. Reg., *ubi supra.*

Miscalling a juror.] On a trial for murder, the panel returned by the sheriff contained the names of J. H. T. and W. T. The name of J. H. T. was called from the panel as one of the jury, and J. H. T., as was supposed, went into the box, and was duly sworn by the name of J. H. T. The prisoner was convicted. The following day it was discovered that W. T. had, by mistake, answered to the name of J. H. T., and that W. T. was really the person who had served on the jury. It was held, in the Court of Criminal Appeal, by Lord Campbell, C. J., Cockburn, C. J., Coleridge, J., Martin and Watson, BB. (five), that there had been a mistrial; by Erle, Crompton, Crowder, Willes, and Byles, JJ., and Channell, B. (six), that there had been no mistrial. It was doubted, in this case, whether the objection was matter of error; and Pollock, C. B., Erle, Williams, Crompton, Crowder, and Willes, JJ., and Channell, B., thought that this was not a question of law arising at the trial over which the Court of Criminal Appeal had jurisdiction. R. v. Mellor, Dear. & B. C. C. 468.

Giving the prisoner in charge.] When the jury have been brought together and sworn, the usual proclamation is made, and then the prisoner or prisoners intended to be tried are given in charge to the jury as their turn comes. It is not necessary

that, after a jury has been once got together, and the prisoner had his challenges, that that jury should try him, if he be not given in charge; a fresh jury may be got together for the purpose, each of the prisoners, of course, having the same right of challenge as before.

By the 24 & 25 Vict. c. 96, s. 116, in larceny and offences connected therewith (*supra*, p. 182), where a prisoner is charged with a previous conviction, the jury shall be charged in the first instance to inquire concerning the subsequent offence only, "and after that inquiry is concluded, the prisoner is to plead to the count charging him with a previous conviction," and "if he deny that he had been so previously convicted, or stand mute of malice, or will not answer directly to such question, the jury shall then be charged to inquire concerning such previous conviction or convictions; and in such case it shall not be necessary to swear the jury again, but the oath already taken by them shall, for all purposes, be deemed to extend to such last-mentioned inquiry." The 24 & 25 Vict. c. 99, s. 37, contains a similar provision with respect to coinage offences. In other offences the practice stands as at common law, the 14 & 15 Vict. c. 19, s. 9, which is general in its provisions, having been repealed.

Opening the case—conversations and confessions.] Where there is counsel for a prisoner in a case of felony, the counsel for the prosecution ought always to open the case. R. v. Gascoine, 7 C. & P. 772: 32 E. C. L. R. But sometimes he does not [*201] open it, if the prisoner has no counsel: R. *v. Jackson, Id. 773; unless there is some peculiarity in the circumstances. Per Parke, B., R. v. Bowler, Ib. Where there is no counsel for the prosecution there can be no opening, as the prosecutor himself is never allowed personally to address the jury. R. v. Brice, 2 B. & Ald. 606. Where the counsel for the prosecution was proceeding to state the details of a conversation which one of the witnesses had had with the prisoner, upon an objection being taken, the court said, that in strictness he had a right to pursue that course: R. v. Deering, 5 C. & P. 165: 24 E. C. L. R.; 7 C. & P. 773: 32 E. C. L. R.; and the same rule was laid down in R. v. Swatkin, 4 C. & P. 548: 19 E. C. L. R.; but the judges in that case stated, that the correct practice was only to state the general effect of the conversation. 5 C. & P. 166 (*n*). In a later case, however, Parke, B., after consulting Alderson, B., ruled, that with regard to conversations, the fair course to the prisoner was to state what it was intended to prove. R. v. Orrell, MS., Lanc. Spr. Ass., 1835; 1 Moo. & R. 467; R. v. Hartel, 7 C. & P. 773: 32 E. C. L. R.; R. v. Davis, Id. 785. Parke, B., seems to have thought that the rule was different with respect to confessions, and that they ought not to be opened, as they may turn out to have been made under circumstances rendering them inadmissible in evidence. See R. v. Davis, *supra*. Probably the learned baron was here speaking of a formal confession of all the facts.

Defence.] The counsel for the defendant cross-examines the witnesses for the prosecution. As to the mode of conducting the cross-examination, see *supra*, p. 131. When they have all been called, he proceeds to address the jury. Where there are several defendants, and they are separately defended, the order in which the counsel for the defence are to address the jury is not very clearly settled. In R. v. Barber, 1 C. & K. 434: 47 E. C. L. R., Gurney, B. (Williams, and Maule, JJ., being present), said that the rule was this: that, if counsel cannot agree among themselves as to the course to be adopted, it is for the court to call upon them in the order in which the prisoners are named in the indictment. In R. v. Esdaile, 1 F. & F. 213,

which was an indictment for a conspiracy to defraud, Lord Campbell, C. J., called upon the counsel for the defendants in the order of their seniority. In R. v. Belton, 5 Jur. N. S. 276, Martin, B., said that, where one prisoner was defended by counsel and another not, he made it an invariable rule to hear the counsel for the defended prisoner first. In R. v. Harris, 3 Jur. N. S. 272, Channell, B., in a similar case, decided upon following the order in the indictment; but in R. v. Holman, Id. 722, Pollock, C. B., said, he did not subscribe to that imaginary rule of following the order in the indictment, and called upon the counsel before the undefended prisoner. In R. v. Meadows, 2 Jur. N. S. 718, Erle, J., said, "In a case before Lord Tenterden, in which I was counsel, it was held that the priority of defence should be determined by the priority of the names of the prisoners in the indictment, and I have ever since understood that to be the rule. Attention must, however, be paid to the precise offence with which each prisoner is charged; for instance, the principal should make his defence before the accessory, and the thief before the receiver, and such like; but when the indictment is drawn by a knowing man, he usually puts the principal person first." When the counsel for one prisoner has witnesses to facts to examine, the counsel for another cannot be allowed to postpone his address to the jury until *after those witnesses have been examined. R. v. Barber, 1 C. & [*202] K. 434: 47 E. C. L. R.

A prisoner's counsel, in addressing the jury, will not be allowed to state anything which he is not in a situation to prove, or which is not already in proof. Per Coleridge, J., R. v. Beard, 8 C. & P. 142: 34 E. C. L. R. And after his counsel has addressed the jury, the prisoner will not be permitted to make any statement to them. R. v. Boucher, Id. 141. But where a prisoner had in the absence of his counsel pleaded to an indictment, Patteson, J., on the application of the counsel, allowed the prisoner to demur before the evidence was gone into. R. v. Purchase, C. & M. 617: 41 E. C. L. R. Where, in a case of shooting with intent to do grievous bodily harm, there was no one present at the committing of the offence but the prosecutor and the prisoner, Alderson, B., allowed the latter, under these peculiar circumstances, to make his own statement before his counsel addressed the jury. R. v. Malings, 8 C. & P. 242: 34 E. C. L. R. And the same course was permitted by Gurney, B., in another case, but with an observation that it ought not to be drawn into a precedent. R. v. Walkling, Id. 243. "The general rule certainly ought to be that a prisoner defended by counsel should be entirely in the hands of his counsel, and that rule should not be infringed on, except in very special cases indeed." Per Patteson, J., R. v. Ryder, 8 C. & P. 539. See also R. v. Dyer, 1 Cox, C. C. 113. In R. v. Taylor, 1 F. & F. 535, Byles, J., refused to permit it, but allowed the prisoner to exercise the option of either speaking for himself or of having his counsel to speak for him. The importance of this point arises from the anxiety which frequently exists on the part of the defence to lay the prisoner's statement before the jury, which the prosecutor cannot be compelled to do. In R. v. Beard, *supra*, Coleridge, J., said that counsel could not be allowed to relate the prisoner's story, unless he were in a position to prove its truth; on the other hand Crowder, J., told the counsel for the prisoner that, what the prisoner said before a magistrate, he might now repeat through his counsel. R. v. Haines, 1 F. & F. 86. Perhaps the better course is for the court, which it has power to do, to have the statement read to the jury.

Formerly prisoners charged with felony were not allowed to make their defence by counsel, but now the 6 & 7 Wm. 4, c. 114, s. 1, after reciting that "it is just and reasonable that persons accused of offences against the law should be enabled to make their full answer and defence to all that is alleged against them," enacts that "all

persons tried for felony shall be admitted, after the close of the case for the prosecution, to make full answer and defence thereto by counsel learned in the law, or by attorney, in courts where attorneys practice as counsel." And by s. 2, "in all cases of summary conviction persons accused shall be admitted to make their full answer and defence, and to have all witnesses examined and cross-examined by counsel or attorney."

Right to reply.] Wherever any witnesses are called for the defence, or any documents put in on behalf of the defendant, at any time in the course of the trial, the counsel for the prosecution will have a right, at the conclusion of the defence, to address the jury in reply. This is so laid down as to depositions offered as evidence on the part of the defendant in the rules drawn up by the judges after the passing of [*203] the Prisoner's Counsel Act (see p. 63); but the practice is precisely similar *in all cases. An effort is frequently made to induce the court itself to refer to the depositions and to have them read, either with a view of contradicting a witness without giving the other side a right to reply, or in order to get the prisoner's statement before the jury (*supra*, p. 145), and this is sometimes done. Coleridge, J., doubted whether this course would not equally give the counsel for the prosecution a right to reply. R. v. Edwards, 8 Car. & P. 20 : 34 E. C. L. R.

Although the evidence brought for the defence be only as to character, the right to reply still exists, but it is seldom exercised.

Where four prisoners were jointly indicted, two for stealing a sheep, and two for receiving separate parts of the sheep so stolen, and the counsel for the receivers put in the depositions to contradict the case against them, by showing a variation between the testimony of the principal witness and his deposition, but no evidence was given on behalf of the other prisoners, Parke, B., after conferring with Coltman, J., stated that the reply must be confined altogether to the case of the receivers. His lordship added, that he did not wish to lay down a general rule, that in no case, where several were indicted together, would witnesses being called by one entitle the prosecutor to reply against all, but in the case before him the offences were distinct, as the receivers might have been indicted separately from the principals. R. v. Hayes, 2 Moo. & R. 155. Three prisoners were indicted for murder, and witnesses were called for the defence of one only: Talfourd, J., held that the counsel for the prosecution was entitled to reply generally on the case, and was not to be limited in his reply to the case as against the prisoner for whom the witnesses were called, although the evidence adduced for the one prisoner did not affect the case as it respected the other two prisoners. R. v. Blackburn, 3 C. & K. 330. Where two prisoners were indicted for night poaching, one of whom called witnesses to prove an *alibi*, and the other called none, Williams, J., allowed the counsel for the prosecution to reply on the whole case. R. v. Briggs, 1 F. & F. 106.

A. and B, the drivers of rival omnibuses, were indicted for the manslaughter of C., caused by their negligence in driving. After the case for the prosecution had closed, and A.'s counsel had addressed the jury, witnesses were called on behalf of B., for the purpose of throwing all the blame on A.; it was held that the counsel for A. was entitled to cross-examine B.'s witnesses, and again to address the jury. R. v. Wood, 6 Cox C. C. 224; Acc. R. v. Bardett, 24 L. J. M. C. 63.

Where there were cross-indictments for assault to be tried as traverses at the assizes, and the same transaction was the subject-matter of both indictments, Gurney, B., directed the jury to be sworn on both traverses, and the counsel for the prosecution of the indictment first entered to open his case and call his witnesses, and then the

counsel on the other side to open his case and call his witnesses; neither side to have a reply. R. v. Wanklyn, 8 C. & P. 290.

The attorney-general of England, prosecuting for the crown *in person*, has the right to reply, whether witnesses be called or not. This is admitted; but it is doubtful whether the crown has the right in any, and, if any, what other cases. In R. v. Esdaile, 1 F. & F. 213, a prosecution instituted by the crown, the right was exercised without objection by the counsel for the crown, who was not attorney-general. In R. v. Beckwith, 7 Cox C. C. 505, a prosecution instituted by the *poor- [*204] law board, Byles, J., refused to permit it, saying that the right was confined to the attorney-general of England in person, and that he wished it were not allowed even in that case. In R. v. Christie, 1 F. & F. 75, a prosecution at Liverpool directed by the board of trade, Martin, B., refused to permit it to the attorney-general of the county palatine, and said, that he thought the practice in any case was a bad one. In R. v. Taylor, 1 F. & F. 535, Byles, J., said, he did not admit the right in the case of counsel, not the attorney-general, prosecuting for the mint. On the other hand in R. v. Gardiner, 1 C. & K. 628: 47 E. C. L. R., where it was stated by the counsel for the prosecution that he appeared as the representative of the attorney-general, it was held by Pollock, C. B., that he was entitled to the right.

Verdict.] If by mistake the jury deliver a wrong verdict (as where it is delivered without the concurrence of all), and it is recorded, and a few minutes elapse before they correct the mistake, the record of the verdict may also be corrected. R. v. Parkins, 1 Moody, C. C. 46. In R. v. Bodden, Dear. C. C. 229, S. C. 23 L. J. M. C. 7, one of the jury pronounced a verdict of "not guilty," which was entered by the clerk of the peace in his minute-book, and the prisoner was discharged; other jurymen then interfered, and said their verdict was "guilty;" whereupon the prisoner was brought back, and the jury being again asked for their verdict, they all said it was "guilty," and that they had been unanimous; a verdict of guilty having been recorded, it was held by the Court of Criminal Appeal that the verdict was properly amended, and that the conviction must stand.

The jury have a right to find either a general or a special verdict.(1) 4 Bl. Comm 361; 1 Chitty, C. L. 637, 642; Mayor, &c., of Devizes v. Clark, 3 A. & E. 506: 30 E. C. L. R. And in a case of felony, although a judge may make the suggestion, he will not direct the jury to find special facts, and they may, if they think proper, return a general verdict, instead of finding special facts, with a view to raise a question of law. Per Lord Abinger, C. B., R. v. Allday, 8 C. & P. 136: 34 E. C. L. R. Upon an indictment for stealing a watch, the jury returned the following verdict: "We find the prisoner not guilty of stealing the watch, but guilty of keeping it, in the hope of reward, from the time he first had the watch." Held by the Court of Criminal Appeal that this finding amounted to a verdict of "not guilty." R. v. York, 1 Den. C. C. R. 335, S. C. 18 L. J. M. C. 38.

Arrest of judgment.] A motion in arrest of judgment may be made for any substantial defect which appears on the face of the record. It is made at the time when the defendant is called up to receive judgment, and cannot be made after judgment is given. Formal defects, apparent on the face of the indictment, which were formerly ground for arrest of judgment, can now only be taken advantage of by demurrer, or motion to quash the indictment, and not afterwards. 14 & 15 Vict. c.

(1) The idea that in criminal cases the jury are the judges of the law as well as of the facts, is erroneous. Carpenter v. The People, S. Barbour, 603.

100, s. 25. If the objections taken in arrest of judgment be valid, the whole proceedings will be set aside; but the party may be indicted again. 4 Rep. 45; 4 Bl. Comm. 375.(1)

Judgment.] The 11 Geo. 4, and 1 Wm 4, c. 70, s. 9 (the 1 & 2 Wm. 4, c. 31, [*205] s. 4, I.), enacts, "that upon all trials for felonies or *misdemeanors, upon any record in the Court of King's Bench, judgments may be pronounced during the sittings or assizes by the judge before whom the verdict shall be taken, as well as upon the person who shall have suffered judgment by default or confession upon the same record, as upon those who shall be tried and convicted, whether such persons be present or not in court, excepting only where the prosecution shall be by information filed by leave of the Court of King's Bench, or such cases of informations filed by his Majesty's attorney-general, wherein the attorney-general shall pray that the judgment may be postponed; and the judgment so pronounced shall be indorsed upon the record of nisi prius, and afterwards entered upon the record in court, and shall be of the same force and effect as a judgment of the court, unless the court shall, within six days after the commencement of the ensuing term, grant a rule to show cause why a new trial should not be had, or the judgment amended; and it shall be lawful for the judge before whom the trial shall be had, either to issue an immediate order or warrant for committing the defendant in execution, or to respite the execution of the judgment, upon such terms as he shall think fit, until the sixth day of the ensuing term; and, in case of imprisonment shall be part of the sentence, to order the period of imprisonment to commence on the day on which the party shall be actually taken to and confined in prison."

It is not necessary in recording sentence to refer to the statute which gives the punishment. Murray v. Reg. (in error), 7 Q. B. 700: 53 E. C. L. R.; S. C. 14 L. J. Q. B. 357.

Where judgment on a record of the Q. B. is pronounced at the assizes, under the above section, the court on motion under that clause, may, if they think fit, amend the judgment by ordering it to be arrested. Reg. v. Nott, 4. Q. B. 768. A sentence of imprisonment passed at nisi prius, under the above section, the defendant not being present, may declare that the imprisonment shall commence on the day on which he shall be taken to and confined in prison. King v. Reg. 7 Q. B. 782, S. C. 14 L. J. M. C. 172.

Where there are several felonies or misdemeanors charged in the indictment, care must be taken in passing sentence, and also in making up the record, that no error is made which will vitiate the judgment. There is some obscurity as to what will constitute error in this respect. In R. v. Powell, 2 Barn. & Adol. 75, 22 E. C. L. R., the first count of the indictment charged an assault with intent to ravish, the second a common assault. The record stated that the jury found that "the said H. P. is guilty of the misdemeanor and offence in the said indictment specified, in the manner and form as by the said indictment is alleged against him; whereupon all and singular the premises being seen, &c, it is considered and adjudged by the court here, that the said H. P., for the said misdemeanor, be imprisoned in the house of correction at Guilford, in the said county of Surrey, for the space of two years,

(1) One good count, even if others are defective, will support a general verdict of guilty. The People v. Stein, 1 Parker C. R. 202; Baron v. The People, Ibid. 246; Stoughton v. Ohio, 2 Ohio, 562; The United States, 5 McLean, 23; The State v. Burke, 33 Maine, 574; Hazen v. The Commonwealth, 11 Harris, 355; The Commonwealth v. Hawkins, 3 Gray, 463; The State v. Rutherford, 13 Texas, 24; United States v. Potter, 6 McLean, 186; The State v. Montgomery, 28 Missouri, 594; Johnson v. The State, 5 Dutcher, 453.

and be there kept to hard labor." The Court of Q. B. held upon a writ of error that the word "misdemeanor" was *nomen collectivum*, and that the finding of the jury and the judgment applied therefore to the whole indictment, and were good. In the case of O'Connell v. Reg. 11 Cl. & F. 155, the indictment contained several counts charging different offences against various defendants. The judgment against each of the defendants was stated in the record to be "in respect of the offences aforesaid." Some of the counts turned out to be bad. A large majority both of the English and Irish *judges thought that the judgment being warranted by the [*206] counts which were good ought to be confirmed, and in this opinion Lord Brougham and Lord Lyndhurst concurred; but Lord Cottenham, Lord Campbell, and Lord Denham thought otherwise; and the judgment was reversed In Campbell v. Reg. 11 Q. B. 799, 63 E. C. L. R., S. C. 14 L. J. M. C. 76, there were two counts in the indictment, one charging a stealing in the dwelling-house of D. above the value of 5*l.*, the other for a simple larceny of the moneys of D. (not other moneys). The record stated the finding of the jury against the prisoners to be "guilty of the felony aforesaid on them above charged as aforesaid," and the judgment to be that the said prisoners "be transported beyond the seas, &c., for the term of ten years." The Court of Queen's Bench held that the word "felony" in this record could not be construed in the same way as the word "misdemeanor" in R. v. Powell, *supra*, namely, as *nomen collectivum*, so that it was uncertain to which of the felonies charged the finding of the jury applied; and that as the judgment of transportation for ten years was applicable to the first felony charged only, the judgment was erroneous and reversed. The Court of Exchequer Chamber confirmed this decision.

It was said in the course of the discussion in this case that, even if the word "felony" could be construed in the way contended for, the judgment was erroneous, on the authority of O'Connell v. Reg., *supra*; but the Court of Exchequer Chamber seemed to think otherwise, and that in that case the judgment would have been good.

In Gregory v. Reg. 15 Q. B. 957: 69 E. C. L. R., S. C. 19 L J. Q. B. 367, the sentence passed by the judge was that "for and in respect of the offences charged upon him in and by each and every count of the said indictment, he the said defendant be imprisoned in the Queen's prison for the space of six calendar months now next ensuing." The judgment as stated in the record was that the said B. G., for his offences aforesaid, whereof he is convicted as aforesaid, be imprisoned in the Queen's prison for the space of six calendar months now next ensuing. The Court of Exchequer Chamber seemed to think that the judgment as stated in the record was in form a sentence of one term of six months' imprisonment upon the whole indictment, and would, therefore, be erroneous if any count were bad. No final opinion was, however, expressed, because on an application on the part of the prosecution the court below allowed the judgment to be amended according to the sentence passed, a note of which was contained in the master's book.

The difficulty may now be frequently got over by the power conferred by the 11 & 12 Vict. c. 78, s. 5, which provides that "whenever any writ of error shall be brought upon any judgment on any indictment, information, presentment, or inquisition, in any criminal case, and the court of error shall reverse the judgment, it shall be competent for such court of error either to pronounce the proper judgment or to remit the record to the court below, in order that such court may pronounce the proper judgment upon such indictment, information, presentment, or inquisition." Under this statute where the prisoner is convicted on good and bad counts, and judgment is entered generally on all or on a bad count, the court of error may arrest the

judgment on the bad counts, and enter judgment, or direct it to be entered, on the good ones. Holloway v. Reg., 2 Dear. C. C. 287, S. C. 17 Q. B. 319: 79 E. C. L. R.

[*207] *The form in which sentence was passed in Gregory v. Reg. *supra*, was said by Lord Denman (p. 968 of the report) to be that which the judges had adopted in order to avoid the objection raised in O'Connell v. Reg. And the best plan in making up the record will be to state a separate judgment for each count. See Gregory v. Reg., p. 973 of the report.

An offender, upon whom sentence of death has been passed, ought not, while under that sentence, to be brought up to receive judgment for another felony, although he was under that sentence when he was tried for the other felony, and did not plead his prior attainder. Anon. Russ. & Ry. 268.

By the 24 & 25 Vict. c. 100, s. 2 (replacing the 6 & 7 Wm. 4, c. 30, s. 2), "Upon every conviction for murder the court shall pronounce sentence of death, and the same may be carried into execution, and all the proceedings upon such sentence and in respect thereof may be had and taken, in the same manner in all respects as a sentence of death might have been pronounced and carried into execution, and all the proceedings thereupon and in respect thereof might have been had and taken, before the passing of this act, upon a conviction for any other felony for which the prisoner might have been sentenced to suffer death as a felon."

By s. 3, "the body of every person executed for murder shall be buried within the precincts of the prison in which he shall have been last confined after conviction, and the sentence of the court shall so direct." See as to the sentence for murder under the old law, R. v. Fletcher, Russ. & R. 58; R. v Wyatt, Id. 230.

Where the defendant has been convicted of a misdemeanor in the Queen's Bench, the prosecutor upon the motion for judgment may produce affidavits to be read in aggravation of the offence, and the defendant may also produce affidavits to be read in mitigation. Affidavits in aggravation are not allowed in felonies, although the record has been removed into the Court of Queen's Bench by *certiorari*. R. v. Ellis, 6 B. & C. 145: 13 E. C. L. R.; 3 Burn's Justice, last ed. 933. Where a prisoner pleaded guilty at the Central Criminal Court to a misdemeanor, and affidavits were filed, both in mitigation and aggravation, the judges refused to hear the speeches of counsel on either side, but formed their judgment of the case by reading the affidavits. R. v. Gregory, 1 C. & K. 228: 47 E. C. L. R.; but it is usual to hear counsel in mitigation. See also the same case as to removing from the files of the court affidavits in mitigation. See also the same case as to removing from the files of the court affidavits in mitigation containing scandalous and irrelevant matter, such being a contempt of court; and also as to allowing the opposite party to deny by counter-affidavits the affidavits filed in mitigation.

Where a defendant, having pleaded guilty to an indictment, is brought up for judgment, the counsel for the crown is to be heard before the counsel for the defendant, and the affidavits in aggravation are to be read before the affidavits in mitigation. R. v. Dignam, 7 A. & E. 593: 34 E. C. L. R. *Contra*, where a verdict of guilty has been taken, though by consent, and without evidence. R. v. Caistor, Ib. 594 (*n*). *Semble*, that the rule is not to be varied where several defendants are jointly indicted, and some suffer judgment by default, and others are convicted on verdict. And in such a case, where there was no affidavit in aggravation, but affidavits were offered in mitigation, the court heard the counsel for the defendants first. R. v. Sutton, Ib.

[*208] *By the 8 & 9 Vict. c. 68 (E. & I.), execution on judgments for misdemeanors may be stayed or suspended by writ of error and bail thereon. But by the 16 & 17 Vict. c. 32, no execution is to be stayed, or the defendant to be discharged

from custody, till a recognizance has been given for the defendant's personal appearance, except when the writ is brought by the attorney-general. See ss. 1, sqq. of that statute: Reg. Gen. Q. B. E. T. 1853; 1 El. & Bl. 693: 72 E. C. L. R.; Dugdale v. Reg. 2 El. & Bl. 129: 75 E. C. L. R.; S. C. 22 L. J. M. C. 50; Sill v. Reg. 22 L. J. M. C. 41.

Recording judgment of death.] By the 4 Geo. 4, c. 48 (E. & I.), s. 1, "whenever any person shall be convicted of any felony, except murder, and shall by law be excluded the benefit of clergy in respect thereof, and the court before which such offender shall be convicted shall be of opinion that, under the particular circumstances of the case, such offender is a fit and proper subject to be recommended for the royal mercy, it shall and may be lawful for such court, if it shall think fit so to do, to direct the proper officer then being present in court to require and ask, whereupon such officer shall require and ask, if such offender hath or knoweth anything to say, why judgment of death should not be recorded against such offender; and, in case such offender shall not allege any matter or thing sufficient in law to arrest or bar such judgment, the court shall and may, and is hereby authorized to abstain from pronouncing judgment of death upon such offender; and, instead of pronouncing such judgment, to order the same to be entered of record, and thereupon such proper officer as aforesaid shall and may, and is hereby authorized to enter judgment of death on record against such offender in the usual and accustomed form, and in such and the same manner as is now used, and as if judgment of death had actually been pronounced in open court against such offender by the court before which such offender shall have been convicted."

By the act for the better ordering of prisons (2 & 3 Vict. c. 56, s. 17), offenders against whom sentence of death is recorded may be kept to hard labor while they remain in the gaol, or in the house of correction.

Under the 6 & 7 Wm. 4, c. 30, *supra*, the court was held to be empowered to direct the sentence of death to be recorded in cases of murder. R. v Hogg, 2 Moo. & R. 380. The same would doubtless be held under the 24 & 25 Vict. c. 100, s. 2.

Fines and sureties.] By the 24 & 25 Vict. c. 96 (larceny), s. 117, "whenever any person shall be convicted of any indictable misdemeanor punishable under this act, the court may, if it shall think fit, in addition to or in lieu of any of the punishments by this act authorized, fine the offender, and require him to enter into his own recognizances and to find sureties, both or either, for keeping the peace and being of good behavior; and in case of any felony punishable under this act, the court may, if it shall think fit, require the offender to enter into his own recognizances, and to find sureties, both or either, for keeping the peace, in addition to any punishment by this act authorized: provided that no person shall be imprisoned under this clause for not finding sureties for any period exceeding one year."

A similar provision is contained in the 24 & 25 Vict. c. 97 (injuries *to [*209] property), s. 73; in the 24 & 25 Vict. c. 98 (forgery), s. 51; in the 24 & 25 Vict. c. 99 (coinage), s. 38; and in the 24 & 25 Vict. c. 100 (offences against the person), s. 71.

By the 24 & 25 Vict. c. 94, s. 4, an accessory after the fact may be required to enter into his own recognizances and to find sureties, both or either, for keeping the peace, in addition to the other punishments which may be inflicted upon him; provided that no person shall be imprisoned for not finding such sureties for more than one year.

Discharge of jury.] If a juryman be taken ill so as to be incapable of attending through the trial, the jury may be discharged and the prisoner tried *de novo;* another juryman may be added to the eleven; but in that case the prisoner should be offered his challenges over again, as to the eleven, and the eleven should be sworn *de novo.* R. v. Edward, Russ. & Ry. 224; 4 Taunt. 309; 2 Leach, 621 (*n*); Reg. v. Ashe, 1 Cox, C. C. 150. So if during the trial the prisoner be taken so ill that he is incapable of remaining at the bar, the judge may discharge the jury, and, on the prisoner's recovery, another jury may be returned; and the proceedings commenced *de novo.* The court, on a trial for a misdemeanor, doubted whether in such a case the consent of counsel was sufficient to justify the proceeding with the trial in the absence of the defendant. R. v. Streek, *coram* Park, J., 2 C. & P. 413: 12 E. C. L. R.; R. v. Gourmoo, 2 Leach, C. C. 546, *acc.*

When the evidence on both sides is closed, or after any evidence has been given, the jury cannot be discharged, unless in case of evident necessity (as in the cases above mentioned), till they have given in their verdict, but are to consider of it and deliver it in open court.(1) But the judges may adjourn while the jury are withdrawn to confer, and may return to receive the verdict in open court. 4 Bl. Com. 360. And when a criminal trial runs to such length that it cannot be concluded in one day, the court, by its own authority, may adjourn till next morning. But the jury must be kept together (at least, in a capital case), that they may have no communication but with each other. 6 T. R. 527; Stephen's Summary, 313. It is a general rule that upon a criminal trial there can be no separation of the jury after the evidence is entered upon, and before a verdict is given. R. v. Langhorn, 7 How. St. Tr. 497; R. v. Hardy, 24 Id. 414. In the latter case on the first night of the trial, beds were provided for the jury at the Old Bailey, and the court adjourned till the next morning. On the second night, with the consent of the counsel on both sides, the court permitted the jury to pass the night at a tavern, whither they were conducted by the under-sheriffs and four officers sworn to keep the jury. Id. 572.

(1) In cases not capital where there is no prospect of agreement, a juror may be withdrawn without the defendant's consent. Commonwealth v. Bowden, 9 Mass. 494; Commonwealth v. Wood, 12 Mass. 313; People v. Alcott, 2 Johns. Cas. 301; State v. Woodruff, 3 Day's Cases, 504; People v. Barret et al., 2 Caines, 100; People v. Denton, 2 Johns. Cas. 275.

In capital cases the court may discharge a jury in case of necessity. United States v. Haskell, 4 Wash. C. C. Rep. 402; Commonwealth v. Cook, 6 Serg. & Rawle, 580; but mere inability to agree is not such a case, nor does it arise from the illness of some of the jury, if such illness can be removed by permitting refreshments, and the court, against the consent and prayer of the prisoner, refuse such refreshment, unless a majority of the jury agree to receive them. Commonwealth v. Clew, 3 Rawle, 408. If under such circumstances the jury are discharged, the defendant may plead it in bar to another trial. Ibid. When the jury are discharged unwarrantably, it is equivalent to an acquittal: the law to warrant the discharge of the jury must be one of uncontrollable emergency. The State v. Brown, 12 Conn. 54; The State v. Alabama, 4 Alab. 272; Ned v. The State, 7 Post. 187; United States v. Shoemaker, 2 McLean, 114; The State v. Davis, 4 Blackf. 345. After the jury are impanelled and witnesses sworn, the prosecuting attorney has no right to enter a *nolle prosequi* because the evidence is not sufficient to convict, and such entry is equivalent to a verdict of acquittal. Mount v. The State, 14 Ohio, 295 On an indictment when a jury may find the defendant guilty of a lesser offence than is charged, an acquittal for the greater crime is a bar to a subsequent indictment for the lesser. The State v. Standifer, 5 Post. 523; The People v. McGowan, 17 Wend. 386. If the judgment is arrested, however, even for an insufficient cause, the prisoner may be tried again. Gerhard v. The People, 3 Scam. 362.

An acquittal by a jury, in a court of the United States, of a defendant who is then indicted for an offence of which that court has no jurisdiction, is no bar to an indictment against him for the same offence in a State court. Commonwealth v. Peters, 12 Metcalf, 387.

On a plea of *autrefois acquit*, the law test to determine whether the accused has been put in jeopardy for the same offence is whether the facts alleged in the second indictment if proven to be true, would have warranted a conviction on the first indictment. Price v. The State, 19 Ohio, 423.

If a jury in a capital case separate without giving a verdict, the prisoner is acquitted. State v. Garrigues, 1 Hayw. 241. But in Connecticut it is otherwise. State v. Babcock, 1 Conn. 401. See State v. Hall, 4 Hals. 236; United States v. Fries, 3 Dall. 515; State v. Anderson, 2 Bailey, 565; Atkins v. The State, 16 Arkansas, 568; McCreary v. The Commonwealth, 5 Casey, 323; Miller v. The State, 8 Indiana, 325; Barrett v. The State, 35 Alabama, 406; McCorkle v. The State, 14 Indiana, 39; Wright v. The State, 5 Indiana, 290; Ponge v. The State, 3 Ohio, 229.

It is not a sufficient ground for discharging a jury, that a material witness for the crown is not acquainted with the nature of an oath, though this is discovered before any evidence is given. R v. Wade, 1 Moody, C. C. 86, *ante*, p. 108. So where during the trial of a felony, it was discovered that the prisoner had a relation on the jury, Erskine, J., after consulting Tindal, C. J., held that he had no power to discharge the jury, but that the trial must proceed. R. v. Wardle, Carr. & M. 647: 41 E. C. L. R. If it should appear in the course of a trial that the prisoner is insane, the judge may order the jury to be discharged, that he may be tried after the recovery of his understanding. 1 Hale, P. *C. 34; 18 St. Tr. 411; Russ. & Ry. 431 (*n*). [210] On a trial for manslaughter, it was discovered after the swearing of the jury, that the surgeon who had examined the body was absent, and the prisoner prayed that the jury might be discharged; they were discharged accordingly, and the prisoner was tried the next day. R. v. Stoke, 6 C. & P. 151: 25 E. C. L. R. As to postponing the trial, see *supra*, p. 184.

In the case of R. v. Davison, removed by *certiorari* into the Central Criminal Court, the prisoner demurred on the ground that he had been tried before for the same offence, and that the jury were discharged, and that no sufficient reason was alleged why the jury were so discharged. The fact that the prisoner had previously been tried, and that the jury had been discharged because they could not agree, was stated on the record. The learned judges, however, who tried the case (Williams and Hill, JJ.) said, that the discharge of the jury was a matter for the discretion of the judge, and which must be assumed to be for some valid reason, and they overruled the demurrer. They also said that no notice of the reason why the jury were discharged need have been taken on the record. 2 F. & F.

The power to discharge a jury was very much discussed in a case of R. v. Charlesworth, which came before the court on several occasions. It was an information for bribery, at the suit of the crown, and at the trial a witness refused to give evidence. Hill, J., committed the witness to prison, and a conviction being impossible, discharged the jury. The defendant then applied for leave to place upon the record a plea setting out these facts, but this the court refused to permit, on the ground that there was already a plea of not guilty upon the record, and that in misdemeanor a defendant could not plead two different pleas; but they said the facts stated in the plea might be placed upon the record as part of the proceedings, which was accordingly done. A rule was then obtained, calling upon the crown to show cause why judgment *quod eat sine die* should not be entered for the defendant, and why the award of jury process and all other proceedings should not be set aside. The rule was discharged, the court being of opinion that, whether the judge had power to discharge the jury *or not*, the defendant was not entitled to final judgment, and that the new trial ought to proceed; it being open to the defendant to take advantage of the objection (if any) upon a writ of error. The judgments of the court contain a great deal of extra-judicial opinion as to what power a judge has to discharge a jury, and the weight of opinion seems to incline to that power being limited *in law* only by the discretion of the judge; but that it ought not to be exercised, except in some case of physical necessity, or where it is hopeless that the jury will agree, or where there have been some practices to defeat the ends of justice. Much reliance is placed by the court on the opinion of Crampton, J., in the case of Conway v. Reg., 7 Tr. Law Rep. 149, where that learned judge differed from his brethren, and took substantially the view taken by the Court of Queen's Bench in England in R. v. Charlesworth. The case will be found reported in 30 L. J. M. C. 25.

Discharge of prisoners.] By the 14 Geo. 3, c. 20, "every person charged with any felony or any other crime, or as an accessory thereto, before any court holding [*211] criminal jurisdiction within England *and Wales, against whom no bill of indictment shall be found by the grand jury, or who on his or her trial shall be acquitted, or who shall be discharged for want of prosecution, shall be immediately set at large in open court, without payment of any fee or sum of money to the sheriff, gaoler or keeper of the gaol or prison from whence he or she shall be so discharged and set at liberty, for or in respect of such discharge."

Property found on the prisoner.] It has been said by some judges that a constable has no right to take away from a prisoner any property which he has about him, unless it is in some way connected with the offence with which he is charged: per Patteson, J., R. v. O'Donnell, 7 C. & P. 138: 32 E. C. L. R.; R. v. Jones, 6 C. & P. 343: 25 E. C. L. R.; per Gurney, B., R. v. Kinsey, 7 C. & P. 447: 32 E. C. L. R.; R. v. Bass, 2 C. & K. 822: 61 E. C. L. R.; per Platt, B. And if this has been done, as is frequently the case, the court will, on the application of the prisoner, order the property to be given up to him: R. v. Barnett, 3 C. & P. 600: 14 E. C. L. R.; unless it be required as evidence. But this will not be done if the property, though not that actually stolen, is the produce of it. R. v. Burgiss, 7 C. & P. 488; R. v. Rooney, 7 C. & P. 515: 32 E. C. L. R.

By the 24 & 25 Vict. c. 96, s. 100 (replacing the 7 & 8 Geo. 4, c. 29, s. 27), if any person guilty of any such felony or misdemeanor as is mentioned in that act, "in stealing, taking and obtaining, extorting, embezzling, converting, or disposing of, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted for such offence by or on the behalf of the owner of the property, or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner, or his representative; and in every case in this section aforesaid the court before whom any person shall be tried for any such felony or misdemeanor shall have power to award, from time to time, writs of restitution for the said property, or to order the restitution thereof in a summary manner; provided that, if it shall appear before any award or order made, that any valuable security shall have been *bonâ fide* paid or discharged by some person or body corporate liable to the payment thereof, or, being a negotiable instrument, shall have been *bonâ fide* taken or received by transfer or delivery by some person or body corporate, for a just and valuable consideration, without any notice, or without any reasonable cause to suspect that the same had, by any felony or misdemeanor, been stolen, taken, obtained, extorted, embezzled, converted or disposed of, in such case the court shall not award or order the restitution of such security; provided also that nothing in this section contained shall apply to the case of any prosecution of any trustee, banker, merchant, attorney, factor, broker, or other agent, intrusted with the possession of goods or documents of title to goods for any *misdemeanor* against this act."

The court cannot, under the above provision, order a Bank of England note, which has been paid and cancelled, to be delivered up to the prosecutor of the party who stole it. R. v. Stanton, 7 C. & P. 431. Where a prisoner was convicted of stealing money, and he was at the time the owner of a horse which it was clear from the evidence had been purchased with the stolen money, an order was made for the delivery of the horse to the prosecutor. Per Gurney, B., and Williams, J., R. v. Powell, 7 C. & P. 646.

[*212] After the trial and conviction of a felon, the judges who presided *at the trial made an order, directing that property, found in his possession when he was

apprehended, should be disposed of in a particular manner. This property was not shown to be part of the stolen property, or to be the produce of it. The Court of Queen's Bench held that the order was bad, as the judges had no jurisdiction to make it. R. v. Corporation of London, 27 L. J. M. C. 231.

The effect of this statute is, upon conviction of the thief, besides giving to the original owner the summary power of recovery pointed out therein, to restore to him the property in the goods which were stolen, together with all the legal remedies incident to that right; and this notwithstanding a sale in market overt. Scattergood v. Sylvester, 15 Q. B. 506: 69 E. C. L. R.

Previous conviction.] By the 7 & 8 Geo. 4, c. 28 s. 11, "if any person shall be convicted of any felony, not punishable with death, committed after a previous conviction for felony, such person shall, on such subsequent conviction, be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned for any term not exceeding four years, and, if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment; and in an indictment for any such felony committed after a previous conviction of felony, it shall be sufficient to state that the offender was at a certain time and place convicted of felony, without otherwise describing the previous felony; and a certificate containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous felony, purporting to be signed by the clerk of the court, or other officer having the custody of the records of the court where the offender was first convicted, or by the deputy of such clerk or officer (for which certificate a fee of six shillings and eightpence, and no more, shall be demanded or taken), shall, upon proof of the identity of the person of the offender, be sufficient evidence of the first conviction, without proof of the signature or official character of the person appearing to have signed the same."

This act was followed by the 14 & 15 Vict. c. 19, s. 9, which provided that the jury should not be charged to inquire of the subsequent offence until after the prisoner had been found guilty of the previous offence.

The 14 & 15 Vict. c. 19, s. 9, is now repealed. The mode of arraigning and giving in charge prisoners, where the indictment contains a charge of a previous conviction, in offences against the larceny and coinage acts, has already been pointed out (*supra*, pp. 182 and 200).

The punishment provided for special offences, when committed after a previous conviction, will be found under the head of those offences.

By the 24 & 25 Vict. c. 96, s. 116, "in any indictment for any offence punishable under this act, and committed after a previous conviction or convictions for any felony, misdemeanor, or offence or offences punishable upon summary conviction, it shall be sufficient, after charging the subsequent offence, to state that the offender was, at a certain time and place, or at certain times and places, convicted of felony, or of an indictable misdemeanor, or of an offence or offences punishable upon summary conviction (as the case may be), not otherwise *describing the previous felony, [*213] misdemeanor, offence or offences; and a certificate, containing the substance and effect only (omitting the formal part) of the indictment and conviction for the previous felony or misdemeanor, or a copy of any such summary conviction, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court where the offender was first convicted, or to which such summary conviction shall have been returned, or by the deputy of such clerk or officer (for which certificate or copy a fee of five shillings, and no more, shall be demanded or taken),

shall, upon proof of the identity of the person of the offender, be sufficient evidence of such conviction, without proof of the signature or the official character of the person appearing to have signed the same."

The 24 & 25 Vict. c. 99 (coinage), s. 37, contains a substantially similar provision.

By the 24 & 25 Vict. c. 97 (malicious injuries to property), s. 70, "Every justice of the peace before whom any person shall be convicted of any offence against this act, shall transmit the conviction to the next court of general or quarter sessions which shall be holden for the county or place wherein the offence shall have been committed, there to be kept by the proper officer among the records of the court; and upon any indictment or information against any person for a subsequent offence, a copy of such conviction, certified by the proper officer of the court, or proved to be a true copy, shall be sufficient evidence to prove a conviction for the former offence, and the conviction shall be presumed to have been unappealed against until the contrary be shown."

It was held by Cresswell, J., that a certificate of a previous conviction, under the 7 & 8 Geo. 4, c. 28, s. 11, must state that judgment was given. R. v. Ackroyd, 1 C. & K. 158: 47 E. C. L. R. As to the mode of proving the record of previous convictions in other cases, see pp. 153, 154. But other judges have been in the habit of receiving certificates of a previous conviction, without any reference to the judgment. See Burgess v. Boetefeur, 7 M. & G. 491, 498: 49 E. C. L. R.

It is sufficient to prove that the prisoner is the person who underwent the sentence mentioned in the certificate: *e. g.*, by the gaoler, who received him into his custody under such sentence, without producing any witness who was present at the former trial. R. v. Crofts, 9 C. & P. 219: 38 E. C. L. R.; R. v. Ling, 1 F. & F. 77, *acc.*

The record of conviction, however, must be proved by a certificate, as above mentioned; neither the production of the calendar of the witnesses, signed by the clerk of assizes, and by him delivered to the governor of the prison, nor the evidence of a person who heard sentence passed, is sufficient. Per Maule, J., in R. v. Bourdon, 2 C. & K. 366: 61 E. C. L. R.

Any number of previous convictions may be alleged in the same indictment, and, if necessary, proved against the prisoner. R. v. Clark, Dears. C. C. 198; S. C. 22 L. J. M. C. 135.

Writ of error.] A writ of error lies from all inferior criminal jurisdictions to the Queen's Bench for mistakes appearing in the judgment or other parts of the record. 4 Bl. Comm. 391. There were formerly many objections which were matter of error, but which now, by the 14 & 15 Vict. c. 100, s. 25, *supra*, p. 192, must be taken by demurrer or motion to quash the indictment, and not afterwards. It has been held [*214] that error will lie in the following cases: Where the oath *upon which perjury is assigned does not appear to have been taken in a judicial proceeding: R. v. Overton, 4 Q. B. 90: 45 E. C. L. R.; or the court has not competent authority to administer the oath. R. v. Hallett, 2 Den. C. C. 237; R. v. Chapman, 1 Den. C. C. 432; Lavey v. Reg., 2 Den. C. C. 504. So if, in an indictment for libel, the words do not appear to be libellous: R. v. Perry, 1 Lord Raym. 158; or if on an indictment for obtaining money by false pretences it is not shown what the false pretences were. R. v. Mason, 2 T. R. 581; Holloway v. Reg., 2 Den. C. C. 296. If, in an indictment for burglary, it appears from the indictment that the prisoner broke and entered the dwelling-house, with intent to commit a trespass or misdemeanor, and not a felony, error would lie. R. v. Powell, 2 Den. C. C. 403. These and other cases are collected

in Arch. Cr. Law, 13th ed., p. 161. In what cases error will lie for improperly allowing or disallowing challenges, is somewhat doubtful. See Mansell v. Reg., Dears. & B. C. C. 375, *supra*, 214. If a verdict of the jury were returned during the absence of one of the jurors, it would be a matter of error.

It is in all cases necessary, before suing out the writ of error, to obtain the *fiat* of the attorney-general; but in cases of misdemeanor, on probable cause being shown, this *fiat* is understood to be granted as of course: Ex parte Newton, 4 E. & B. 869; 82 E. C. L R.; 4 Bl. Comm. 391; and it is not generally refused, if reasonable ground of error be shown to exist in other cases. But it is entirely in the discretion of the attorney-general whether or not he will grant it; the court will not control him. Ex parte Newton, *supra;* R. v. Lees, 1 El. B. & El. 828: 96 E. C. L. R.

By the 8 & 9 Vict. c. 68, amended by the 9 & 10 Vict. and 16 & 17 Vict. c. 32, where judgment shall have been given for a misdemeanor, and the defendant shall have obtained a writ of error to reverse it, execution thereon shall be stayed, and the defendant discharged from custody, upon his entering into the recognizances, with sureties, required by those acts.

As to the practice of delivering and form of paper-books, see Reg. Gen. E. T. 16 Vict., 1. E. & B. 693: 72 E. C. L. R.

In capital cases the prisoner must appear in person to assign errors. Corn. Cr. Pr. 102; Holloway v. Reg., *supra*.

When the judgment is reversed upon a writ of error in any criminal case, the court of error may, by the provisions of the 11 & 12 Vict. c. 78, s. 5, *supra*, p. 206, pronounce the proper judgment itself, or remit the record back to the inferior court, in order that that court may do so. If the judgment be affirmed, then by the 16 & 17 Vict. c. 32, s. 4, the court of error may order the defendant, if present, to be committed to the queen's prison. By s. 5, any judge may, if necessary, within four days, issue a warrant for his apprehension.

The Court of Q. B. has power to set aside a writ of error sued out for purposes of collusion. R. v. Alleyne, Dears. C. C. 505.

Bill of exceptions.] In the case of R. v. Alleyne, an indictment for obtaining money by false pretences, Lord Campbell, C. J., after hearing an argument at chambers, sealed a bill of exceptions to the admissibility of certain documents in evidence: Arch. Cr. Law, 13th ed., p. 145; but in R. v. Esdaile, 1 F. & F. 213, 228, a prosecution for conspiring to defraud, the same learned judge, on a bill of exceptions to the evidence being tendered, said, "A bill of exceptions cannot be tendered in a criminal case. I once thought otherwise, but I have *fully considered the [*215] subject, and am satisfied that it cannot be." It seems, at any rate, formerly to have been thought that a bill of exceptions might be tendered to the ruling of a judge in improperly disallowing a challenge. See p. 214.

New trial.] There can be no new trial in cases of felony whether the defendant be convicted or acquitted. Ex parte Edulgee Byramjee, 11 Jur. 855. In R. v. Scaife, 17 Q. B. 238: 79 E. C. L. R., where a conviction for felony was removed into the Court of Queen's Bench, a new trial was moved for on the ground of the improper reception of depositions in evidence, and was granted; but it is said that that case was without precedent, and it has not been followed.

In case of a conviction for misdemeanor a new trial may be granted at the instance of the defendant, where the justice of the case requires it: R. v. Mawbey, 6 T. R. 638; though inferior jurisdictions cannot grant a new trial upon the merits, but only

for an irregularity. (See the cases collected on this point in note (b) to R. v. Inhab. of Oxford, 13 East, 416.) A new trial will be granted on the ground of surprise. R. v. Whitehouse, Dears. C. C R. 1. It must be moved within the first four days of term. R. v. Newman, 1 El. & Bl. 268; 22 L. J. Q B. 156. Where several defendants are tried at the same time for a misdemeanor, and some are acquitted and others convicted, the court may grant a new trial as to those convicted, if they think the conviction improper. R. v. Mawbey, 6 T. R. 619; R. v. Gompertz, 9 Q. B. 824: 58 E. C. L. R.; S. C. 16 L. J. Q. B. 121. It is a rule that all the defendants convicted upon an indictment for a misdemeanor must be present in court when a motion is made for a new trial on behalf of any of them, unless a special ground be laid for dispensing with their attendance. R. v. Teal, 11 East, 307; R. v. Askew, 3 M. & S. 9. In R. v. Cauldwell, 2 Den. C. C. R. 372 (*n*), S. C. 21 L. J. M. C. 48, the defendant had been convicted of perjury, and sentenced to seven years' transportation. On application on his behalf being made for a new trial, Campbell, C. J., inquired whether the defendant was present or in custody; and being answered in the negative, the court refused to hear the motion, the chief justice saying, "I have always considered it to be a hardship, where there are several defendants who have been found guilty on an indictment, not to allow one of them to move for a new trial, unless all the other defendants are present when the motion is made. But there can be no such hardship when there is but one defendant. In this case peculiarly, the defendant ought to be in court. Sentence has been passed, which he has hitherto evaded; and the court will not permit him to make the experiment of obtaining a new trial, without coming into court to abide the consequences in case we should refuse the rule." Where the defendant is liable to a fine only, it is not necessary that he should be present in court. R. v. Parkinson, 2 Den. C. C. R. 459; S. C. 21 L. J. M. C. 48 (*n*).

No new trial can be had when the defendant is acquitted, although the acquittal was founded on the misdirection of the judge: R. v. Jacob, 1 Stark. N. P. 516: 2 E. C. L. R.; R. v. Sutton, 5 B. & Ad. 52: 27 E. C. L. R.; or where a verdict is found for a defendant on a plea of *autrefois acquit*, although that raises a collateral issue which may have been found in favor of the defendant on insufficient evidence. R. v. Lea, 2 Moo. C. C. R. 9; 7 C. & P. 836: 32 E. C. L. R., S. C.; 2 Russ. by Grea. 726. In R. v. Russell, 3 E. & B. 942: 77 E. C. L. R.; S. C. 23 L. J. M. [*216] C. 173, Coleridge, J., *was of opinion that whenever the substance of a criminal proceeding is civil, a new trial may be granted after a verdict for the defendant, on the ground either of misdirection or of the verdict being against the evidence; but Campbell, C. J., and Crompton, J., considered that the practice as to granting a new trial in a criminal case, after a verdict for the defendant, did not extend to the case where the defendant, if found guilty, might suffer fine and imprisonment; and they therefore held, that where an indictment charged the defendant with erecting an obstruction to the navigation of the Menai Straits, and the right to an oyster-fishery was in question, the court ought not to grant a new trial after a verdict for the defendant. R v. Johnson, 29 L J. M. C. 106, *acc.*

Court of Criminal Appeal.] Formerly, where any objection was taken on the part of the prisoner, during the course of the trial, which the judge considered well founded, it was usual to defer giving judgment till the next assizes, and in the meantime take the advice of the judges. But this was a mere extrajudicial proceeding, to satisfy the conscience of the presiding judge. Now, however, by the 11 & 12 Vict. c. 78, it is enacted, by s. 1, "that when any person shall have been convicted of any

treason, felony, or misdemeanor before any court of oyer and terminer or gaol delivery, or court of quarter sessions, the judge, or commissioner, or justice of the peace before whom the case shall have been tried, may, in his or their discretion, reserve any question of law which may have arisen on the trial for the consideration of the justices of either bench and barons of the exchequer, and therefore shall have authority to respite execution of the judgment on such conviction, or postpone the judgment until such question shall have been considered and decided, as he or they may think fit; and in either case the court in its discretion shall commit the person convicted to prison, or shall take a recognizance of bail, with one or two sufficient sureties, and in such sum as the court shall think fit, conditioned to appear at such time or times as the court shall direct, and receive judgment, or to render himself in execution, as the case may be."

By s. 2, "That the judge, or commissioner, or court of quarter sessions, shall thereupon state, in a case signed in the manner now usual, the question or questions of law which shall have been so reserved, with the special circumstances upon which the same shall have arisen; and such case shall be transmitted to the said justices and barons; and the said justices and barons shall thereupon have full power and authority to hear and finally determine the said question or questions, and thereupon reverse, affirm, or amend any judgment which shall have been given on the indictment or inquisition on the trial whereof such question or questions have arisen, or to avoid such judgment, and to order an entry to be made on the record, that in the judgment of the said justices and barons the party convicted ought not to have been convicted, or to arrest the judgment or order judgment to be given thereon at some other session of oyer and terminer or gaol delivery, or other sessions of the peace, if no judgment shall have been before that time given, as they shall be advised, or to make such other order as justice may require; and such judgment and order, if any, of the said justices and barons shall be certified under the hand of the presiding chief justice or chief baron to the clerk of assize or his deputy, or the clerk of the peace or his *deputy, as the case may be, who shall enter the same on the [*217] original record in proper form; and a certificate of such entry under the hand of the clerk of assize or his deputy, or the clerk of the peace or his deputy, as the case may be, in the form, as near as may be, or to the effect mentioned in the schedule annexed to this act, with the necessary alterations to adapt it to the circumstances of the case, shall be delivered or transmitted by him to the sheriff or gaoler in whose custody the person convicted shall be; and the said certificate shall be a sufficient warrant to such sheriff or gaoler, and all other persons for the execution of the judgment, as the same shall be so certified to have been affirmed or amended, and execution shall be thereupon executed on such judgment, and for the discharge of the person convicted from further imprisonment, if the judgment shall be reversed, avoided, or arrested, and in that case such sheriff or gaoler shall forthwith discharge, and also the next court of oyer and terminer and gaol delivery, or sessions of the peace, shall vacate the recognizance of bail, if any; and if the court of oyer and terminer and gaol delivery or court of quarter sessions shall be directed to give judgment, the said court shall proceed to give judgment at the next sessions."

By s. 3, "That the jurisdiction and authorities by this act given to the said justices of either bench, and barons of the exchequer, shall and may be exercised by the said justices and barons, or five of them at the least, of whom the lord chief justice of the Court of Queen's Bench, the lord chief justice of the Court of Common Pleas, and the lord chief baron of the Court of Exchequer, or one of such chiefs, at least, shall be part, being met in the exchequer chamber or other convenient place; and the judgment or

judgments of the said justices and barons shall be delivered in open court, after hearing counsel or the parties, in case the prosecutor or the person convicted shall think it fit that the case shall be argued, in like manner as the judgments of the superior courts of common law at Westminster or Dublin, as the case may be, are now delivered."

By s. 4, "That the said justices and barons, when a case has been reserved for their opinions, shall have power, if they think fit, to cause the case or certificate to be sent back for amendment, and thereupon the same shall be amended accordingly, and judgment shall be delivered after it shall have been amended."

The following rules were promulgated by the Court of Criminal Appeal on the 1st June, 1850:

That when any case shall be transferred by a court of oyer and terminer or gaol delivery, or court of quarter sessions, for the consideration of this court, the original case signed by the judge, commissioner, or chairman of sessions reserving the question of law, and seventeen copies of such case, one for each judge, and one for each party, shall be delivered to the clerk of this court at the exchequer chamber at Westminster, at least four days before the day appointed for the sitting of the said court.

That every case transmitted for the consideration of this court briefly state the question or questions of law reserved, and such facts only as raise the question or questions submitted; if the question turn upon the indictment, or upon any count thereof, then the case must set forth the indictment or the particular count.

That no case be heard upon any demurrer to the pleadings.

[*218] That every case state whether judgment on the conviction was *passed or postponed, or the execution of the judgment respited, and whether the person convicted be in prison or has been discharged on recognizance of bail to appear to receive judgment, or to render himself in execution.

That when any case is intended to be argued by counsel, or by the parties, notice thereof be given to the clerk of this court at least two days previously to the sitting of the said court.

That with every case delivered to the judges of the court (except such cases as shall be reserved by such judge) the fee payable to the clerks of the said judges shall not exceed the fee payable on demurrer and other paper books, as contained in the table of fees allowed and sanctioned by the judges, pursuant to the statute 1 Vict. c. 30.

Upon this act of Parliament it has been decided that a recorder has power to reserve questions of law under it: R. v. Masters, 1 Den. C. C. 332; that the court is bound to examine the validity of the indictment, though no questions be reserved upon it: R. v. Webb, 1 Den. C. C. 338; S. C. 18 L. J. M. C. 39; that a question raised in the court below in arrest of judgment, is a question arising "on the trial," and therefore properly reserved: R. v. Morton, 1 Den. C. C. 398: S. C. 18 L. J. M. C. 137; but that the court has no jurisdiction to hear a case stated from the court below on a judgment given on demurrer, for the Court of Criminal Appeal has jurisdiction only after a conviction on trial by jury: R. v. Faderman, 19 L. J. M. C. 147; nor *semble*, by Cresswell, J., has it power to amend an indictment, and so make the jury a party to the finding. R. v. Harris, Dears. C. C. 347.

In R. v. Mellor, Dear. & B. C. C. 468, the prisoner was found guilty of murder and sentenced to death; the following day it was discovered that J. H. T. had been called as one of the jury to try the case, but that W. T. had, by mistake, answered to that name and had been sworn by it. Wightman, J., respited execution, and reserved the point for the consideration of the court; seven judges out of fourteen who were present held that this was not a question of law arising at the trial over which the court had jurisdiction. See *supra*, p. 200.

The statute was held to apply to points of law arising upon a trial under a special commission appointed under the repealed statute. 9 Geo. 4, c. 31, s. 7; R. v. Bernard, 1 F. & F. 241.

With respect to the practice of the court, cases reserved should be submitted in a complete form, and the court will generally refuse to send back a case for amendment: R. v. Holloway, 1 Den. C. C. 370; S. C. 18 L. J. M. C. 61; the court will look at the indictment for the purpose of assisting their judgment, although it be not set out in the case: R. v. Williams, 2 Den. C. C. 61; S. C. 20 L. J. M. C. 106; but they will not consider an objection which has not been reserved, even though it be fairly deducible from the case itself, nor will they go into any matter of evidence which occurred at the trial, if it is not stated in the case. R. v. Smith, Temp. & M. 214; S. C. 14 Jur. 92. Where there are two judges of assize, and the one of them who tries a criminal case reserves a point for the consideration of the Court of Criminal Appeal, but dies before the case is stated, the other judge may state and sign the case. R. v. Featherstone, Dears. C. C. 369; S. C. 23 L. J. M. C. 127. The Court of Criminal Appeal has no power to order the costs of the prosecution *incurred [*219] by the case being reserved. R. v. Dolan, Dears. C. C. 445; S. C. 24 L. J. M. C. 59; R. v. Hornsea, Dears. C. C. 291. But in R. v. Cluderoy, 3 C. & K. 205, Williams, J., held that he had power, under the 7 Geo. 4, c. 64, s. 22, *infra*, to allow the costs of the prosecution in such a case reserved. In R. v. Lewis, 1 Dear. & B. C. C. 227, this was confirmed, and Cockburn, C. J., said, "We think it would be convenient that the officer of this court should examine into costs incurred in this court; and although his certificate cannot, in law, bind the taxing officer below, yet we have no doubt those officers will accept and consider as binding the certificate of the experienced officer of this court."

The invariable practice of this court is for the defendant's counsel to begin. R. v. Gate Fulford, Dear. & B. C. C. 94.

Costs in cases of felony.] At common law there was no provision for the payment of costs in criminal cases. By the 27 Geo. 2, c. 3, the 18 Geo. 3, c. 19, and the 58 Geo. 3, c. 70, provision was made for this purpose in cases of felony. By the 7 Geo. 4, c. 64, the above statutes are repealed; and by s. 22 the following provision is substituted, which provides equally for the payment of costs in all cases of felony: "The court before which any person shall be prosecuted or tried for any felony is hereby authorized and empowered, at the request of the prosecutor, or of any other person who shall appear on recognizance or subpœna to prosecute or give evidence against any person accused of any felony, to order payment unto the prosecutor of the costs and expenses which such prosecutor shall incur in preferring the indictment, and also payment to the prosecutor and witnesses for the prosecution, of such sums of money as to the court shall seem reasonable and sufficient to reimburse such prosecutor and witness for the expenses they shall severally have incurred in attending before the examining magistrate or magistrates, and the grand jury, and in otherwise carrying on such prosecution; and also to compensate them for their trouble and loss of time therein; and although no bill of indictment be preferred, it shall still be lawful for the court, where any person shall, in the opinion of the court, *bonâ fide* have attended the court in obedience to any such recognizance or subpœna, to order payment unto such person of such sum of money as to the court shall seem reasonable and sufficient to reimburse such person for the expenses which he or she shall *bonâ fide* have incurred, by reason of attending before the examining magistrate or magistrates, and by reason of such recognizance or subpœna, *and also to compensate such*

person for trouble and loss of time, and the amount of expenses of attending before the examining magistrate or magistrates, and the compensation for trouble and loss of time therein shall be ascertained by the certificate of such magistrate or magistrates granted before the trial or attendance in court, if such magistrate or magistrates shall think fit to grant the same; and the amount of all the other expenses and compensation shall be ascertained by the proper officer of the court, subject nevertheless to the regulations to be established in the manner hereinafter mentioned."

By the 7 & 8 Vict. c. 2, s. 1, the same power of ordering payment of costs as is given by the 7 & 8 Geo. 4, c. 64, is given to courts of oyer and terminer when trying offences committed on the high seas by virtue of that act.

[*220] By the 17 & 18 Vict. c. 103, s. 267, a similar power is given with respect to offences committed by British seamen, ashore or afloat, in places out of her majesty's dominions. Power to order payment of costs in all cases of felony is given to the High Court of Admiralty by the 7 Geo. 4, c 64; see ss. 22 and 27.

By the 19 Vict. c. 16, s. 13, the expenses of a proseeution removed into the Central Criminal Court under that act may be ordered by that court to be paid, in the same way as if that court were holden under a commission of oyer and terminer and general gaol delivery for the county or place in which the indictment was found. By s. 25, when the trial at the Central Criminal Court is obtained by the crown, a sum not exeeeding 20*l.* may be ordered by the Court of Queen's Bench, or by a judge in vacation, to be paid by the Treasury to the person charged with the offence, to defray the charges and expenses of the attendance of his witnesses. By s. 26 the Central Criminal Court may order reimbursement to be made to any person tried before that court under the provisions of the aet, and who shall be acquitted, "of such sum as shall appear to them to have been properly expended for such removal of the trial of such person."

It has been much doubted whether under the 7 Geo. 4, c. 64, s. 22, upon which most of the other statutes depend, any costs can be awarded to a prosecutor or witness who has not been bound over or subpœnaed. Where, however, the prisoner had been apprehended under a bench warrant, and neither the prosecutor nor any of the witnesses were under recognizance to prosecute or to give evidence, and only one of the latter had been subpœnaed, Parke, B., at first thought he could only grant the costs of the witness who had been subpœnaed; but on the following day his lordship said that on comparing the words of the 7 Geo. 4, c. 64, s. 22, relating to felonies, with those of the subsequent section, relating to misdemeanors (s. 23), it appeared to him that the court had authority in prosecutions for felony to award the prosecutor his costs, even although he was not under any recognizance; and his lordship accordingly granted the costs of the prosecution generally, including those of the witnesses. R. v. Butterwick, 2 Moo. & R. 196. But a person not bound over, and who is not the prosecutor, but who assists in getting up a prosecution, is not entitled to any costs. R. v. Cook, 1 F. & F. 389; R. v. Yates, 7 Cox, Cr. Ca. 361.

It seems that in general no costs will be allowed before the trial has taken place; as when it is postponed. R. v. Hunter, 3 C. & P. 591. However, in a case of murder, which was postponed until the following assizes, on the application of the prisoner, and in which the costs of the prosecution were very heavy, Alderson, B., made an order for their payment. R. v. Bolam, Newc. Spr. Ass. 1839, MS.

Costs in cases of misdemeanor.] There is no general provision for the payment of costs in cases of misdemeanor, but in the case of nearly every misdemeanor of common occurrence it is specially provided for. By the 7 Geo. 4, c. 64, s. 23, it is

enacted that "where any prosecutor or other person shall appear before any court, *on recognizance or subpœna*, to prosecute or give evidence against any person indicted for any assault with intent to commit felony—of any attempt to commit felony—of any riot—of any misdemeanor for receiving stolen property, knowing the same to have been stolen—of any assault upon a peace officer in the execution of his duty, or upon *any person acting in aid of such officer, or of any neglect or breach of duty [*221] as a peace officer—of any assault committed in pursuance of any conspiracy to raise the rate of wages—of knowingly and designedly obtaining any property by false pretences—of wilful and indecent exposure of the person—of wilful and corrupt perjury, or of subornation of perjury—every such court is hereby authorized and empowered to order payment of the costs and expenses of the prosecutor and witnesses for the prosecution, together with a compensation for their trouble and loss of time, in the same manner as courts are hereinbefore authorized and empowered to order the same in cases of felony; and although no bill of indictment be preferred, it shall still be lawful for the court, where any person shall have, *bonâ fide*, attended the court in obedience to any such recognizance, to order payment of the expenses of such person, together with a compensation for his or her trouble and loss of time, in the same manner as in cases of felony."

By the 7 Wm. 4 and 1 Vict. c. 44, the same power of granting costs as is conferred by the 7 Geo. 4, c. 64, in cases of misdemeanor there specified, is granted to the court in prosecutions for endeavoring to conceal the birth of a child.

By the 14 & 15 Vict. c. 55, s. 2, the power of courts to allow expenses of prosecutions is extended to the following misdemeanors, namely, "unlawfully and carnally knowing and abusing any girl being above the age of ten years and under the age of twelve years—unlawfully taking or causing to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her—conspiring to charge any person with any felony, or to indict any person of any felony—conspiring to commit any felony."

By the 14 & 15 Vict. c. 55, s. 3, in every case of assault brought before justices for summary decision, "in which the justices shall be of opinion that the same is a fit subject for prosecution by indictment, and shall thereupon bind the complainant and witnesses in recognizance to prosecute and give evidence at the assizes or sessions of the peace, every such court is hereby authorized and empowered at its discretion to order payment of the costs and expenses of the prosecutor and witnesses so appearing before such court under such recognisance, together with compensation for their trouble and loss of time, in the same manner as courts are authorized and empowered to order the same in cases of felony."

By the 24 & 25 Vict. c. 100, s. 74, "where any person shall be convicted on any indictment of any assault, whether with or without battery and wounding, or either of them, such person may, if the court think fit, in addition to any sentence which the court may deem proper for the offence, be adjudged to pay to the prosecutor his actual and necessary costs and expenses of the prosecution, and such moderate allowance for the loss of time as the court shall by affidavit or other inquiry and examination ascertain to be reasonable; and, unless the sum so awarded shall be sooner paid, the offender shall be imprisoned for any term the court shall award, not exceeding three months, in addition to the term of imprisonment (if any) to which the offender may be sentenced for the offence." By s. 75, "the court may, by warrant under hand and seal, order such sum as shall be so awarded to be levied by distress and sale of goods and chattels *of the offender, and paid to the prosecutor, and that [*222]

the surplus, if any, arising from such sale shall be paid to the owner; and in case such sum shall be so levied, the imprisonment awarded until payment of such sum shall thereupon cease."

By the 24 & 25 Vict. c. 100 (offences against the person act), s. 77, "the court before whom any misdemeanor indictable under the provisions of this act shall be prosecuted and tried, may allow the costs of the prosecution in the same manner as in cases of felony, and every order for the payment of such costs shall be made out and the sum of money mentioned therein paid and repaid upon the same terms and in the same manner in all respects as in cases of felony."

It will be seen, therefore, that the case of a prosecution for common assault stands in this position: that the costs can only be ordered to be paid where the case comes within the provision of the 14 & 15 Vict. c. 55, s. 3, as it is not a "misdemeanor indictable under the provisions" of the 24 & 25 Vict. c. 100. See Greave's Criminal Acts of 24 & 25 Vict. p. 68.

By the 24 & 25 Vict. c. 96 (the larceny and kindred offences act), s. 121, a similar provision to the 24 & 25 Vict. c. 100, s. 77, is made with respect to indictable misdemeanors against that act.

By the 24 & 25 Vict. c. 97 (the malicious injuries to property act), s. 77, a similar provision is made with respect to indictable misdemeanors against that act.

By the 24 & 25 Vict. c. 98 (the forgery act), s. 54, a similar provision is made with respect to indictable misdemeanors against that act.

By the 24 & 25 Vict. c. 99 (offences relating to the coin), s. 42, in all prosecutions for any offence against this act in England, which shall be conducted under the direction of the solicitors of her majesty's treasury, the court before which such offence shall be prosecuted or tried shall allow the expenses of the prosecution in all respects as in cases of felony; and in all prosecutions for any such offence in England, which shall not be so conducted, it shall be lawful for such court, in case a conviction shall take place, but not otherwise, to allow the expenses of the prosecution in like manner; and every order for the payment of such costs shall be made out and the sum of money mentioned therein paid and repaid upon the same terms and in the same manner in all respects as in cases of felony.

As to the point of costs in prosecutions under the bankruptcy act, see 24 & 25 Vict. c. 134, s. 223.

The payment of expenses of prosecutions for misdemeanors removed into the Central Criminal Court under the 19 Vict. c. 16, are provided for by s. 13 of that act; *supra*, p. 220; see also ss. 25 and 26, ib.

By the 7 & 8 Vict. c. 2, s. 1, which empowers courts of oyer and terminer to try offences committed on the high seas, power is given to those courts "to order the payment of the costs and expenses of the prosecution of such offences in the manner prescribed by the 7 Geo. 4, c. 64." It might be a question how far the costs of misdemeanor not included within the 7 Geo. 4, c. 64, but of which the costs are made payable by subsequent acts, can be directed to be paid by virtue of the 7 & 8 Vict. c. 2, s. 1.

By the 17 & 18 Vict. c. 104, s. 267, the costs of prosecutions against British seamen for offences committed ashore or afloat in places out of her majesty's dominions [*223] may be ordered to be paid "as in the case *of costs and expenses of prosecutions for offences committed within the jurisdiction of the admiralty of England." See the next provision.

By the 7 Geo. 4, c. 64, s. 27, it is provided that it shall be lawful for the judge

of the Court of Admiralty to order the payment of costs in every case of misdemeanor of the denominations thereinbefore enumerated (see s. 22, *supra*).

The costs in prosecutions relating to highways are, in some respects, assimilated to civil cases, the prosecutor being compelled, in vexatious indictments, to pay costs to the defendant. 5 & 6 Wm. 4, c. 50, s. 98. The provisions are somewhat complicated, and are too long for insertion in this place. See Shelford on Highways, pp. 93, 158.

In misdemeanors, the expenses of witnesses who have not been subpœnaed cannot be allowed. R. v. Dunn, 1 C. & K. 738. And it is very doubtful indeed whether the costs of a prosecutor, not bound over to prosecute, can be granted: R. v. Jeyes, 3 A. & E. 416; from which it would seem not; and see R. v. Butterwick, *supra*, p. 220. But if the prosecutor's name be included in a subpœna, they may. R. v. Sheering, 7 C. & P. 440: 32 E. C. L. R.

In the case of misdemeanors not provided for by statute, if the defendant submits to a verdict on an understanding that he shall not be brought up for judgment, the prosecutor is not, without a special agreement, entitled to costs. R. v. Rawson, 9 B. & C. 598.

As to the payment of costs in indictments removed into the Court of Queen's Bench by *certiorari*, see Corner Cr. Pr.

Mode of payment by the treasurer of the county, &c.] By the 7 Geo. 4, c. 64, s. 24, "Every order for payment to any prosecutor or other person as aforesaid, shall be forthwith made out and delivered by the proper officer of the court unto such prosecutor, or other person, upon being paid for the same the sum of one shilling for the prosecutor, and sixpence for each other person, and no more, and, except in the cases thereinafter provided for, shall be made upon the treasurer of the county, riding, or division in which the offence shall have been committed, or shall be supposed to have been committed, who is thereby authorized and required, upon the sight of every such order, forthwith to pay to the person named therein, or to any one duly authorized to receive the same on his or her behalf, the money in such order mentioned, and shall be allowed the same in his accounts."

The Central Criminal Court act, 4 & 5 Wm. 4, c. 36, enacts (s. 12) that, "it shall be lawful for any two of the said justices and judges of oyer and terminer and of gaol delivery, to order and direct the costs and expenses of prosecutors and witnesses, in all cases where prosecutors and witnesses may be by law entitled thereto, to be paid by the treasurer of the county in which the offence of any person prosecuted would have been tried but for this act; and that every such treasurer or some known agent shall attend the said justices and judges of oyer and terminer and gaol delivery during the sitting of the court to pay all such orders."

And with respect to places which do not contribute to the payment of any county rate, or which have no fund applicable to similar purposes, it is enacted by the 7 Geo. 4, c. 64, s. 25, "that all sums directed to be paid by virtue of this act, in respect of felonies and of *such misdemeanors as aforesaid, committed, or [*224] supposed to have been committed in such liberties, franchises, cities, towns, and places, shall be paid out of the rate in the nature of a county rate, or out of any fund applicable to similar purposes where there is such a rate or fund, by the treasurer or other officer having the collection or disbursement of such rate or fund; and where there is no such rate or fund in such liberties, franchises, cities, towns, and parishes, shall be paid out of the rate or fund for the relief of the poor of the parish, township, district, or precinct therein, where the offence was committed or supposed to have

been committed, by the overseers or other officers having the collection or disbursement of such last-mentioned rate or fund, and the order of the court shall in every such case be directed to such treasurer, overseers, or other officers, respectively, instead of the treasurer of the county, riding, or division, as the case may require."

Expenses of prosecution for capital offences in exclusive jurisdictions.] By the 60 Geo. 3, c. 14, s. 3, "In all cases of any commitment to the county gaol, under the authority of this act, all the expenses to which the county may be put by reason of such commitment, together with all such expenses of the prosecution and witnesses as the judge shall be pleased to allow, by virtue of any law now in force, shall be borne and paid by the said town, liberty, soke, or place, within which such offence shall have been committed, in like mannner, and to be raised by the same means whereby such expenses would have been raised and paid, if the offender had been prosecuted and tried within the limits of such exclusive jurisdiction, and that the judge or court of oyer and terminer and general gaol delivery, shall have full power and authority to make such order touching such costs and expenses as such judge or court shall deem proper, and also to direct by whom and in what manner such expenses shall in the first instance be paid and borne, and in what manner the same shall be repaid and raised within the limits of such exclusive jurisdiction, in case there be no treasurer or other officer within the same, who, by the custom and usage of such place, ought to pay the same in the first instance."

The Irish statutes relating to the remuneration of witnesses in cases of felony are the 55 Geo. 3, c. 91, 1 Wm. 4, c. 57, and the 6 & 7 Wm. 4, c. 116. See also *post*, tit. Practice.

Rewards for the apprehension of offenders.] By the 7 Geo. 4, c. 64, s. 28, "Where any person shall appear to any court of oyer and terminer, gaol delivery, superior criminal court of a county palatine, or court of great sessions, to have been active in or towards the apprehension of any person charged with murder, or with feloniously and maliciously shooting at, or attempting to discharge any kind of loaded firearms at any other person, or with stabbing, cutting, or poisoning, or with administering anything to procure the miscarriage of any woman, or with rape, or with burglary, or feloniously housebreaking, or with robbery on the person, or with arson, or with horse-stealing, bullock-stealing, or sheep-stealing, or with being accessary before the fact to any of the offences aforesaid, or with receiving any stolen property, knowing the same to have been stolen, every such court is hereby authorized and [*225] empowered, in any of the *cases aforesaid, to order the sheriff of the county in which the offence shall have been committed to pay to the person or persons who shall appear to the court to have been active in or towards the apprehension of any person charged with any of the said offences, such sum or sums of money as to the court shall seem reasonable, and sufficient to compensate such person or persons for his, her, or their expenses, exertions, and loss of time, in or towards such apprehension; and where any person shall appear to any court of sessions of the peace, to have been active in or towards the apprehension of any party charged with receiving stolen property, knowing the same to have been stolen, such court shall have power to order compensation to such persons, in the same manner as the other courts hereinbefore mentioned: provided always, that nothing herein contained shall prevent any of the said courts from also allowing to any such persons, if prosecutors or witnesses, such costs, expenses, and compensation, as courts are by this act empowered to allow to prosecutors and witnesses respectively." By the 14 & 15 Vict. c. 55, the power of

the court of sessions in this particular is extended to all the offences mentioned in 7 Geo. 4, c. 64, s. 28, "which such sessions may have power to try," and "provided that such compensation to any one person shall not exceed the sum of five pounds, and that every order for payment to any person of such compensation be made out and delivered by the proper officer of the court unto such person without fee or payment for the same."

It was held by Hullock, B., that the case of *sacrilege* was not included in the above section, not coming within the words *burglary* or housebreaking. R. v. Robinson, 1 Lewin, C. C. 129. And on the authority of this case, Bolland, B., refused a similar application, though both he and Park, J., would otherwise have been disposed to put a different construction upon the statute. Ib. But where a woman was indicted for an attempt to murder her child by suffocating it, Patteson, J., allowed the constable his extra expenses in apprehending the prisoner, being of opinion that the case was within the spirit and intention of the foregoing clause, though not within the words. R. v. Durkin, 2 Lew. C. C. 163. It has been held, however, by Maule, J., that a stealing from the person is not within the words, "robbery on the person." R. v. John Thompson, York Spr. Ass., 1845, MS. Under the word "exertions," in the above clause, Parke, B., ordered a prosecutor a gratuity of five pounds for his courage in apprehending the prisoner. R. v. Womersly, 2 Lew. C. C. 162.

By the stat. 7 Geo. 4, c. 64, s. 29, "Every order for payment to any person, in respect to such apprehension as aforesaid, shall be forthwith made out and delivered by the proper officer of the court unto such person, upon being paid for the same the sum of five shillings, and no more; and the sheriff of the county for the time being is hereby authorized and required, upon sight of such order, forthwith to pay to such person, or to any one duly authorized on his or her behalf, the money in such order mentioned; and every such sheriff may immediately apply for repayment of the same to the commissioners of his majesty's treasury, who, upon inspecting such order, together with the acquittance of the person entitled to receive the money thereon, shall forthwith order repayment to the sheriff of the money so by him paid, without any fee or reward whatsoever."

**Allowance to the widows and families of persons killed in endeavoring to apprehend offenders.*] [*226] By the 7 Geo. 4, c. 64, s. 30, "If any man shall happen to be killed in endeavoring to apprehend any person who shall be charged with any of the offences hereinbefore last-mentioned [in sect. 28], it shall be lawful for the court before whom such person shall be tried to order the sheriff of the county to pay to the widow of the man so killed, in case he shall have been married, or to his child or children, in case his wife shall be dead, or to his father or mother, in case he shall have left neither wife nor child, such sum of money as to the court, in its discretion, shall seem meet; and the order for payment of such money shall be made out and delivered by the proper officer of the court unto the party entitled to receive the same, or unto some one on his or her behalf, to be named in such order by the direction of the court, and every such order shall be paid by and repaid to the sheriff in the manner hereinbefore mentioned" [in the 29th section].

The 4 & 5 Wm. 4, c. 36, s. 12, empowers the Central Criminal Court to order the costs and expenses of prosecutors and witnesses, allowable under the 7 Geo. 4, c. 64, to be paid by the treasurer of the county in which the offence was committed.

By the 5 & 6 Wm. 4, c. 76, s. 113, all sums directed to be paid by the foregoing enactments of the 7 Geo. 4, c. 64, in respect of felony and such misdemeanors as therein mentioned, committed in any borough in which a separate quarter sessions

shall be holden, shall be paid out of the borough fund, and the order of the court shall in such case be directed to the treasurer of such borough.

[*227] *VENUE.

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14 & 15 *Vict. c.* 100, *s.* 23.] In general the offence must, on the face of the indictment, appear to have been committed within the jurisdiction of the court before whom the prisoner is tried; and if it appear by the evidence that the venue of the offence, *i. e.*, the place where it was committed, is not the same as that mentioned in the indictment, the variance unamended would be fatal.

But the strictness of this rule has been modified in various ways, so that of late years but little attention has been paid to questions of venue; this and the number of provisions scattered through various acts of Parliament relating to this subject render such questions, when they do arise, very difficult of solution.

Formerly it was necessary, in the narrative of the offence itself, to show the venue; now, by the 14 & 15 Vict. c. 100, s. 23, it is enacted, that "it shall not be necessary to state any venue in the body of any indictment; but the county, city, or other jurisdiction named in the margin thereof shall be taken to be the venue for all the facts stated in the body of such indictment: provided, that in cases where local description is or hereafter shall be required, such local description shall be given in the body of the indictment: and provided also, that where an indictment for an offence committed in the county of any city or town corporate, shall be preferred at the assizes of the adjoining county, such county of the city or town shall be deemed the venue, and may either be stated in the margin of the indictment, with or without the name of the county in which the offender is to be tried, or be stated in the body of the indictment, by way of venue."

By s. 24 of the same act, no indictment for any offence shall be held insufficient . . . . . for want of a proper perfect venue.

By a previous section of the same statute, s. 1, *supra*, p. 193, power is given to [*228] the court, in any indictment for felony or misdemeanor, to *amend a variance "in the name of any county, riding, division, city, borough, town corporate, parish, township, or place mentioned or described in such indictment."

And by the 7 Geo. 4, c. 64, s. 20, no judgment upon any indictment or information for any felony or misdemeanor, whether after verdict or outlawry, or by confession, default, or otherwise, shall be stayed or reversed for want of a proper perfect venue, where the court shall appear by the indictment to have had jurisdiction over the offence.

The effect of these provisions appears to be that only two objections are now of much importance with respect to the venue: First, that on the face of the record it appears that the court has no jurisdiction. Secondly, that the evidence shows that the court has no jurisdiction. And even the first of these objections may sometimes be got over by an exercise of the above power of amendment.

If it appears upon the face of the record that the court has no jurisdiction, a conviction cannot be sustained without amendment, notwithstanding that the court really had jurisdiction to try the offence. R. v. Mitchell, 2 Q. B. 636: 42 E. C. L. R.

Offences committed on the boundary of counties, or partly in one county and partly in another.] By the 7 Geo. 4, c. 64, s. 12 (repealing 59 Geo. 3, c. 96), "where any felony or misdemeanor shall be committed on the boundary or boundaries of two or more counties, or within the distance of five hundred yards of any such boundary or boundaries, or shall be begun in one county and completed in another, every such felony or misdemeanor may be dealt with, inquired of, tried, determined, and punished, in any of the said counties, in the same manner as if it had been actually and wholly committed therein." The Irish statute, 9 Geo. 4, c. 54, contains an exactly similar enactment.

It has been held, that the section does not extend to trials in limited jurisdictions, but only to county trials. R. v. Welsh, 1 Moody, C. C. 175. Nor does it enable the prosecutor to lay the offence in one county and try it in another; but only to lay and try it in either. R. v. Mitchell, 2 Q. B. 636. It applies to offences which are local in their nature, such as burglary, as well as to larcenies and other transitory felonies. R. v. Ruck, Hereford Spr. Ass., 1829; 1 Russ. by Grea. 827. The prisoner wrote and posted in the county a letter containing a false pretence to the prosecutor, who received it in a borough which was a county of itself. The prosecutor in the borough posted to the prisoner in the county a letter, containing the money obtained by the false pretence, and which the prisoner received in the county. The Court of Criminal Appeal held, that the prisoner might be tried at the borough quarter sessions, part of the offence being the making of the false pretence, which was made to the prosecutor by the delivery to him of the letter containing the false pretence by the post-office authorities, whom the prisoner had made his agents for that purpose. R. v. Leech, 25 L. J. M. C. 77.

Offences committed in detached parts of counties.] By the 2 & 3 Vict. c. 82, s. 1, justices of the peace for any county may act as justices in all things relating to any detached part of any other county which is surrounded in whole or in part by the county for which such justices act, and all offenders in such detached part may be committed *for trial, tried, convicted, and sentenced, and judgment and [*229] execution may be had upon them, in like manner as if such detached part were to all intents and purposes part of the county for which such justices act.

By s. 2, the expenses of prosecuting offenders committed from the detached part of any county are to be repaid by the county to which such detached part belongs, in the manner therein prescribed.

It has been held that the grand jury of the county which wholly surrounds a detached part of another county, may find an indictment for an offence committed in such detached part, and that the prisoner may be tried by a jury of such surrounding county. The prisoner was indicted in Dorsetshire for larceny in a parish of Somersetshire, entirely detached from it, and surrounded in whole by Dorsetshire. He had been committed by a Dorsetshire magistrate to the gaol of that county. The indict-

ment laid the offence to have been committed in the parish of H., the same being a detached part of the county of Somerset, surrounded in the whole by the county of Dorset; the venue in the margin was Dorset. The indictment did not state that the prisoner was in Dorsetshire, or that he was committed by a Dorsetshire magistrate. It was objected, first, that this should have appeared on the face of the indictment, and secondly, that the grand jury of Dorsetshire could not find the bill, as there were no words in the statute giving any power to find the bill; and the 60 Geo. 3, c. 4, the 7 Geo. 4, c. 64, s. 12, and the 4 & 5 Wm. 4, c. 36, were referred to in order to show that the word "try" in a statute did not include the finding of a bill by the grand jury. Rolfe, B., however, overruled the objection, saying that it would strike the act out of the statute-book. R. v. Loader, 2 Russ. by Grea. 122.

Offences committed on persons or property in coaches employed on journeys, or in vessels employed in inland navigation.] The 7 Geo. 4, c. 64, s. 13, for the more effectual prosecution of offences committed during journeys from place to place, enacts, "that where any felony or misdemeanor shall be committed on any person, or on or in respect of any property in or upon any coach, wagon, cart, or other carriage whatever, employed in any journey, or shall be committed on any person, or on or in respect of any property on board any vessel whatever, employed in any voyage or journey upon any navigable river, canal, or inland navigation, such felony or misdemeanor may be dealt with, inquired of, tried, determined, and punished in any county through any part whereof such coach, wagon, cart, carriage, or vessel shall have passed in the course of the journey or voyage, during which such felony or misdemeanor shall have been committed, in the same manner as if it had been actually committed in such county; and in all cases where the side, centre, or other part of any highway, or the side, bank, centre, or other part of any such river, canal, or navigation shall constitute the boundary of any two counties, such felony or misdemeanor may be dealt with, inquired of, tried, determined, and punished in either of the said counties through or adjoining to, or by the boundary of any part whereof such coach, wagon, cart, carriage, or vessel shall have passed in the course of the journey or voyage, during which such felony or misdemeanor shall have been committed, in the same manner as if it had been actually committed in such county."

The Irish statute, 9 Geo. 4, c. 54, contains a similar enactment.

[*230] *The offence must be committed "in or upon the coach," to bring it within the above act; therefore, where a guard of a coach, on changing horses near Penrith carried a parcel to a privy, and while there, took two sovereigns from it, Parke, B., held, that he must be tried in Westmoreland. R. v. Sharpe, 2 Lew. C. C. 233.

Offences committed in the county of a city or town corporate.] By the 38 Geo. 3, c. 52, a prosecutor may prefer his bill of indictment for any offence committed within the county of any city or town corporate, to the jury of the county next adjoining, and the offender may be there tried in the same way as if the offence had been committed in the county. Formerly the cities of London and Westminster, the borough of Southwark, and the cities of Bristol, Chester, and Exeter, were exempted from the operation of this act; but as to Bristol, Chester, and Exeter, the exception is repealed by the 5 & 6 Wm. 4, c. 76, s. 109.

Now, by the 14 & 15 Vict. c. 55, s. 19, "whenever any justice or justices of the peace, or coroner, acting for any county of a city or county of a town corporate within which her majesty has not been pleased for five years next before the passing of this act to direct a commission of oyer and terminer and gaol delivery to be executed,

and until her majesty shall be pleased to direct a commission of oyer and terminer and gaol delivery to be executed, within the same, shall commit to safe custody in the gaol or house of correction of such county of a city or town any person charged with any offence committed within the limits of such county of a city or town not triable at the court of quarter sessions of the said county of a city or county of a town, the commitment shall specify that such person is committed pursuant to this act, and the recognizances to appear to prosecute and give evidence taken by such justice, justices, or coroner, shall, in all such cases, be conditioned for appearance, prosecution, and giving evidence at the court of oyer and terminer and gaol delivery for the next adjoining county; and whenever any such person shall be so committed, the keeper of such gaol or house of correction shall deliver to the judges of assize for such next adjoining county a calendar of all prisoners in his custody so committed, in the same way that the sheriff of the county would be by law required to do if such prisoners had been committed to the common gaol of such adjoining county; and the justice, justices, or coroner, by whom persons charged as aforesaid may be committed, shall deliver or cause to be delivered to the proper officer of the court the several examinations, informations, evidence, recognizances, and inquisitions relative to such persons, at the time and in the manner that would be required in case such persons had been committed to the gaol of such adjoining county by a justice, or justices, or coroner having authority so to commit, and the same proceedings shall and may be had thereupon at the sessions of oyer and terminer or general gaol delivery for such adjoining county, as in the case of persons charged with offences of the like nature committed within such county." By s. 24, "for the purpose of this act the counties named in the second column of schedule C, to the 5 & 6 Wm. 4, c. 76, shall be considered next adjoining the counties of cities and towns corporate in the first column of the same schedule in conjunction with which they are respectively named." That is to say, Northumberland is the next adjoining county to Berwick-upon-Tweed and Newcastle-upon-Tyne; Gloucestershire to Bristol; Cheshire *to Chester; [*231] Devonshire to Exeter; and Yorkshire to Kingston-upon-Hull. The same provision with respect to Hull and Newcastle is contained in the 38 Geo. 3, c. 52.

By the 14 & 15 Vict. c. 100, s. 23, "where an indictment for an offence committed in the county of any city or town corporate shall be preferred at the assizes of the adjoining county, such county of the city or town shall be deemed the venue, and may either be stated in the margin of the indictment, with or without the name of the county in which the offender is to be tried, or be stated in the body of the indictment by way of venue." This is a very clumsy provision; probably what it means is, that the offence may be laid in the county corporate, and tried in the county adjoining; but that is exceedingly awkward, and it is better to follow the direction given in Arch. Pr. 10th ed., p. 34, and state it thus, "County of Chester (being the next adjoining county to the county of the city of Chester), to wit."

An important alteration has been made in the boundaries of some counties by the boundary act 2 & 3 Wm. 4, c. 54, and the municipal reform act, 5 & 6 Wm. 4, c. 76, so that, if a felony be now committed in that part of the county of a town which has been added to it by the boundary act and the municipal reform act, it is triable within the county of the town. The prisoner was indicted for wounding with intent to do grievous bodily harm. The offence was committed at a place which was added to the borough of Haverfordwest, which is a county of itself by the boundary act, and declared by the municipal reform act to be part of the borough, the place in question not having been within the borough before the passing of those acts. It was held by Coleridge, J., that the prisoner might be tried by a jury of the borough. R. v. Piller,

7 C. & P. 337: 32 E. C. L. R. In R. v. the Just. of Gloucestershire, 4 A. & E. 689: 31 E. C. L. R., it was held that the effect of these statutes was to transfer the party entirely and for all purposes out of one county into the other. 2 Russ. by Grea. 120.

Offences committed at sea—jurisdiction of the Court of Admiralty.] The jurisdiction of the Court of Admiralty, according to Blackstone, extends to all crimes and offences committed either upon the sea or upon the coasts out of the body of any English county, 4 Black. Com. 268. But this definition is not accurate, for, on the one hand, the jurisdiction is expressly extended by 15 Ric. 2, c. 3, to death and mayhem happening in great ships being in the streams of great rivers, and so within the extent of a county. And on the other hand, there are certain parts of the sea which, as being *intra fauces terræ*, are considered as belonging to the adjoining counties, and yet as to these the Court of Admiralty has a concurrent jurisdiction. Thus where a murder was committed in Milford Haven, seven or eight miles from the river's mouth, and sixteen miles below any bridge across the river; the passage where the murder was committed was about three miles across, and the place itself about twenty-three feet deep, and never known *to be dry but at very low tides.* Sloops and cutters of one hundred tons were able to navigate where the body was found, and nearly opposite the place men-of-war were able to ride at anchor. The deputy vice-admiral of Pembrokeshire had of late employed his bailiff to execute process in that part of the haven. The judges were unanimously of opinion that the trial was rightly had at [*232] the admiralty sessions, though the place was within *the body of the county of Pembroke, and the courts of common law had concurrent jurisdiction. During the discussion, the construction of the statute 28 H. 8, c. 15, by Lord Hale, was much preferred to the doctrine of Lord Coke in his Institutes (3 Inst. 111, 4 Inst. 134); and most, if not all the judges seemed to think that the common law had a concurrent jurisdiction in this haven, and in other havens, creeks, and rivers of this realm. R. v. Bruce, 2 Leach, 1093; Russ. & Ry. 243. See also R. v. Cunningham, 28 L. J. M. C. 66, a similar case.

With regard to the sea-shore, it is clear that the courts of common law and the Court of Admiralty have alternate jurisdiction between high and low water mark. 3 Inst. 113.

The rule of law, which lays down that both the public and private vessels of every nation on the high seas and out of the territorial limits of any other state are subject to the jurisdiction of the state to which they belong, materially extends the jurisdiction of the Court of Admiralty. For it results therefrom that every offence committed on board an English ship, whether by a subject of this country or *a foreigner*, is an offence against the municipal laws of this country, and triable in the same way as other offences committed within the jurisdiction of the Court of Admiralty. This was expressly decided in R. v. Lopez and R. v. Sattler, Dears. & B. C. C. 525. These cases clearly overrule, if necessary, R. v. Depardo, 1 Taunt. 26, in which no judgment was delivered, but the marginal note suggests a contrary decision.

There seems no express decision as to whether the jurisdiction of the Court of Admiralty extends at common law to offences committed by British subjects on board foreign vessels on the high seas. But it seems very doubtful whether an offence committed within the territorial limits of a foreign country by a subject of this country is cognizable by any of our courts; and, as the foreign ship is in law a part of the territory of the country to which it belongs, offences committed on board her would seem to be equally excluded. In America, in the case of United States v.

Wiltberger, 5 Wheat. 76, it was held that no such jurisdiction exists in the courts of that country, though some American lawyers (see 1 Kent, Comm. 363, *n.*; R. v. Lopez, Dears. & B. C. C. 530) seem still to think the point doubtful.

Many countries have claimed dominion over certain narrow and inland seas, which claim has given rise to great controversy. The sovereign of this country has made this claim with reference to those parts of the seas adjoining this island known as the king's chambers. Even foreign vessels navigating those seas would, therefore, perhaps be considered subject to the jurisdiction of the Court of Admiralty.

In the absence of any such claim, the rule is, that *ibi finitur imperium ubi finitur armorum vis*, which distance is usually computed at three miles from low-water mark of the nearest land belonging to the sovereign claimant.

The rule that the ship is part of the territory of the state to which she belongs ceases to operate as regards a private ship as soon as she enters that part of the sea which is *infra dominium* of any other sovereign. But public ships, even in a foreign port, are still considered as coming within the rule; so that offences on board these are offences against the municipal law of the country to which the ships belong, and in this country such an offence would at common law be cognizable by the Court of Admiralty.

*Whether or no at common law an offence committed by a British subject [*233] on board a British ship within the dominions of a foreign state is cognizable in this country, is a question which gives rise to the same difficulties as that of an offence committed by a British subject on board a foreign ship (*supra*, p. 232), or on land in a foreign country (*infra*, p. 236). There is one case, R. v. Allen, 1 Moo. C. C. 494, which may seem to support the admiralty jurisdiction. The prisoner was tried for larceny. He was a sailor in the Aurora of London, and it was proved that at the time the larceny was committed the vessel was at Wampu (*qu.* Whampoa, about two miles below Canton) in China. It was objected for the prisoner that the offence was not committed on the high seas, and, therefore, not within the jurisdiction of the Court of Admiralty, but the judges were unanimously of opinion that the conviction was right, "the place being one where great ships go." This reason is not very satisfactory, and the report itself is very meagre. It must be recollected, however, that China has sometimes been treated in this country as without the pale of civilization, and as having no claim to those international rights without which the question could not arise; and, even if this were not so, there might have been some ground, from certain privileges granted to us by the Chinese, to treat Whampoa rather in the light of a British factory than as part of a foreign territory.

By the 17 & 18 Vict. c. 104, s. 267, "all offences against property or person, committed in or at any place, either ashore or afloat, out of her majesty's dominions by any master, seaman, or apprentice, who at the time when the offence is committed is, or within three months previously has been employed in any British ship, shall be deemed to be offences of the same nature respectively, and be inquired of, heard, tried, determined and adjudged in the same manner and by the same courts and in the same places as if such offences had been committed within the jurisdiction of the admiralty of England."

By engaging in piracy a person becomes *hostis humani generis*, and forfeits all claim to protection from his own country. Any country, therefore, may assume to punish him, whether he be a subject of that country or not, and wherever the offence is committed. In England this offence comes within the jurisdiction of the admiralty court.

As to offences against the customs, see tit. Smuggling.

Offences committed within the jurisdiction of the admiralty—where tried.] These offences were originally tried in the court of the lord high admiral according to the forms of the civil law. But this mode of proceeding being found objectionable, it was provided by the 28 Hen. 8, c. 15, that all treasons, felonies, robberies, murders, and confederacies thereinafter to be committed in or upon the sea, or in any other haven, river, creek, or place where the admiral or admirals have, or pretend to have, power, authority, or jurisdiction, shall be inquired, tried, heard, determined, and judged, in such shires and places in the realm, as shall be limited by the king's commission or commissions to be directed for the same in the like form and condition as if such offence or offences had been committed or done in or upon the land. Both Lord Eldon and Lord Stowell, however, considered that this statute had been allowed to become obsolete (Brown, Adm. App. 3), and accordingly by the 39 Geo. 3, c. 37, s. 1, it was provided that "all and every offence and offences which, after the passing [*234] of that act, shall be committed upon the high seas, out of the *body of any county of this realm, shall be and they are declared to be of the same nature respectively, and to be liable to the same punishment respectively, as if they had been committed upon the shore, and shall be inquired of, heard, tried, and determined, and adjudged, in the same manner as treasons, felonies, murders, and confederacies are directed to be tried by the 28 Hen. 8, c. 15."

This mode of trying offences being found inconvenient, it was provided by the Central Criminal Court act, 4 & 5 Wm. 4, c. 36, s. 22, "that it shall and may be lawful for the justices and judges of oyer and terminer and gaol delivery, to be named in and appointed by the commission to be issued under the authority of this act or any two or more of them, to inquire of, hear, or determine any offence or offences committed or alleged to have been committed on the high seas, or other places within the jurisdiction of the admiralty of England, and to deliver the gaol of Newgate of any person or persons committed to or detained therein for any offence or offences alleged to have been done or committed upon the high seas within the jurisdiction of the admiralty of England; and all indictments found and trials and other proceedings had and taken by and before the said justices and judges shall be valid and effectual to all intents and purposes whatsoever."

A more general provision was subsequently made by the 7 & 8 Vict. c. 2, which, after reciting that the issuing of a special commission in the manner prescribed by the 28 Hen. 8, c. 15, was found inconvenient, enacts by s. 1, "that her majesty's judges of assize or others her majesty's commissioners, by whom any court shall be holden under any of her majesty's commissions of oyer and terminer and general gaol delivery, shall have, severally and jointly, all powers which by any act are given to the commissioners named in any commission of oyer and terminer for the trying of offences committed within the jurisdiction of the admiralty of England, and to deliver the gaol within every county and franchise within the limits of their several commissions of any person committed or imprisoned therein for any offence alleged to have been committed on the high seas and other places within the jurisdiction of the admiralty of England; and all indictments found, and trials and other proceedings had by and before the said justices and commissioners shall be valid." By s. 2, "in all indictments preferred before the said justices and commissioners under this act the venue laid in the margin shall be the same as if the offence had been committed in the county where the trial is had; and all material facts, which in other facts would have been averred to have taken place in the county where the trial is had, shall in indictments prepared under this act be averred to have taken place on the high seas."

By the 18 & 19 Vict. c. 91, s. 21, "if any person being a British subject, charged with having committed any crime or offence on board any British ship on the high seas, or in any foreign port or harbor, or if any person not being a British subject, charged with having committed any crime or offence on board any British ship on the high seas, is found within the jurisdiction of any court of justice in her majesty's dominions, which would have had cognizance of such crime or offence if committed within the limits of its ordinary jurisdiction, such court shall have jurisdiction to hear and try the case as if such crime or offence had been committed within such limits."

By the 24 & 25 Vict. c. 96 (the larceny act, s. 115), "all indictable *of- [*235] fences mentioned in this act which shall be committed within the jurisdiction of the admiralty of England or Ireland shall be deemed to be offences of the same nature, and liable to the same punishments, as if they had been committed upon the land in England or Ireland, and may be dealt with, inquired of, tried, and determined in any county or place in which the offender shall be apprehended or be in custody; and in any indictment for any such offence, or for being an accessory to any such offence, the venue in the margin shall be the same as if the offence had been committed in such county or place, and the offence itself shall be averred to have been committed 'on the high seas;' provided that nothing herein contained shall alter or affect any of the laws relating to the government of her majesty's land or naval forces."

The 24 & 25 Vict. c. 97 (malicious injuries to property), s. 72, contains precisely similar provisions: so also do the 24 and 25 Vict. c. 98 (forgery), s. 50; the 24 & 25 Vict. c. 99 (coinage), s. 36; and the 24 & 25 Vict. c. 100 (offences against the person), s. 68.

By the 24 & 25 Vict. c. 94, s. 9, "where any person shall, within the jurisdiction of the admiralty of England or Ireland, become an accessory to any felony, whether the same be a felony at common law or by virtue of any act passed or to be passed, and whether such felony shall be committed within that jurisdiction or elsewhere, or shall be begun within that jurisdiction and completed elsewhere, or shall be begun elsewhere and completed within that jurisdiction, the offence of such person shall be felony; and in any indictment for any such offence, the venue in the margin shall be the same as if the offence had been committed in the county or place in which such person shall be indicted, and his offence shall be averred to have been committed 'on the high seas:' provided that nothing herein contained shall alter or affect any of the laws relating to the government of her majesty's land or naval forces."

Offences committed partly at sea and partly on land.] It was formerly matter of great doubt, whether the killing of one who died on land of a wound received at sea could be inquired of either by the ordinary commissions of oyer and terminer, or by the admiral. 1 East, P. C. 365. To take away this doubt, the 2 Geo. 2, c. 21, was passed, which was repealed by the 9 Geo. 4, c. 31. The latter statute was again repealed, and by the 24 & 25 Vict. c. 100, s. 10, it is enacted that, "where any person being feloniously stricken, poisoned, or otherwise hurt upon the sea, or at any place out of England or Ireland, shall die of such stroke, poisoning, or hurt in England or Ireland, or being feloniously stricken, poisoned, or otherwise hurt at any place in England or Ireland, shall die of such stroke, poisoning, or hurt upon the sea, or at any place out of England or Ireland, every offence committed in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory to murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished in the county or place in England or Ireland in which such

death, stroke, poisoning, or hurt shall happen, in the same manner in all respects as if such offence had been committed in that county or place."

This section would not apply to the case of a person standing on the shore and firing a loaded musket at a cutter on the high seas, which would be an offence com- [*236] mitted entirely within the jurisdiction of the *admiralty: R. v. Coombe, 1 Lea. C. C. 388; S. C. 1 East, P. C. 367; nor would it apply to the case of a foreigner feloniously struck by another foreigner on board a foreign ship, and dying on land in England, which is not an offence cognizable by our laws. R. v. Lewis, Dearsley & B. C. C. 182. These decisions are applicable to the present statute.

Offences committed abroad.] It has already been said (*supra*, pp 232, 233) that the question whether an offence committed by a British subject in a foreign country is to be considered as an offence against the laws of this country, is one of some difficulty. And this difficulty is greater with respect to offences committed on land than offences committed on board ship within foreign dominions, because over the latter, if they are offences against the laws of our country at all, the admiralty court would clearly have jurisdiction; but with respect to the former, it does not appear that any of the criminal courts in this country, all of which are limited to some part of the Queen's dominions, could claim jurisdiction over them, even if, on general principles, they were cognizable here. Mr. Greaves thinks murder would be triable by the court of the constable and marshal, according to the forms of the civil law. Gr. Stat. of 24 & 25 Vict. p. 20.

Some information on this subject may be derived from the American cases which are collected in the first volume of Kent's Comm., but it must be borne in mind that it is fully settled that the criminal courts of that country have no common law jurisdiction, but only such as is conferred upon them by the acts of Congress.

It may also be borne in mind that no principle of international law is in any way violated by the assumption of jurisdiction in these cases; for, of course, the British tribunal does not presume to act until the party accused comes within the Queen's dominions, from which moment the question becomes one entirely of municipal law.

To a certain extent the matter has been made the subject of legislation; for the 17 & 18 Vict. c. 104, s. 267 (*supra*, p. 233), applies to offences ashore as well as afloat; the 18 & 19 Vict. c. 91, s. 21 (*supra*, p. 234), applies to offences committed by British subjects in foreign ports; and by the 9 Geo. 4, c. 31, s. 7, the sovereign was empowered to issue commissions to try persons charged in England with any murder or manslaughter, "committed on land out of the United Kingdom, whether within the King's dominions or without." This statute is now repealed, and by the 24 & 25 Vict. c. 100, s. 9, it is enacted that "where any murder or manslaughter shall be committed on land out of the United Kingdom, whether within the Queen's dominions or without, and whether the person killed was a subject of her majesty or not, every offence committed by any subject of her majesty, in respect of any such case, whether the same shall amount to the offence of murder or of manslaughter, or of being accessory to murder or manslaughter, may be dealt with, inquired of, tried, determined, and punished in any county or place in England or Ireland in which such person shall be apprehended or be in custody, in the same manner in all respects as if such offence had been actually committed in that county or place: provided that nothing herein contained shall prevent any person from being tried in any place out of England or Ireland for any murder or manslaughter committed out of England or [*237] Ireland, in the same manner as such persons might *have been tried before the passing of this act." By s. 4, of the same statute, "all persons who shall con-

spire, confederate, and agree to murder any person, whether he be a subject of her majesty's or not, and whether he be within the Queen's dominions or not, and whosoever shall solicit, encourage, persuade, or endeavor to persuade, or shall propose to any person to murder any other person, whether he be a subject of her majesty's or not, and whether he be within the Queen's dominions or not, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not more than ten and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor."

Property feloniously taken in one part of the United Kingdom and carried into another.] By the 24 & 25 Vict. c. 96, s. 114, "If any person shall have in his possession in any one part of the United Kingdom any chattel, money, valuable security, or other property whatsoever, which he shall have stolen or otherwise feloniously taken in any other part of the United Kingdom, he may be dealt with, indicted, tried, and punished for larceny or theft in that part of the United Kingdom where he shall have such property, in the same manner as if he had actually stolen or taken it in that part; and if any person in any one part of the United Kingdom shall receive or have any chattel, money, valuable security, or other property whatsoever which shall have been stolen or otherwise feloniously taken in any other part of the United Kingdom, such person knowing such property to have been stolen or otherwise feloniously taken, he may be dealt with, indicted, and punished for such offence in that part of the United Kingdom where he shall so receive or have such property, in the same manner as if it had been originally stolen or taken in that part."

See further as to this section, tit. Receiving.

Venue and jurisdiction of the Central Criminal Court.] By the 4 & 5 Wm. 4, c. 36, s. 2, the jurisdiction of the Central Criminal Court extends over all offences committed within the city of London and county of Middlesex, and those parts of the counties of Essex, Kent, and Surrey, within the parishes of Barking, East Ham, West Ham, Little Ilford, Low Laton, Walthamstow, Wanstead, St. Mary Woodford, and Chingford, in the county of Essex; Charlton, Lee, Lewisham, Greenwich, Woolwich, Eltham, Plumstead, St. Nicholas Deptford, and that part of St. Paul Deptford which is within the said county of Kent, the liberty of Kidbrook, and the hamlet of Mottingham, in the county of Kent; and the borough of Southwark, the parishes of Battersea, Bermondsey, Camberwell, Christchurch, Clapham, Lambeth, St. Mary Newington, Rotherhithe, Streatham, Barnes, Putney, and that part of St. Paul Deptford which is within the said county of Surrey, Tooting, Graveney, Wandsworth, Merton, Mortlake, Kew, Richmond, Wimbledon, the Clink liberty, and the district of Lambeth Palace, in the county of Surrey.

By s. 3, the district situated within the limits of the jurisdiction thereinbefore established is to be deemed one county for all purposes of venue, local description, trial, judgment, and execution not therein specially provided for; and in all indictments and presentments the venue laid in the margin shall be "Central Criminal Court, to wit," and all offences and material facts are to be laid to *have been committed [*238] and averred to have taken place "within the jurisdiction of the said court:" and see also 9 & 10 Vict. c. 24.

Where an indictment for misdemeanor was preferred at the Central Criminal Court, and the marginal venue was "Central Criminal Court, to wit," and in the body of the indictment the facts were stated to have taken place "at the parish of

St. Mary, Lambeth, Surrey, within the jurisdiction of the said court," and the indictment was removed by *certiorari*, it was held that the trial must be at the assizes for Surrey. R. v. Connop, 4 A. & E. 942. See also, as to the venue of the Central Criminal Court, Reg. v. Gregory, 1 Cox, C. C. 198; S. C. 14 L. J. M. C. 82.

An indictment for misdemeanor found at the Central Criminal Court had in the margin the words, "Central Criminal Court," and stated that M. A., "late of the parish of St. Stephen, Coleman Street, in the city of London, and within the jurisdiction of the said court, laborer," intending, &c., on, &c., "at the parish aforesaid, and within the jurisdiction," &c., unlawfully, &c.; alleging the offence without further statement of venue. The indictment was removed by *certiorari* and tried in London, and the defendant was convicted. On motion in arrest of judgment: *Semble*, that the venue assigned to the material fact appeared sufficiently to be in the city of London; and it was held, assuming this to be otherwise, that the defect was only want of a proper or perfect venue, and was cured by the 7 Geo. 4, c. 64, s 20, for that the indictment showed jurisdiction in the court at nisi prius to try the case in London. Reg. v. Albert, 5 Q. B. 37. An indictment was laid in the Central Criminal Court, the venue in the margin being, "Central Criminal Court, to wit," and the material facts being laid only as having taken place "within the jurisdiction of the said court." The defendant having removed it by *certiorari*, was tried at nisi prius in Middlesex and found guilty. The Court of Q. B. arrested the judgment, the description of place not being made sufficient by the 4 & 5 Wm. 4, c. 36, s. 3, in cases not tried at the Central Criminal Court, and the defect not being cured by 7 Geo. 4, c. 64, s. 20, the nisi prius court not appearing "by the indictment," "to have had jurisdiction over the offence." The court refused after verdict to enter a suggestion for a trial in Middlesex, *nunc pro tunc*. And *semble*, such an application would not be granted at any period. An indictment preferred in the Central Criminal Court should, with a view to the possibility of its removal, contain, besides the statutory venue, a venue of the county where the offence really took place. And if that has not been done, it should be made a condition of the removal by *certiorari* that the defendant consent to the insertion. R. v. Stowell, 5 Q. B. 44: 48 E. C. L. R.; and see also R. v. Gregory, 7 Q. B. 274: 53 E. C. L. R.; R. v. Huot, 10 Q. B. 925: 59 E. C. L. R.; S. C. 17 L. J. M. C. 14; and R. v. Smythies, 1 Den. C. C. R. 498; S. C. 19 L. J. M. C. 31. By the 19 & 20 Vict. c. 16, the Court of Queen's Bench has power to order certain offenders, against whom indictments have been found for felonies or misdemeanors committed out of the jurisdiction of the Central Criminal Court, and which indictments have been removed by *certiorari*, to be tried at the Central Criminal Court.

Change of venue] When a fair and impartial trial cannot be had in the county where the venue is laid, the Court of King's Bench (the indictment being removed thither by *certiorari*) (*ante*, p. 180), will upon an affidavit stating that fact, permit a [*239] suggestion to be entered *on the record, so that the trial may be had in an adjacent county. Good ground must be stated in the affidavit for the belief that a fair trial cannot be had. R. v. Clendon, 2 Str. 911; R. v. Harris, 3 Burr. 1330; 1 W. Bl. 378. The suggestion need not state the facts from which the inference is drawn that a fair trial cannot be had. R. v. Hunt, 3 B. & A. 444. This suggestion when entered is not transferable. 1 Chitty, Crim. Law, 201. And the venue in the indictment remains the same, the place of trial alone being changed. Ibid. It is only, however, in case of misdemeanor that the Court of King's Bench will, in general, award a *venire* to try in a foreign county, though cases may occur in which the

court would change the venue in felony. R. v. Holden, 5 B. & Ad. 347 : 27 E. C. L. R.; 2 Nev. & M. 167. And even in cases of misdemeanor, the court has not exercised its discretionary power, unless there has been some peculiar reason, which made the case almost one of necessity. Ib. Upon an indictment for a misdemeanor, the application to change the venue ought to be made before issue joined. R. v. Forbes, 2 Dowl. P. C. 440.

As to removing indictments into the Central Criminal Court, see 19 & 20 Vict. c. 16, *supra*, p. 238.

*APPREHENSION OF OFFENDERS. [*240]

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By private persons at common law.] At common law all private persons are justified, without a warrant, in apprehending and detaining, until they can be carried before a magistrate, all persons found committing or attempting to commit a felony. R. v. Hunt, 1 Moo. C. C. 93.

But in cases of suspicion of felony, and in cases of offences less than felony, a private person has at common law no right to apprehend offenders. Fost. 318. Whether or not a private person may arrest a person who stands *indicted* of felony, does not appear to be well settled. Lord Hale inclines to the opinion that the protection does not extend to a private person in such case, because a person innocent may be indicted, and because there is another way of bringing him to answer, viz., process of *capias* to the sheriff, who is a known responsible officer. 2 Hale, P. C. 84. The reasoning of Mr. East, however, is rather in favor of the protection. It may be urged, he observes, that if the fact of the indictment found against the party be known to those who endeavor to arrest him, in order to bring him to justice, it cannot be truly said that they act upon their own private suspicion or authority, and therefore they ought to have equal protection with the ordinary ministers of the law. At any rate, it is a good cause of arrest by private persons, if it may be made without the death of the felon. Dalton, c. 170, s. 5. And if the fact of the prisoner's guilt be necessary for their complete justification, the bill of indictment found by the grand jury would (he conceives) for that purpose be *primâ facie* evidence of the fact, till the contrary should be proved. 1 East, P. C. 300.

Where a breach of the peace is actually being committed, any private person may interfere to prevent it, even though no felony be committed or attempted, after proper warning, and calling upon the parties to desist. Fost. 272, 311. And as they may take all necessary measures to end the breach and to prevent its recurrence, they may apprehend and detain any persons taking part in the disturbance. Whether or no, when all danger of any further breach is over, no felony having been committed, they are bound to set at liberty the persons in their custody, or whether they may take them before a magistrate or give them into the custody of a peace officer, does not appear to have been discussed.

It is said by Hawkins that at common law every private person may arrest any suspicious night-walker, and detain him till he give a good account of himself. Hawk. P. C. b. 2, c. 13, s. 6. But this would be an authority even more general than that of peace officers (*infra*, p. 242), and the passage is not law. See 1 Russ. by Gr. 601.

By private persons by statute.] By the 24 & 25 Vict. c. 96 (larceny), *s. 103, "Any person found committing any offence, punishable either upon indictment or upon summary conviction, by virtue of this act, except only the offence of angling in the daytime, may be immediately apprehended, without a warrant, by any person, and forthwith taken, together with such property, if any, before some neighboring justice of the peace, to be dealt with according to law; and if any credible witness shall prove, upon oath, before a justice of the peace, a reasonable cause to suspect that any person has in his possession, or on his premises, any property whatsoever on or with respect to which any offence, punishable either by indictment or by summary conviction, by virtue of this act, shall have been committed, the justice may grant a warrant to search for such property, as in the case of stolen goods; and any person to whom any property shall be offered to be sold, pawned, or delivered, if he shall have reasonable cause to suspect that any such offence has been committed on or with respect to such property, is hereby authorized and, if in his power, is required to apprehend and forthwith to take before a justice of the peace the party offering the same, together with such property, to be dealt with according to law."

By the 24 & 25 Vict. c. 99 (coinage), s. 31, "It shall be lawful for any person whatsoever to apprehend any person who shall be found committing any indictable offence, or any high crime and offence, or crime and offence against this act, and to convey or deliver him to some peace officer, constable, or officer of police, in order to his being conveyed, as soon as reasonably may be, before a justice of the peace, or some other proper officer, to be dealt with according to law."

By the 24 & 25 Vict. c. 97 (injuries to property), s. 61, "Any person found committing any offence against this act, whether the same be punishable upon indictment or upon summary conviction, may be immediately apprehended without a warrant, by any peace officer, *or the owner of the property injured, or his servant, or any person authorized by him*, and forthwith taken before some neighboring justice of the peace to be dealt with according to law."

By the 14 & 15 Vict. c. 19, s. 11, "It shall be lawful for any person whatsoever to apprehend any person who shall be found committing any indictable offence in the night, and to convey him or deliver him to some constable or other peace officer, in order to his being conveyed, as soon as conveniently may be, before a justice of the peace, to be dealt with according to law."

So also in the rural police act, 10 & 11 Vict. c. 89, s. 15 (*infra*, p. 243), persons found committing offences against that act may be apprehended by the owner of the property, on or in respect to which the offence is committed, or his servant, or any person authorized by him.

By 9 Geo. 4, c. 69, s. 2, "where any person shall be found upon any land, committing any such offence as is hereinbefore mentioned, it shall be lawful for the owner or occupier of such land or for any person having a right of free warren or free chase thereon, or for the lord of the manor or reputed manor, wherein such land may be situate, and also for any gamekeeper or servant of any of the persons hereinbefore mentioned, or any person assisting such gamekeeper or servant, to seize and apprehend such offender upon such land, or in case of pursuit being made in any other place to which he may have escaped therefrom, and to deliver him, as soon as may be, into the custody of a peace officer, in order to his being conveyed before two justices of the peace."

Very frequent discussions have taken place upon the interpretation of this section; the cases will be found under the title "*Game.*"

*By peace officer without warrant at common law] The power of a peace officer to apprehend and detain offenders is much greater than that of private persons. For they may exercise all the powers of the latter, and their right to apprehend persons indicted for felony is undoubted. 1 East, P. C. 298, 300. And they may, which private persons cannot do, apprehend persons *on a reasonable suspicion* of felony. Samuel v. Payne, Dougl. 359; 1 East, P. C. 301; 2 Hale, P. C. 83, 84, 89.

What is a reasonable suspicion of felony cannot, of course, be stated with precision. But it has always been considered that a charge of felony by a person not manifestly unworthy of credit, is sufficient to justify the apprehension. 1 East, P. C. 302. The peace officer should also make such inquiries as his experience teaches him are best suited to ascertain the nature of the offence, and there are few that are without special directions how to act in such cases.

Whether a constable or other peace officer is warranted in arresting a person after a breach of the peace has been committed, is a point which has occasioned some doubt. There are, indeed, some authorities, to the effect that the officer may arrest the party on the charge of another, though the affray is over, for the purpose of bringing him before a justice, to find security for his appearance. 2 Hale, P. C. 90; Hancock v. Sandham, Williams v. Dempsey, 1 East, P. C. 306 (*n*). But the better opinion was always said to be the other way. 1 East, P. C. 305; Hawk. b. 2, c. 12, s. 20; 1 Russ. by Grea. 601. See Timothy v. Simpson, 1 C. M. & R. 757. And it was so expressly decided in R. v. Walker, 1 Dears. C. C. R. 358; S. C. 23 L. J. M. C. 123; there the prisoner had assaulted a police constable, who went away, and after two hours' time returned and took him into custody; the court held that this was an unlawful apprehension. Pollock, C. B., said, "The assault for which the prisoner might have been apprehended was committed some time before, and there was no continued pursuit. The interference of the officer, therefore, was not for the purpose of preventing an affray, or of arresting a person whom he had seen recently committing an assault. The apprehension was so disconnected from the offence as to render it unlawful."

In R. v. Light, Dears. & B. C. C. 332, the defendant was convicted on an indictment charging him with assaulting a constable in the execution of his duty. It appeared that the constable whilst standing outside the defendant's house, saw him take up a shovel, and hold it in a threatening attitude over his wife's head, and heard him at the same time say, "If it was not for the policeman outside, I would split your head open." About twenty minutes after the defendant left the house, saying that he would leave his house altogether, and he was then taken into custody by the policeman, who had no warrant. It was on this apprehension that the assault took place, and it was held that the policeman was justified under the circumstances in apprehending the defendant, and that the conviction was right. The court, no doubt, in this case, were strongly actuated by the feeling that the policeman, as always happens on such occasions, is placed in a very difficult position. When a man has recently committed an act of violence, the court might very well be extremely unwilling to say that in no view could the peace officer reasonably believe that he was about to commit another similar act, and so be justified in apprehending him. Much, in such a case, ought to be presumed in favor of an officer of justice, and it is a point upon which the *opinion of the jury might be very properly taken. See Baynes v. [*243] Brewster, 11 L. J. M. C. 5, which is in accordance with this view.

By peace officer without warrant by statute.] By the 24 & 25 Vict. c. 96 (larceny), s. 104, "Any constable or peace officer may take into custody, without war-

rant, any person whom he shall find lying and loitering in any highway, yard, or other place, during the night, and whom he shall have good cause to suspect of having committed or being about to commit any felony against this act, and shall take such person, as soon as reasonably may be, before a justice of the peace, to be dealt with according to law."

Similar provisions are contained in the 24 & 25 Vict. c. 97 (injuries to property), s. 57, and the 24 & 25 Vict. c. 100 (offences against the person), s. 66.

By the Metropolitan Police Act, 10 Geo. 4, c. 44, s. 7, it is enacted, "That it shall be lawful for any man belonging to the said police force, during the time of his being on duty, to apprehend all loose, idle, and disorderly persons, whom he shall find disturbing the public peace, or whom he shall have just cause to suspect of any evil designs, and all persons whom he shall find, between sunset and the hour of eight in the forenoon, lying in any highway, yard, or other place, or loitering therein, and not giving a satisfactory account of themselves, and to deliver any person so apprehended into the custody of the constable appointed under this act, who shall be in attendance at the nearest watch-house, in order that such person may be secured until he can be brought before a justice of the peace, to be dealt with according to law, or may give bail for his appearance before a justice of the peace, if the constable shall deem it prudent to take bail in the manner thereinafter mentioned."

By the Metropolitan Police Act, the 2 & 3 Vict. c. 47, s. 65, "It shall be lawful for any constable belonging to the Metropolitan police force to take into custody, without warrant, any person who, within the limits of the Metropolitan police district, shall be charged by any other person with committing any aggravated assault, in every case in which such constable shall have good reason to believe that such assault has been committed, *although not within the view of such constable*, and that by reason of the recent commission of the offence a warrant could not have been obtained for the apprehension of the offender." See also ss. 54, 64, and 66 of the same statute.

So by the Rural Police Act, 10 & 11 Vict. c. 89, s. 15, "Any person found committing any offence punishable either upon indictment or as a misdemeanor upon summary conviction, by virtue of this or the special act, may be taken into custody, without a warrant, by any of the said constables, or may be apprehended by the owner of the property on or with respect to which the offence is committed, or by his servant or any person authorized by him, and may be detained until he can be delivered into the custody of a constable; and the person so arrested shall be taken, as soon as conveniently may be, before some justice, to be examined and dealt with according to law: provided always, that no person arrested under the powers of this or the special act, shall be detained in custody by any constable or other officer, without the order of some justice, longer than shall be necessary for bringing him before a justice, or than forty hours at the utmost."

*ABDUCTION OF WOMEN AND CHILDREN.

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At common law.] It seems very doubtful how far abduction was, in any case, an offence at common law. Of course, if the woman did not consent, there would be an assault upon *her;* if she consented, but those having lawful charge of her resisted, and force were used, there would be an assault upon *them.* A conspiracy also to seduce would be an offence at common law. All the authorities usually quoted to show that this is an offence at common law, may be explained on one or other of these grounds. See R v. Lord Grey, 3 St. Tr. 519; R. v. Mears, 2 Den. C. C. 79; 1 East, P. C. 460; 1 Russ. by Gr. 401; Hawk. P. C. b. 1, c. 41, s. 8.

By statute] The various statutes formerly directed against this offence were the 3 Hen. 7, c. 2; 29 Eliz. c. 9; 4 & 5 P. & M. c. 8; 1 Geo. 4, c. 115, and the 9 Geo. 4, c. 31. All these statutes are now repealed, and the provisions relating to the offence are contained in the 24 & 25 Vict. c. 100.

Abduction of a woman against her will from motives of lucre.] By section 53, "Where any woman of any age shall have any interest, whether legal or equitable, present or future, absolute, conditional, or contingent, in any real or personal estate, or shall be a presumptive heiress or coheiress, or presumptive next of kin, or one of the presumptive next of kin, to any one having such interest, whosoever shall, from motives of lucre, take away or detain such woman against her will, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person, shall be guilty of felony." For the punishment, see the next provision.

Abduction of a girl under age against the will of her guardian.] By the same section, "Whoever shall fraudulently allure, take away, or detain such woman, being under the age of twenty-one years, out of the possession and against the will of her father or mother, or of any other *person having the lawful care or charge of [*245] her, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor."

Offender incapable of taking property.] By the same section, "Whosoever shall be convicted of any offence against this section shall be incapable of taking any estate

or interest, legal or equitable, in any real or personal property of such woman, or in which she shall have any such interest, or which shall come to her as such heiress, coheiress, or next of kin as aforesaid; and if any such marriage as aforesaid shall have taken place, such property shall, upon such conviction, be settled in such manner as the Court of Chancery in England or Ireland shall upon any information at the suit of the attorney-general appoint."

Taking away a woman by force, with intent to marry or carnally know her.] By section 54, "Whosoever shall by force take away or detain against her will any woman, of any age, with intent to marry or carnally know her, or to cause her to be married or carnally known by any other person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor."

Abduction of a girl under sixteen years of age.] By section 55, "Whosoever shall unlawfully take or cause to be taken any unmarried girl, being under the age of sixteen years, out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labor."

Taking or enticing away children under fourteen years of age.] By section 56, "Whosoever shall unlawfully, either by force or fraud, lead or take away, or decoy or entice away or detain, any child under the age of fourteen years, with intent to deprive any parent, guardian, or other person having the lawful care or charge of such child, of the possession of such child, or with intent to steal any article upon or about the person of such child, to whomsoever such article may belong, and whosoever shall, with any such intent, receive or harbor any such child, knowing the same to have been by force or fraud led, taken, decoyed, enticed away or detained as in this section before mentioned, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and, if a male under the age of sixteen years, with or without whipping; provided that no person who shall have claimed any right to the possession of such child, or shall be the mother, [*246] or shall have claimed to be the father of an illegitimate child, *shall be liable to be proseeuted by virtue hereof on account of the getting possession of such child, or taking such child out of the possession of any person having the lawful charge thereof."

What constitutes a taking or detaining.] There are so many different kinds of taking and detaining mentioned in the statute, that it is necessary to attend very carefully to the words used. The first part of s. 53 says, whosoever shall "take away or detain against her will;" s. 54 says, whosoever shall "*by force* take away or detain against her will;" but the words "by force" can hardly make any difference.

Even under the old statute of Hen. 7, which did not contain the words "or detain," detaining a person who originally came with her own consent was considered to be within the statute. R. v. Brown, 1 Ventr. 243; Hawk. P. C. b. 1, c. 41, s. 7; 1 East, P. C. 454; 1 Russ. by Gr. 703.

In the latter part of s. 53, the words are, "whosoever shall fraudulently allure, take or detain such woman out of the possession and against the will of her father or mother." It is clear that these words are intended to include the case of the woman herself consenting. They are taken from a statute which formerly related to Ireland only (10 Geo. 4, c. 34, s. 23). The decisions on ss. 55 and 56 may perhaps throw some light on their meaning.

In s. 55, which applies to girls under sixteen years of age, the words are "whosoever shall take or cause to be taken out of the possession and against the will of her father or mother," &c. Here also any violation of the girl's will is unnecessary. Thus it is said by Herbert, C. J., that the statute of 4 & 5 P. & M., which was to the same effect, was made to prevent children from being seduced from their parents or guardians by flattering or enticing words, promises or gifts, and married in a secret way to their disparagement. Hicks v. Gore, 3 Mod. 84. So upon the same statute it was held that it is no excuse that the defendant, being related to the girl's father, and frequently invited to the house, made use of no other seduction than the common blandishments of a lover to induce the girl secretly to elope and marry him, if it appear that it was against the consent of the father. R. v. Twisleton, 1 Lev. 257; 1 Sid. 387; 2 Keb. 432; Hawk. P. C. b. 1, c. 41, s 10; 1 Russ. by Grea. 712. If the same latitude of construction were applied to s. 53, which relates to women of any age, it might be rather dangerous. It has been argued that, though by the statute a taking by force is not necessary, still that a person cannot in any sense be said to be *taken* who goes willingly, and that the word *take* in itself imports the use of some coercion. But this view has not been adopted; thus where A. went in the night to the house of B. and placed a ladder against the window, and held it for F., the daughter of B., to descend, which she did, and then eloped with A.; F. being a girl fifteen years old; this was held to be a "taking" of F. out of the possession of her father within the statute, although F. had herself proposed to A. to bring the ladder and elope with him. R. v. Robins, 1 C. & K. 456: 47 E. C. L. R. So in R. v. Mankletow, 1 Den. C. C. R. 159; S. C. 22 L. J. M. C. 115, where the prisoner, intending to emigrate to America, had privately persuaded a girl between twelve and thirteen years of age to go with him, and on the morning of his departure had secretly told her to put up her things in a bundle and meet him at a *certain spot, [*247] and she accordingly left her father's house and met the prisoner, and the two travelled up to London together; this was held to be a "taking." Jervis, C. J., in delivering judgment in this case said: "There are two points in this case. The first turns on the construction of the word 'take' in the statute. It is contended for the prisoner that the word 'take' must mean taking by force, actual or constructive. But a comparison of the sections shows that that is not necessary. It is unimportant under the section on which this indictment was framed whether the girl consented or not to go away with the man. There can be no question upon the facts stated in this case, that when the prisoner met the girl at the appointed place, there was then a taking of her. The statute was framed for the protection of parents." In R. v. Handley, 1 F. & F. 648, Wightman, J., said, "a taking by force is not necessary; it is sufficient if such moral force was used as to create a willingness on the girl's part to leave her father's home. If, however, the going away was entirely voluntary on the part of the girl, the prisoner would not be guilty of any offence under the statute."

From what was said by Parke, B., in R. v. Mankletow, it would seem that the case of R. v. Meadows, 1 C. & K. 399 : 47 E. C. L. R., cannot be relied on for any useful purpose.

In R. v Timmins, 30 L. J. M. C. 45, the prisoner induced a girl of fourteen

years and a half old to leave her father's house, and cohabited with her for three days, and then told her to go home. The jury found the prisoner guilty generally, but also found that he did not intend, when he took away the girl, to keep her away from home permanently. The Court of Criminal Appeal confirmed the conviction, but seemed anxious to limit their decision to the particular circumstances of this case.

The possession of father, mother, &c.] A similar difficulty has been suggested on this point, namely, that where the girl leaves the house of the person, in whose custody she is, of her own accord, the offence cannot be committed, because the words of the statute are, "take out of the possession," and it is urged that if taken at all in this case, she is not taken *out of the possession* of her father, &c. But in R. v. Mankletow, *ubi supra*, the court held that an actual possession of the father or other person was not necessary; and that though the girl may leave home of her own accord, still that possession continues in law until put an end to by the accused taking the girl into his own possession. Maule, J., seems to have ruled in the same way in a case of R. v. Kipps, 4 Cox, C. C. 167.

How far a girl who had left her father's house temporarily, as on a visit, would still be in his possession for this purpose, does not appear to have been decided. But it seems reasonable to hold that she should be considered to remain in the possession of the father unless she have herself abandoned it (which, of course, being a reasonable creature she is capable of doing), or he has transferred her to the care and guardianship of another; so that by a mere temporary absence, as in the case put, the father's possession would not be broken; whereas if she were sent to school, or the like, she would then be in possession of a person "having lawful care or charge of her," which lawful care or charge would be protected by the statute.

[*248] **Proof of the want of consent.*] The want of consent of the father must be presumed, if it appears that, had he been asked, he would not have consented. Per Wightman, J., in R. v. Handley, 1 F. & F. 648. In R. v. Hopkins, Car. & M 264: 41 E. C. L. R., Gurney, B., seemed to think that where a man by false and fraudulent representations, as by representing that he wished to place her in the service of a lady, induced the parents of a girl between ten and eleven years of age to allow him to take her away, such taking away was an abduction within the statute. This would be in accordance with the general principle, that a consent obtained by fraud avails nothing.

The statute says, "out of the possession and against the will of her father or mother, or of any other person having the lawful care or charge of her." Mr. East suggests that it deserves good consideration before it is decided, that an offender acting in collusion with one who has the temporary custody of another's child for a special purpose, and knowing that the parent or proper guardian did not consent, is yet not within the statute; for otherwise every schoolmistress might dispose of the children committed to her care, though such delegation of a child for a particular purpose be no delegation of the power of disposing of her in marriage; but the government of the child in that respect may still be said to remain in the parent. 1 East, P. C. 457. Probably the only way of meeting this case is to hold that, by the fraud of the temporary guardian, the latter loses all right to the possession of the child, who reverts into the possession of her natural guardian.

Proof of the age.] In cases where the offence depends upon the age this must be proved in the usual way, by the girl herself, or by a person who can speak to the

date of the birth. In R. v. Robins, 1 C. & K. 456: 47 E. C. L. R., it was held that it was no defence that the prisoner did not know that the girl was under sixteen, or that from her appearance he might have thought that she was of greater age.

Proof of the intent.] It is only in the case of a female over sixteen years that the intent to marry or carnally know is an ingredient in the offence. This intent may be inferred either from the solicitations addressed to the woman herself, or from the preparations made by the prisoner. The only intent which is necessary to prove under s. 55, is the intent to deprive the parent or other person of the possession of the child: R. v. Timmins, 30 L. J. M. C.

The same intent as that last mentioned will constitute an offence under s. 56; but under this section it is also an offence to entice or take away the child, without any intent to deprive her father or other person having lawful custody of her, of the possession of her, but with the intent of stealing any article upon or about the person of such child, to whomsoever such article may belong.

Proof of the woman being an heiress, &c.] To constitute the offence described in the first part of s. 53, it is necessary that the woman should have an interest, legal or equitable, present or future, absolute, conditional, or contingent in some real or personal estate, or should be an heiress or co-heiress, or presumptive next of kin, or one of the presumptive next of kin to some one having such interest, and the abduction must be from "motives of lucre," by which, it is supposed, is meant that the prisoner when he carried off the woman, *had in view, the advancement [*249] of his own pecuniary position by using the legal rights of a husband over his wife's property. If this is so, why the intent to carnally know was inserted does not clearly appear; because a man can only carnally know a woman *from motives of lucre* when his plan is thereby to coerce her into a marriage, so that if the statute had expressed the intent to marry only, it would have been enough. It is quite clear that carrying off an heiress from motives of lust only would not be an offence under this part of the statute.

Looking to the much more general provisions of s. 54, it is probably only necessary to pay any attention to the provision we have just been discussing, where it is wished to make sure that the husband shall be deprived of any benefit from the wife's property, according to the last provision in s. 53.

As no motives of lucre are mentioned in the second class of offences mentioned in s. 53, it seems that fraudulently alluring, taking away, or detaining a woman under twenty-one years of age, with intent to marry or carnally know her, would be felony, whatever the motives might be, provided she was such a woman as came within the description in the first part of the section, namely, an heiress. It follows that alluring "an heiress" between the ages of seventeen and twenty-one, from motives of lust, would be a felony, but alluring a woman of no property or expectations, between these ages, from the same motives, would be no offence at all. The reason of this is not quite apparent.

*ABORTION.

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Offence at common law.] A CHILD *en ventre sa mère* cannot be the subject of murder, *vide post*, Murder. At common law an attempt to destroy such a child appears to have been held to be a misdemeanor. 3 Chitt. Cr. Law, 798; 1 Russ. by Grea. 671.

If, however, with the attempt to procure abortion a person does an act whereby a living child is brought into the world immaturely, and who dies in consequence, that would be murder in the person doing the act. Per Maule, J., in R. v. West, 2 C. & K. 784: 61 E. C. L. R.(1)

By statute] This offence was formerly provided for by the 7 Wm. 4 & 1 Vict. c. 85 (E. & I.), s. 6, which is now repealed; and by the 24 & 25 Vict. c. 100, s. 58, it is enacted that, "Every woman being with child who, with intent to procure her own miscarriage, shall unlawfully administer to herself any poison or other noxious thing, or shall unlawfully use any instrument or other means whatsoever, with the like intent, and whosoever with intent to procure the miscarriage of any woman, whether she be or be not with child, shall unlawfully administer to her, or cause to be taken by her, any poison, or other noxious thing, or shall unlawfully use any instrument, or other means whatsoever, with the like intent, shall be guilty of felony, and being convicted thereof shall be liable at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

By s. 59, "Whosoever shall unlawfully supply, or procure any poison or other noxious thing, or any instrument or thing whatsoever, knowing that the same is intended to be unlawfully used or employed with intent to procure the miscarriage of any woman, whether she be or be not with child, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labor."

Proof of the administering.] Where the prisoner gave the prosecutrix a cake containing poison, which she merely put into her mouth, and spit out again without swallowing any portion of it; the judges held, that a mere delivery did not constitute [*251] an administering within *the 43 Geo. 3, c. 58, and that there was no administering unless the poison was taken into the stomach. R. v. Cadman, Carr. Supp.

(1) To cause abortion when the child is quick is not murder or manslaughter at common law, but a great misdemeanor. Although the law, for many civil purposes, recognizes the existence of a child from its conception, it does not for the purpose of punishing its destruction, recognize it as a living being until it quickens and stirs in the womb. State v. Cooper, 2 Zabriskie, 52. It is not a punishable offence by the common law, to perform an operation upon a pregnant woman with her consent, for the purpose of procuring an abortion, and thereby to effect such purpose, unless the woman be quick with child. Commonwealth v. Parker, 9 Meto. 263. *Contra*, Mills v. The Commonwealth, 1 Harris, 631.

237. And see R. v. Harley, 4 C. & P. 370: 19 E. C. L. R.; where the report of this case in 1 Moo. C. C. 114, is stated to be inaccurate. But to constitute an administering, there need not be an actual delivery by the hand of the prisoner. R. v. Harley, *supra*.

Upon an indictment under this section it was proved that the woman requested the prisoner to get her something to procure miscarriage, and that a drug was both given by the prisoner and taken by the woman with that intent, but that the taking was not in the presence of the prisoner. It was held, nevertheless, that the prisoner had caused the drug to be taken within the meaning of the statute. R. v. Wilson, Dear. & B. C. C. 127; R. v. Farrow, Id. 164, *acc.*

See further as to administering, *infra*, tit. Poison.

Proof of the nature of the thing administered.] The nature of the poison or other noxious thing must be proved. Upon an indictment on the 43 Geo. 3, c. 58, s. 2, for administering *savin* to a woman not quick with child, with intent, &c., the charge was that the prisoner administered "six ounces of the *decoction* of a certain shrub called *savin* then and there, being a noxious and destructive thing." It appeared that the prisoner had prepared the medicine by pouring boiling water on the leaves of the shrub, and the medical men examined stated that such preparation is called an *infusion* and not a decoction. It was objected that the medicine was misdescribed, but Lawrence, J., overruled the objection. He said *infusion* and decoction are *ejusdem generis*, and the variance is immaterial. The question is, whether the prisoner administered *any matter or thing* to the woman with intent to procure abortion. R. v. Phillips, 3 Campb. 78. The authority of this decision appears to have been recognized by Vaughan, B., in the following case. The prisoner was indicted under the 9 Geo. 4, c. 31, s. 13, for administering saffron to the prosecutrix, with intent to procure abortion. The counsel for the prisoner cross-examining as to the innocuous nature of the article administered, Vaughan, B., said, "does that signify? It is with the intention that the jury have to do; and if the prisoner administered a bit of bread merely with the intent to procure abortion, it is sufficient to constitute the offence contemplated by the act of Parliament." R. v. Coe, 6 C. & P. 403: 25 E. C. L. R. It should be observed, that the words of the statute were the same as those used in the present statute, "shall administer any *poison* or other *noxious thing*," or use "any instrument or *other means* whatsoever."

The former statutes on this subject, the 43 Geo. 3, c. 58, and 9 Geo. 4, c. 31, distinguished between the case where the woman was quick and was not quick with child, and under both acts the woman must have been pregnant at the time. See R. v. Scudder, 3 C. & P. 605: 14 E. C. L. R.; 1 Moo. C. C. 216. The terms of the 7 Wm. 4 & 1 Vict. c. 85, s. 6, were "with intent to procure the miscarriage of any woman," omitting the words "being then quick with child," &c.; under which it was held that it was immaterial whether the woman is or is not pregnant, if the prisoner, believing her to be so, administers the drug, or uses the instrument, with the intent of producing abortion. R. v. Goodhall, 1 Den. C. C. 187; *Acc.* R. v. Gaylor, Dear & B. C. C. 288. Under the present statute the case is expressly provided for.

**Proof of the intent.*] The intent will probably appear from the other cir- [*252] cumstances of the case. That the child was likely to be born a bastard, and to be chargeable to the reputed father, the prisoner, would be evidence to that effect. Proof of the clandestine manner in which the drugs were procured or administered would tend to the same conclusion.

*AFFRAY.

An affray is the fighting of two or more persons in some public place, to the terror of the king's subjects; for if the fighting be in private, it is not an affray, but an assault. 4 Bl. Com. 145. See Timothy v. Simpson, 1 Cr. M. & R. 757. It differs from a riot, in not being premeditated. Thus if a number of persons meet together at a fair or market, or upon any other lawful or innocent occasion, and happen on a sudden quarrel to engage in fighting, they are not guilty of a riot, but of an affray only (of which none are guilty but those who actually engage in it); because the design of their meeting was innocent and lawful, and the breach of the peace happened without any previous intention. Hawk. P. C. b. 1, c. 65, s. 3. Two persons may be guilty of an affray, but it requires three or more to constitute a riot. *Vide post.* Mere quarrelsome words will not make an affray. 4 Bl. Com. 146; 1 Russ. by Grea. 292.

To support a prosecution for an affray, the prosecutor must prove—1, the affray, or fighting, &c.; 2, that it was in a public place; 3, that it was to the terror of the king's subjects; 4, that two or more persons were engaged in it.

The principals and seconds in a prize fight were indicted in one count for a riot, and in another for an affray. The evidence was that the two first prisoners had fought together amidst a great crowd of persons, and that the others were present aiding and abetting; that the place where they fought was at a considerable distance from any highway, and when the officers made their appearance the fight was at an end. The prisoners, on being required to do so, quietly yielded. Alderson, B., said, "it seems to me that there is no case against these men. As to the affray, it must occur in some public place, and this is to all intents and purposes a private one. As to the riot, there must be some sort of resistance made to lawful authority to constitute it, some attempt to oppose the constables who are there to preserve the peace. The case is nothing more than this: Two persons choose to fight, and others look on, and the moment the officers present themselves, all parties quietly depart. The defendants may be indicted for an assault, but nothing more." R. v. Hunt, 1 Cox, C. C. 177; and see R. v. Brown, Car. & M. 314.(1)

The punishment of common affrays is by fine and imprisonment; the measure of which must be regulated by the circumstances of the case; for where there is any material aggravation, the punishment will be proportionally increased. 4 Bl. Com. 145; 1 Hawk. P. C. c. 63, s. 20; 1 Russ. by Grea. 296.

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(1) One may be acquitted and the other convicted. It may be an affray though the parties fight without consent being proved. Cash v. State, 2 Tenn. 198; Duncan v. Comm., 6 Dana, 295; Simpson v. The State, 5 Yerger, 356. One who aids, assists, and abets an affray, is guilty as principal. Carlin v. State, 4 Ibid. 143; Duncan v. The Commonwealth, 6 Dana, 295; The State v. Benthal, 5 Hump. 519; The State v. Priddy, 4 Humph. 429.

It must be in a public place. The State v. Sumner, 5 Strobhart, 53.

A field surrounded by a forest and situated one mile from any highway or other public place, does not lose its private character by the casual presence of three persons, so as to make two of them who fight together willingly, guilty of an affray. Taylor v. The State, 22 Alabama, 15.

Words alone will not constitute an affray; but accompanied by acts, such as drawing knives and attempting to use them in a public street of a city, will. Hawkins v. The State, 13 Georgia, 322.

*AGENTS, BANKERS, FACTORS, &c.—FRAUDS COMMITTED BY.

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FRAUDS committed by bankers, merchants, brokers, attorneys, and other agents, were provided for by the 52 Geo. 3, c. 63; that statute was repealed and other provisions substituted by the 7 & 8 Geo. 4, c. 29, 5 & 6 Vict. c. 39, and the 20 & 21 Vict. c. 54. These statutes are also now repealed, and the statute at present in force is the 24 & 25 Vict. c. 96.

Agents, bankers, factors, &c., embezzling money or selling securities or goods.] By s. 75, "Whosoever, having been intrusted, either solely, or jointly with any other person, as a banker, merchant, broker, attorney, or other agent, with any money or security for the payment of money, with any direction in writing to apply, pay, or deliver such money or security or any part thereof respectively, or the proceeds or any part of the proceeds of such security, for any purpose, or to any person specified in such direction, shall, in violation of good faith, and contrary to the terms of such direction, in anywise convert to his own use or benefit, or the use or benefit of any person other than the person by whom he shall have been so intrusted, such money, security, or proceeds, or any part thereof respectively; and whosoever, having been intrusted, either solely, or jointly with any other person, as a banker, merchant, broker, attorney, or other agent, with any chattel or valuable security, or any power of attorney for the sale or transfer of any share or interest in any public stock or fund, whether of the United Kingdom, or any part thereof, or of any foreign state, or in any stock or fund of any body corporate, company, or society, for safe custody or for any special purpose, without any authority to sell, negotiate, transfer, or pledge, shall, in violation of good faith, and contrary to the object or purpose for which such chattel, security, or power of attorney shall have been intrusted to him, sell, negotiate, transfer, pledge, or in any manner convert to his *own use or benefit, or the use or [*255] benefit of any person other than the person by whom he shall have been so intrusted, such chattel or security, or the proceeds of the same, or any part thereof, or the share or interest in the stock or fund to which such power of attorney shall relate, or any part thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Provisions not to affect trustees, or mortgagees, or bankers in certain cases.] By the same section, "Nothing in this section contained relating to agents shall affect

any trustee in or under any instrument whatsoever, or any mortgagee of any property, real or personal, in respect of any act done by such trustee or mortgagee, in relation to the property comprised in or affected by any such trust or mortgage, nor shall restrain any banker, merchant, broker, attorney, or other agent, from receiving any money which shall be or become actually due and payable upon or by virtue of any valuable security, according to the tenor and effect thereof, in such manner as he might have done if this act had not been passed, nor from selling, transferring, or otherwise disposing of any securities or effects in his possession, upon which he shall have any lien, claim, or demand, entitling him by law so to do, unless such sale, transfer, or other disposal shall extend to a greater number or part of such securities or effects than shall be requisite for satisfying such lien, claim, or demand."

Agents, bankers, merchants, &c., fraudulently selling property.] By s. 76, "Whosoever, being a banker, merchant, broker, attorney, or agent, and being intrusted, either solely, or jointly with any other person, with the property of any other person for safe custody, shall, with intent to defraud, sell, negotiate, transfer, pledge, or in any manner convert or appropriate the same, or any part thereof, to or for his own use or benefit, or for the use or benefit of any person other than the person by whom he was so intrusted, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award, as hereinbefore last mentioned."

Fraudulently selling property under powers of attorney.] By s. 77, "Whosoever, being intrusted, either solely, or jointly with any other person, with any power of attorney for the sale or transfer of any property, shall fraudulently sell or transfer, or otherwise convert the same or any part thereof to his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award, as hereinbefore last mentioned."

Factors or agents fraudulently obtaining advances on property.] By s. 78, "Whosoever, being a factor or agent, intrusted, either solely, or jointly with any other person, for the purpose of sale or otherwise, with the possession of any goods, or [*256] of any document of *title to goods, shall, contrary to or without the authority of his principal in that behalf, for his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted, and in violation of good faith, make any consignment, deposit, transfer, or delivery of any goods or document of title so intrusted to him as in this section before mentioned, as and by way of a pledge, lien, or security, for any money or valuable security borrowed or received by such factor or agent at or before the time of making such consignment, deposit, transfer, or delivery, or intended to be thereafter borrowed or received, or shall, contrary to or without such authority, for his own use or benefit, or the use or benefit of any person other than the person by whom he was so intrusted, and in violation of good faith, accept any advance of any money or valuable security on the faith of any contract or agreement to consign, deposit, transfer, or deliver any such goods or document of title, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award, as hereinbefore last mentioned."

Clerks wilfully assisting] By the same section, "Every clerk or other person, who shall knowingly and wilfully act and assist in making any such consignment, deposit, transfer, or delivery, or in accepting or procuring such advance as aforesaid, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the same punishments."

Exception where the pledge does not exceed lien.] By the same section, "Provided that no such factor or agent shall be liable to any prosecution for consigning, depositing, transferring, or delivering any such goods or documents of title, in case the same shall not be made a security for or subject to the payment of any greater sum of money than the amount which at the time of such consignment, deposit, transfer, or delivery was justly due and owing to such agent from his principal, together with the amount of any bill of exchange drawn by or on account of such principal and accepted by such factor or agent."

Definitions of terms.] By s. 79, "Any factor or agent intrusted as aforesaid, and possessed of any such document of title, whether derived immediately from the owner of such goods, or obtained by reason of such factor or agent having been intrusted with the possession of the goods or of any other document of title thereto, shall be deemed to have been intrusted with the possession of the goods represented by such document of title; and every contract pledging or giving a lien upon such document of title as aforesaid shall be deemed to be a pledge of and lien upon the goods to which the same relates; and such factor or agent shall be deemed to be possessed of such goods or document whether the same shall be in his actual custody or shall be held by any other person subject to his control, or for him, or on his behalf; and when any loan or advance shall be *bonâ fide* made to any factor or agent intrusted with and in possession of any such goods or document of title on the faith of any contract or agreement in writing to consign, deposit, transfer, or deliver such goods or document of title, and such goods or document of title shall actually be received *hy the person making such loan or advance without notice that [*257] such factor or agent was not authorized to make such pledge or security, every such loan or advance shall be deemed to be a loan or advance on the security of such goods or document of title within the meaning of the last preceding section, though such goods or document of title shall not really be received by the person making such loan or advance till the period subsequent thereto; and any contract or agreement, whether made direct with such factor or agent, or with any clerk or other person on his behalf, shall be deemed a contract or agreement with such factor or agent; and any payment made, whether by money or bill of exchange, or other negotiable security, shall be deemed to be an advance within the meaning of the last preceding section."

See further as to interpretation of terms, "property," "valuable security," "document of title," &c., 24 & 25 Vict. c. 96, s. 1, *post*, tit. Larceny.

Possession to be evidence of intrusting.] By the same section, "A factor or agent in possession as aforesaid of such goods or document shall be taken, for the purpose of the last preceding section, to have been intrusted therewith by the owner thereof, unless the contrary be shown in evidence."

Persons accused not protected from answering.] By s. 85, "Nothing in any of the last ten preceding sections of this act contained shall enable or entitle any person to

refuse to make a full and complete discovery by answer to any bill in equity, or to answer any question or interrogatory in any civil proceeding in any court, or upon the hearing of any matter in bankruptcy or insolvency."

Persons making disclosures in a compulsory proceeding not liable to prosecution.] By the same section, "No person shall be liable to be convicted of any of the misdemeanors in any of the said sections mentioned by any evidence whatever in respect of any act done by him, if he shall at any time previously to his being charged with such offence have first disclosed such act on oath, in consequence of any compulsory process of any court of law or equity, in any action, suit, or proceeding which shall have been *bonâ fide* instituted by any party aggrieved, or if he shall have first disclosed the same in any compulsory examination or deposition before any court upon the hearing of any matter in bankruptcy or insolvency."

Nature of disclosure which protects party making it.] Under the previous statute, 5 & 6 Vict. c. 39, s. 6, the terms of which differed somewhat from those of the 24 & 25 Vict. c. 96, s. 85, *supra*, as to the nature of the disclosure which would protect a defendant, the following decision took place. The defendants were charged before a magistrate on the 13th of July, under the above section, with having fraudulently transferred a bill of lading, intrusted to them as brokers, and were fully committed for trial. On the 6th of July preceding they had been adjudged bankrupts, and on the 20th of the same month, while the above prosecution was pending against them, being examined in the Court of Bankruptcy at the instance of a creditor, they made a statement to the same effect as that proved against them before the magistrate, and [*258] amounting to a confession of *guilt. When the trial came on the defendants pleaded not guilty, and after the case for the prosecution had closed, tendered in evidence the depositions made by them in the Court of Bankruptcy in bar of prosecution under the proviso in the above section. The prisoners were convicted; two points being reserved for the opinion of the Court of Criminal Appeal; first, whether the evidence was admissible under a plea of not guilty; secondly, whether it showed *a disclosure* within the meaning of the proviso, so as to constitute a defence. All the court thought that the evidence was admissible, and also expressed an opinion that it was tendered at the proper time. But on the other point there was a difference of opinion. Lord Campbell, C. J., Pollock, C. B., Wightman, Willes, and Hill, JJ., Martin, Bramwell, Watson, and Channell, BB., thought that the statement in the Court of Bankruptcy was not, under the circumstances, a disclosure within the meaning of the above section. Cockburn, C. J., Williams, Crowder, Crompton, and Byles, JJ., thought that it was. The conviction was, therefore, affirmed. R. v. Skeen, 1 Bell, C. C. 97; S. C. 28 L. J. M. C. 91.

In the present enactment the word "first" is introduced before the word "disclosed," in order to obviate any doubt which may arise in future on this point. Greaves' Crim. Stat. p. 92.

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At common law.] THE offence of arson, which is a felony at common law, is defined by Lord Coke to be the malicious and voluntary burning the house of another, by night or by day. 3 Inst. 66; 1 Hale, P. C. 566.

The *setting fire* to the house of another, maliciously to burn it, is *not at [*260] common law a felony, if either by accident or timely prevention, the fire does not take place.(1) 1 Hale, P. C. 568.

By statute.] The various offences of burning have been long provided for by the 9 Geo. 1, c. 22, the 7 & 8 Geo. 4, c. 30, and the 7 Wm. 4 & 1 Vict. c. 89. These statutes are all now repealed, and the offence is regulated for the most part by the 24 & 25 Vict. c. 97.

Churches and chapels.] By s. 1, "Whosoever shall unlawfully and maliciously set fire to any church, chapel, meeting-house, or other place of divine worship, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three

(1) Commonwealth v. Van Schaack, 16 Mass. 105; The People v. Butler, 16 Johns. 203. See Ball's Case, 2 Rogers's Rec. 85. To attempt to fire a house is a misdemeanor at common law. Orr's Case, 5 Ibid. 181. The least burning of the house is sufficient to constitute the crime. The charring of the floor to the depth of half an inch is certainly sufficient. The State v. Sandy, 3 Iredell, 570.

years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping."

Dwelling-house, any person being therein.] By s. 2, "Whomsoever shall unlawfully and maliciously set fire to any dwelling-house, any person being therein, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping."

House, outhouse, manufactory, farm, &c.] By s. 3, "Whosoever shall unlawfully and maliciously set fire to any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malthouse, hop-oast, barn, storehouse, granary, hovel, shed, or fold, or to any farm building, or to any building or erection used in farming land, or in carrying on any trade or manufacture or any branch thereof, whether the same shall then be in the possession of the offender or in the possession of any other person, with intent thereby to injure or defraud any person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping."(1)

Railway stations and buildings belonging to ports, docks, and harbors.] By s. 4, "Whosoever shall unlawfully and maliciously set fire to any station, engine-house, warehouse, or other building belonging or appertaining to any railway, port, dock, or harbor, or to any canal or other navigation, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and, if a male under the age of sixteen years, with or without whipping."

Public buildings.] By s 5, "Whosoever shall unlawfully and maliciously set fire [*261] to any building other than such as are in this act before *mentioned belonging to the Queen, or to any county, riding, division, city, borough, poor law union, parish, or place, or belonging to any university, or college, or hall of any university, or to any inn of court, or devoted or dedicated to public use or ornament, or erected or maintained by public subscription or contribution, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and, if a male under the age of sixteen years, with or without whipping."

Other buildings.] By s. 6, "Whosoever shall unlawfully and maliciously set fire to any building, other than such as are in this act before-mentioned, shall be guilty of felony; and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less

(1) A banking-house is a store, shop, or warehouse. Wilson v. The State, 24 Conn. 57.

than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and, if a male under the age of sixteen years, with or without whipping."

Goods in buildings.] By s. 7, "Whosoever shall unlawfully and maliciously set fire to any matter or thing, being in, against, or under any building, under such circumstances that if the building were thereby set fire to the offence would amount to felony, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen, and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and, if a male under the age of sixteen years, with or without whipping."

Attempting to set fire to buildings.] By s. 8, "Whosoever shall unlawfully and maliciously, by any overt act, attempt to set fire to any building, or any matter or thing in the last preceding section mentioned, under such circumstances that if the same were thereby set fire to the offender would be guilty of felony, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen, and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping."

Crops of corn, woods, plantations, gorse, &c.] By s. 16, "Whosoever shall unlawfully and maliciously set fire to any crop of hay, grass, corn, grain, or pulse, or of any cultivated vegetable produce, whether standing or cut down, or to any part of any wood, coppice, or plantation of trees, or to any heath, gorse, furze, or fern, wheresoever the same may be growing, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen, and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping."

**Stacks of corn, straw, wood, coals, &c.*] By s. 17, "Whosoever shall un- [*262] lawfully and maliciously set fire to any stack of corn, grain, pulse, tares, hay, straw, haulm, stubble, or of any cultivated vegetable produce, or of furze, gorse, heath, fern, turf, peat, coals, charcoal, wood, or bark, or to any steer of wood or bark, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping."

Attempting to set fire to crops or stacks of corn, &c.] By s. 18, "Whosoever shall unlawfully and maliciously, by any overt act, *attempt* to set fire to any such matter or thing as in either of the last two preceding sections mentioned, under such circumstances that if the same were thereby set fire to the offender would be under either of such sections guilty of felony, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any

term not exceeding seven years, and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping."

Coal mines.] By s. 26, "Whosoever shall unlawfully and maliciously set fire to any mine of coal, cannel coal, anthracite or other mineral fuel, shall be guilty of felony." The same punishment as in s. 17.

Attempt to set fire to coal mines.] By s. 27, "Whosoever shall unlawfully and maliciously, by any overt act, attempt to set fire to any mine, under such circumstances that if the mine were thereby set fire to the offender would be guilty of felony, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen, and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping."

Ships or vessels.] By s. 42, "Whosoever shall unlawfully and maliciously set fire to, cast away, or in any wise destroy, any ship or vessel, whether the same be completed or in an unfinished state, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not exceeding three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping."

As to the setting fire to ships, with intent to commit murder, see 24 & 25 Vict. c. 100, s. 13, *infra*, tit. Attempt to Murder.

Ships or vessels, with intent to prejudice owner or underwriter.] By s. 43, "Whosoever shall unlawfully and maliciously set fire to, or cast away, or in any wise destroy, [*263] any ship or vessel, with intent *thereby to prejudice any owner or part-owner of such ship or vessel, or of any goods on board the same, or any person that has underwritten or shall underwrite any policy of insurance upon such ship or vessel, or on the freight thereof, or upon any goods on board the same, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping."

Setting fire to ships of war, &c.] By the 12 Geo. 3, c. 24, s. 1, "If any person or persons shall, either within this realm, or in any of the islands, countries, forts, or places thereunto belonging, wilfully or maliciously set on fire or burn, or otherwise destroy, or cause to be set on fire or burnt, or otherwise destroyed, or aid, procure, abet, or assist in the setting on fire, or burning, or otherwise destroying any of his majesty's ships or vessels of war, whether the said ships or vessels of war be on float or building, or begun to be built, in any of his majesty's dockyards, or building or repairing by contract in any private yards for the use of his majesty, or any of his majesty's arsenals, magazines, dockyards, ropeyards, victualling offices, or any of the buildings erected therein, or belonging thereto; or any timber or materials there

placed, for building, repairing, or fitting out of ships, or vessels, or any of his majesty's military, naval, or victualling stores, or other ammunition of war, or any place or places, where any such military, naval, or victualling stores, or other ammunition of war, is, are, or shall be kept, placed, or deposited; that then the person or persons guilty of any such offence, being thereof convicted in due form of law, shall be adjudged guilty of felony, and shall suffer death as in cases of felony, without benefit of clergy."

By s. 2, "Any person who shall commit any of the offences before mentioned, in any place out of this realm, may be indicted and tried for the same, either in any shire or county within this realm, in like manner and form as if such offence had been committed within the said shire or county, or in such island, country, or place where such offence shall have been actually committed, as his majesty, his heirs or successors, may deem most expedient for bringing such offender to justice: any law, usage, or custom notwithstanding." This offence is still capital. 7 & 8 Geo. 4, c. 28, ss. 6 & 7.

By the articles of the navy (22 Geo. 3, c. 38, art. 25) every person who shall unlawfully burn or set fire to any magazine or store of powder, or ship's boat, ketch, hoy, or vessel, or tackle or furniture thereunto belonging, not appertaining to an enemy or rebel, shall be punished with death, by the sentence of a court-martial.

Setting fire to ships, &c., in the port of London.] The 39 Geo. 3, c. 69, a public local act for rendering more commodious, and for better regulating the port of London, enacts (by s. 104), "That if any person or persons whomsoever shall wilfully and maliciously set on fire any of the works to be made by virtue of this act, or any ship or other vessel lying or being in the said canal, or in any of the docks, basins, cuts, or other works to be made by virtue of this act, every person so offending in any of the said cases, shall be adjudged guilty of felony, without benefit of clergy."

**Attempting to set fire to ships or vessels.*] By the 24 & 25 Vict. c 97, [*264] s. 44, "Whosoever shall unlawfully and maliciously, by any overt act, attempt to set fire to, cast away, or destroy any ship or vessel, under such circumstances that if the ship or vessel were thereby set fire to, cast away, or destroyed, the offender would be guilty of felony, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and if a male under the age of sixteen years, with or without whipping."

Malice against owner of property unnecessary.] By s. 58, "Every punishment and forfeiture by this act imposed on any person maliciously committing any offence, whether the same be punishable upon indictment or upon summary conviction, shall equally apply and be enforced, whether the offence shall be committed from malice conceived against the owner of the property in respect of which it shall be committed or otherwise."

Where person committing the offence is in possession of the property injured.] By s. 59, "Every provision of this act not hereinbefore so applied shall apply to every person who, with intent to injure or defraud any other person, shall do any of the

acts hereinbefore made penal, although the offender shall be in possession of the property against or in respect of which such act shall be done."

Intent to injure or defraud a particular person need not be stated.] By s. 60, "It shall be sufficient in any indictment for any offence against this act, where it shall be necessary to allege an intent to injure or defraud, to allege that the party accused did the act with intent to injure or defraud (as the case may be), without alleging an intent to injure or defraud any particular person; and on the trial of any such offence it shall not be necessary to prove an intent to injure or defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to injure or defraud (as the case may be)."

Proof of the setting fire.] To constitute arson at common law it must be proved that there was an actual burning of the house or of some part of it, though it is not necessary that any part should be wholly consumed, or that the fire should have any continuance. 2 East, P. C. 1020; 1 Hale, P. C. 569. In the 9 Geo. 1, c. 22, the words "set fire" are used, and Mr. East observes, that he is not aware of any decision which has put a larger construction on those words than prevails by the rule of the common law. 2 East, P. C. 1020. And he afterwards remarks, that the actual burning at common law, and the "setting fire," under the statute, in effect mean the same thing. Id. 1038. The words "set fire" are used in all the subsequent statutes, so that this passage and the following decisions are still applicable. The prisoner was indicted (under the 9 Geo. 1, c. 22) for setting fire to an outhouse, commonly called a paper-mill. It appeared that she had set fire to a large quantity of paper, drying in a loft annexed to the mill, but no part of the mill itself was consumed. [*265] The judges held, that this was not a *setting fire* to the *mill* within *the statute. R. v. Taylor, 2 East, P. C. 1020; 1 Leach, 49. So on a charge of arson, it appeared that a small fagot was set on fire on the boarded floor of a room, and the fagot was nearly consumed; the boards of the floor were "scorched black, but not burnt," and no part of the wood of the floor was consumed. Cresswell, J., said, "R. v. Parker (see *infra*) is the nearest case to the present, but I think it is distinguishable. . . . . I have conferred with my brother Patteson, and he concurs with me in thinking, that as the wood of the floor was scorched, but no part of it consumed, the present indictment cannot be supported. We think that it is not essential to this offence that the wood should be in a blaze, because some species of wood will burn and entirely consume without blazing at all." R. v. Russell, Carr. & M. 541: 41 E. C. L. R. Where the prisoner was indicted under the 7 Wm. 4 & 1 Vict. c. 89, s. 3, and it was proved that the floor near the hearth was scorched, and it was in fact charred in a trifling way; that it had been at a red heat, though not in a blaze, Parke, B., held, that the offence was complete. R. v. Parker, 9 C. & P. 45: 38 E. C. L. R. To constitute a setting on fire, it is not necessary that any flame should be visible. R. v. Stallion, 1 Moo. C. C. 398, *post*, p. 268.

Many of these cases come within the felony created by the 24 & 25 Vict. c. 97, namely, that of attempting to set fire to a building, &c. And even if a count for the attempt were not contained in the indictment, the prisoner might be found guilty of it under the 14 & 15 Vict. c. 100, s. 9; *infra*, Attempts.

Proof of property set fire to.] In order to constitute the felonious offence of arson at common law, the fire must burn the house of *another*. The burning of a man's own house is no felony at common law, but such burning in a town, or so near to

other houses as to create danger to them, is at common law a misdemeanor: 1 Hale, P. C. 568; 2 East, P. C. 1027. But it is felony at common law if a man set fire to his own house with intent to burn that of another, or under such circumstances that the house of another would in all probability be burnt: 2 East, P. C. 1031, and the case of R. v. Probert, there cited. Now, however, under the various statutes mentioned above, the crime of arson has a much wider scope.

A misdescription in the nature of the property might now be amended under the 14 & 15 Vict. c. 100, s. 1. Still it is necessary to prove the nature of the property set fire to, in order to show that the property comes within the meaning of one or the other of the above statutes, and which.

Many of the cases in the books were decided upon the statutes which are now repealed. But, as the language of the present statute is identical, in many respects, with that of those which preceded them, these decisions are still, in a great measure, applicable.

Proof of property set fire to—house.] The word *house* includes, as it seems, all such buildings as would come within that description, upon an indictment for arson at common law.(1) That includes such buildings as burglary may be committed in at common law; but whether the word would now be held to include all such buildings as burglary may be committed in under the 7 & 8 Geo. 4, c. 29, s. 13, seems to be doubtful. See Greenwood's Statutes, 232 (*n*). A building intended for and constructed as a dwelling-house, but which had *not been completed or inhab- [*266] ited, and in which the owner had deposited straw and agricultural implements, was held not to be a *house*, *outhouse*, or *barn*, within the 9 Geo. 1, c. 22. It was said, that it was not a house in respect of which burglary or arson could be committed; that it was a house intended for residence, but not inhabited, and therefore not a dwelling-house, though intended to be one. That it was not an outhouse, because not parcel of a dwelling-house; and that it was not a *barn*, within the meaning of that word as used in the statute. Elsmore v. Inhab. hundred of St. Briavells, 8 B. & C. 461: 15 E. C. L. R. Upon the construction of the same statute (9 Geo. 1, c. 22), it has been held that a common gaol comes within the meaning of the word *house*.(2) The entrance to the prison was through the dwelling-house of the gaoler, (separated from the prison by a wall), and the prisoners were sometimes allowed to lie in it. All the judges held, that the dwelling-house was to be considered as part of the prison, and the whole prison was the house of the corporation to whom it belonged. One of the counts laid it as the house of the corporation; another, of the gaoler; and a third, of the person whom the gaoler suffered to live in the house. R. v. Donnevan, 2 East, P. C. 1020; 2 W. Bl. 682; 1 Leach, 69. But where a constable hired a cellar (as a lock-up house) under a cottage, and the cellar was independent of the cottage in all respects, it was held that the cellar was not properly described in an indictment for arson, either as the dwelling-house of the constable, or as an outhouse of the cottage. Anon. cor. Hullock, B., 1 Lewin, C. C. 8.

A shed or cabin, though built of stone, roofed, and with low fire-place and window,

(1) When the prisoner was charged with burning a dwelling-house, and it appeared that the building burned was designed and built for a dwelling-house; was constructed like one; was not painted, though designed to be, and some of the glass in an outer door had not been put in, it was held that this was not a dwelling-house, in such a sense, that the burning of it would constitute the crime of arson. But the law is otherwise, with regard to a dwelling-house, once inhabited as such, and from which the occupant is but temporarily absent. The State v. McGowen, 20 Conn. 245.

(2) Stevens v. Commonwealth, 4 Leigh, 683; People v. Cotteral, 18 Johns. 115; People v. Van Blarcum, 2 Johns. 105; Commonwealth v. Posey, 4 Call, 109.

does not in a case of arson constitute a house within the 7 Wm. 4 and 1 Vict. c. 89, s. 3, where the building was erected not for habitation, but for workmen to take their meals and dry their clothes in, and has not been slept in with permission of the owner. R. v. England, 1 C. & K. 533 : 47 E. C. L. R.

Proof of property set fire to—chapel.] Under the 7 Wm. 4 and 1 Vict. c. 89, s. 3, it was held to be not necessary to prove that a dissenting chapel is registered and recorded; the words "duly registered and recorded," which were contained in the 7 & 8 Geo. 4, c. 30, s. 2, being omitted in the latter enactment.

Proof of property set fire to—outhouse.] Upon the meaning of the word "outhouse," in the 9 Geo. 1, c. 22, the following case was decided: It appeared that the prisoner (who was indicted for setting fire to an outhouse) had set fire to and burnt part of a building of the prosecutor, situated in the yard at the back of his dwelling-house. The building was four or five feet distant from the house, but not joined to it. The yard was inclosed on all sides, in one part by the dwelling-house, in another by a wall, and in a third by a railing, which separated it from a field, and in the remaining part by a hedge. The prosecutor kept a public-house, and was also a flax-dresser. The buildings in question consisted of a stable and chamber over it, used as a shop for the keeping and dressing of flax. It was objected that this was part of the dwelling-house, and not an outhouse; but the prisoner having been convicted, the judges were of opinion that the verdict was right. It was observed that though, for some purposes, this might be part of the dwelling-house, yet that in fact [*267] it was an *outhouse*. R. v. North, 2 East, P. C. 1022. The following case *was decided upon the words of the same statute: The prisoner was indicted in some counts for setting fire to *an outhouse*, in others to a house. The premises burned consisted of a school-room, which was situated very near to the house in which the prosecutor lived, being separated from it only by a narrow passage about a yard wide. The roof of the house, which was of tile, reached over part of the roof of the school, which was thatched with straw; and the school, with a garden and other premises, together with a court which surrounded the whole, were rented of the parish by the prosecutor at a yearly rent. There was a continued fence round the premises, and nobody but the prosecutor or his family had a right to come within it. It was objected for the prisoner that the building was neither a house nor an outhouse within the 9 Geo. 1, c. 22; but the judges were of opinion that it was correctly described either as an outhouse, or part of a dwelling-house within the meaning of the statute.(1) R. v. Winter, Russ. & Ry. C. C. 295; 2 Russ. by Grea. 558. The following case, upon the construction of the same word, arose on an indictment under the 7 & 8 Geo. 4: The place in question stood in an inclosed field, a furlong from the dwelling-house, and not in sight. It had originally been divided into stalls, capable of holding eight beasts, partly open and partly thatched. Of late years it was boarded all round, the stalls taken away, and an opening left for cattle to come in of their own accord. There was neither window nor door, and the opening was

(1) Jones v. Hungerford, 4 Gill & Johns. 402.

A barn not connected with the mansion, but standing alone several rods distant therefrom, is an outhouse. The State v. Brooks, 4 Conn. 446.

The burning of a barn with hay and grain in it, is felony and arson at common law. Sampson v. The Commonwealth, 5 Watts & Serg. 385.

A barn standing eighty feet from a dwelling-house, in a yard or lane with which there was a communication by a pair of bars, is within the curtilage of the house. The People v. Taylor, 2 Michigan, 250.

sixteen feet wide, so that a wagon might be drawn through it, under cover. The back part of the roof was supported by posts, to which the side boards were nailed. Part of it internally was boarded and locked up. There was no distinction in the roof between the inclosed and uninclosed part, and the inhabitants and owners usually called it the cow-stalls. Park, J., did not consider this an outhouse within the statute, but reserved the point for the opinion of the judges. Six of the judges were of opinion that this was an outhouse within the statute; but seven of their lordships being of a contrary opinion, a pardon was recommended. R. v. Ellison, 1 Moody, C. C. 336. See also Hilles v. Inhab. of Shrewsbury, 3 East, 457; R. v. Woodward, 1 Moody, C. C. 325.

The prisoner was tried before Littledale, J., upon an indictment, one count of which charged him with setting fire to an outhouse of W. D. The prosecutor was a laborer and poulterer, and had between two and three acres of land, and kept three cows. The building in question was in the prosecutor's farm-yard, and was three or four poles distant from the dwelling-house, from which it might be seen. The prosecutor kept a cart in it, which he used in his business of a poulterer, and also kept his cows in it at night. There was a barn adjoining the dwelling-house, then a gateway, and then another range of buildings, which did not adjoin the dwelling-house or barn, the first of which from the dwelling-house was a pig-sty, then another pig-sty, then a turkey-house, adjoining to which was the building in question. The dwelling-house and barn formed one side of the farm-yard, and the three other sides were formed by a fence inclosing these buildings. The building in question was formed by six upright posts, nearly seven feet high, three in the front and three at the back, one post being at each corner, and the other two in the middle of the front and back, these posts supporting the roof; there were pieces of wood laid from one side to the other. Straw was put upon these pieces of wood, laid wide at the bottom *and drawn [*268] up to a ridge at the top; the straw was packed up as close as it could be packed; the pieces of wood and straw made the roof. The front of the building to the farm-yard was entirely open between the posts; one side of the building adjoined the turkey-house, which covered that side all the way up to the roof, and that side was nailed to the turkey-house. The back adjoined a field, and was a rail fence, the rails being six inches wide; these came four or five feet from the ground within two feet of the roof, and this back formed part of the fence before mentioned. The side opposite the turkey-shed adjoined the road, and was a paled fence, but not quite up to the top. One of the witnesses for the prosecution, a considerable farmer, said he should consider the building an outhouse. The prisoner was convicted, and sentence of death passed upon him, but execution was respited to take the opinion of the judges. All the judges present (except Tindal, C. J.) thought the erection an outhouse, and that the conviction was right. R. v. Stallion, 1 Moody, C. C. 398.

The prisoner was convicted before Mr. Justice Patteson at the Bedfordshire spring assizes, 1844, for feloniously setting fire to an *outhouse* of Thomas Bourn. The building set fire to was a pig-sty, that shut at the top, with boarded sides, having three doors opening into a yard in the possession of the prosecutor; the back of the pig-sty formed part of the fence between the prosecutor's and the adjoining property. The state of the premises was this: first, the prosecutor's house fronting the public road, with a back door opening into the yard; then a paled fence about two feet; then a cottage; then a barn attached to it: the cottage and barn were let by the prosecutor to a tenant; they opened to the road, and neither of them had any door or opening into the yard. Next to the cottage and barn was a stable; then a barn; then a pig-sty, all in the possession of the prosecutor, and opening into the yard. Next to the

pig-sty was a paled fence, and then a live hedge round to the house, in which hedge were three gates opening into an orchard and two fields. On the part of the prisoner it was contended that this pig-sty was not an outhouse within the statute 7 Wm. 4 & 1 Vict. c. 89, s. 3. The above cases of Ellison, Haughton, and Stallion were referred to; as also the cases of Parrott, 6 C. & P. 402: 25 E. C. L. R.; Woodward, 1 Moody, C. C. 323; and Newill, Ibid. 488. The learned judge reserved the point for the opinion of the judges; and the case was considered at a meeting of all the judges, except Coleridge and Maule, JJ., in Easter term, 1844, when their lordships were unanimously of opinion that the conviction was right. R. v. Amos Jones, 2 Moody, C. C. 308.

Proof of property set fire to—shed.] In R. v. Amos, 2 Den. C. C. R. 65; S. C. 20 L. J. M. C. 103, it was held, that a building twenty-four feet square, with wooden sides, glass windows, slated roof, and commonly called "the workshop," used as a storehouse for seasoned timber, as a place for deposit of tools, and for the working up of timber, may be described as "a shed," under 7 & 8 Vict. c. 62.

Proof of property set fire to—stacks.] A stack of flax with seed in it is "grain" within the meaning of the above enactments. R. v. Spencer, Dears. & B. C. C. 131. Under the 9 Geo. 1, c. 22, which made it felony to set fire to any cock, mow, or stack of corn, a man was indicted for being accessory to setting fire to "an unthrashed [*269] *parcel of wheat;" this was held to be sufficient. R. v. Judd, 1 Leach, 484; 2 East, P. C. 1018. In R. v. Reader, 4 C. & P. 245: 19 E. C. L. R.; S. C. 1 Moody, C. C. 239, the prisoner was indicted under the 7 & 8 Geo. 4, c. 30, s. 17, for setting fire to "a stack of straw." It appeared in evidence that the stack in question was made partly of straw, there being two or three loads at the bottom, and the residue of haulm. The judges held that this was not a stack of straw within the statute. See R. v. Brown, 4 C. & P. 553 (*n*); R. v. Tottenham, 7 C. & P. 237: 32 E. C. L. R.; S. C. 1 Moo. C. C. 461. It was held sufficient under the last-mentioned statute, if the indictment charge the prisoner with setting fire to a *stack of barley:* R. v. Swathin, 4 C. & P. 548: 19 E. C. L. R.; or a *stack of beans:* R. v. Woodward, 1 Moody, C. C. 323.

Proof of property set fire to—wood.] In R. v. Aris, 6 C. & P. 348: 25 E. C. L. R., the prisoner was indicted under the same statute for setting fire to a "stack of wood," and it appeared that between the house of the prosecutor and the next house there was an archway, over which a sort of loft was made by means of a temporary floor, where there was a small quantity of straw and a store of fagots piled on one another: the straw was burnt and some of the fagots. Park, J., was clearly of opinion that this was not a stack of wood within the meaning of the statute. In R. v. Price, 9 C. & P. 429: 38 E. C. L. R., under the same statute, the prisoners were charged with setting fire to a wood, and it appeared that they set fire to a summer-house which was in the wood, and that from the summer-house the fire was communicated to the wood. It was held that they might be properly convicted. Setting fire to a single tree is not arson within this section. R. v. Davy, 1 Cox, C. C. 60.

Proof of property set fire to—ships and vessels.] A pleasure boat, eighteen feet long, was thought by Patteson, J., not to be a vessel within the meaning of the 7 & 8 Geo. 4, c. 30, s. 9. R. v. Bowyer, 4 C. & P. 559: 19 E. C. L. R. Upon an indictment for setting fire to a barge, Alderson, J., said, that if the prisoner was convicted

he would take the opinion of the judges, as to whether a barge was within the same statute; but the prisoner was acquitted. R. v. Smith, 4 C. & P. 569.

Setting fire to goods in a man's own house.] In R. v. Lyons, 28 L. J. M. C., a question was raised whether a man could be indicted for setting fire to goods in his own house, with intent thereby to defraud an insurance company.(1) The house was not set fire to. It was contended that as merely setting fire to a man's own house, without any special intent, was not felony at common law, nor was made so by any statute, setting fire to goods in a man's own house, even with a fraudulent intent, was not felony either, as the 14 & 15 Vict. c. 19, s. 3, only made it felony to set fire to goods in a building the setting fire to which is made felony by that or any other statute. But the court held that the conviction was good, as the offence charged clearly came within the true meaning and intention of the legislature, giving the section a reasonable construction. An opinion was, however, expressed, in the course of the argument, that the indictment ought expressly to state that the goods were set fire to in a building the setting fire to which was a *felony, which was not [*270] done here; but the omission was not considered to be a ground for quashing the conviction. The terms of the present statute (24 & 25 Vict. c. 97, s. 7, *supra*, p. 261) are somewhat different.

When persons are considered as being in the house when set fire to.] A stable, which adjoined a dwelling-house, was set on fire; the flames communicated to the dwelling-house, in which members of the family had been sleeping; but it did not appear whether the house took fire before they left the house or after. Alderson, B., in summing up the case to the jury, directed them to say by their verdict, should they find the prisoner guilty, whether the house took fire before the family were in the yard or after. If they were of opinion that it was after the family were in the yard, his lordship said that he thought they ought to acquit the prisoner of the capital charge, as to sustain that, in his opinion, it was necessary that the parties named in the indictment should be in the house at the very time the fire was communicated to it. But his lordship added, that the point being a new one, and of very great importance, he should not take upon himself to decide it there, but should reserve it for the decision of the judges. The prisoner was acquitted of the entire charge. R. v. Warren, 1 Cox, C. C. 68. In R. v. Fletcher, 2 C. & K. 215 : 61 E. C. L. R., Patteson, J., held, in a similar case, that if the fire caught the house after the inmates had left it, the charge could not be sustained.

Possession how to be described.] The house burned should be described as being in the possession of the person who is in the actual occupation, even though the possession be wrongful.(2) Thus, where a laborer in husbandry was permitted to occupy a house as part of his wages, and after being discharged from his master's service, and told to quit the house in a month, remained in it after that period, it was held by the judges, upon an indictment for setting fire to the house, that it was rightly described as being in the possession of the laborer. R. v. Wallis, 1 Moo. C. C. 344.

(1) Shepherd v. The People, 5 Smith, 537.

(2) If it be in fact the dwelling-house, the court will not inquire into the tenure or interest of the occupant. People v. Van Blarcum, 2 Johns. 105.

In an indictment for burning a public building, it is necessary to allege who is its owner or occupant, and any such allegation, if made, is immaterial. State v. Roe, 12 Verm. 93.

Proof of malice and wilfulness.] It must be proved that the act of burning was both wilful and malicious, otherwise it is only a trespass, and not a felony.(1) 1 Hale, P. C. 569. Therefore, if A. shoot unlawfully at the poultry or cattle of B., whereby he sets the house of another on fire, it is not felony, for though the act he was doing was unlawful, he had no intention to burn the house. Id. In this case, observes Mr. East, it should seem to be understood that he did not intend to *steal* the poultry, but merely to commit a trespass; for otherwise, the first attempt being felonious, the party must abide all the consequences. 2 East, P. C. 1019. If A. has a malicious intent to burn the house of B., and without intending it, burns that of C., it is felony. 1 Hale, P. C. 569; 2 East, P. C. 1019. So, if A. command B. to burn the house of J. S., and he do so, and the fire burns also another house, the person so commanding is accessory to the burning of the latter house. Plowd. 475; 2 East, P. C. 1019. So where the primary intention of the offender is only to burn his own house (which is no felony), yet, if in fact other houses are thereby burned, being adjoining, and in such a situation as that the fire must in all probability reach them, the intent being unlawful, and the consequence immediately and necessarily flowing from the original [*271] act done, it is felony. 2 East, P. C. 1031. On an indictment for *wilfully setting fire to a rick by firing a gun close to it, evidence was allowed to be given by Maule, J., with a view of showing that the fire was not accidental; that on a previous occasion the prisoner was seen near the rick with a gun in his hand, and that the rick was then also on fire. R. v. Dossett, 2 C. & K. 306: 61 E. C. L. R. Upon this point it was said by Tindal, C. J., in his charge to the grand jury at Bristol, "Where the statute directs that to complete the offence it must have been done with intent to injure or defraud some person, there is no occasion that either malice or ill-will should subsist against the person whose property is destroyed. It is a malicious act in contemplation of law when a man wilfully does that which is illegal, and its necessary consequence must injure his neighbor, and it is unnecessary to observe that the setting fire to another's house, whether the owner be a stranger to the prisoner or a person against whom he had a former grudge, must be equally injurious to him; nor will it be necessary to prove that the house which forms the subject of the indictment in any particular case, was that which was actually set on fire by the prisoner. It will be sufficient to constitute the offence, if he is shown to have feloniously set on fire another house, from which the flames communicated to the rest. No man can shelter himself from punishment on the ground that the mischief he committed was wider in its consequences than he originally intended." 5 Car. & P. 266 (*a*): 24 E. C. L. R.

As to malice against the owner of the property being unnecessary, see 24 & 25 Vict. c. 97, s. 58, *supra*, p. 264.

Proof of the intent.] The intent to injure or defraud is an important ingredient in this offence. But like the proof of malice and wilfulness it will generally be assumed. Thus where a man was indicted for setting fire to a mill (43 Geo. 2, c. 58, s. 1, repealed) with intent to injure the occupier thereof, and it appeared from the prosecutor's evidence, that the prisoner was an inoffensive man, and never had any quarrel with the occupier, and that there was no known motive for committing the act; the judges held the conviction right, for that a party who does an act wilfully,

(1) An indictment for arson, charging that the defendant did "feloniously, unlawfully, and maliciously," set fire, &c., was held to be sufficient without the word "wilfully." Chapman v. The Commonwealth, 5 Whart. 427.

necessarily intends that which must be the consequence of his act. R. v. Farrington, Russ. & Ry. C. C. 207; R. v. Philp, 1 Moo. C. C. 273.

But it was held that, on an indictment under the 7 Wm. 4 & 1 Vict. c. 89, s. 2, for the capital offence of setting fire to a dwelling-house, some person being therein, in which there was no charge of any intent to injure or defraud any person, the prisoner could not be convicted of the transportable offence of setting fire to the house, under the 3d section of that statute, as an allegation of intent to injure or defraud some person was essential to an indictment under that section. R. v. Paice, 1 C. & K. 73: 47 E. C. L R.

Where the prisoner was a person of weak intellect, and the jury found that, though the prisoner set fire to the building, as charged, they did not believe that he was conscious that the effect of what he did would be to injure any person, Martin, B., ordered a verdict of not guilty to be rendered. R. v. Davies, 1 F. & F. 69.

It has been held, that a wife who set fire to her husband's house, was not guilty of felony, within the 7 & 8 Geo. 4, c. 30, s. 2. The indictment described the prisoner as the wife of J. Marsh, and charged her with setting fire to a certain house of the said J. Marsh, with intent to injure him, against the statute. It appeared that the *prisoner and her husband had lived separate for about two years, and pre- [*272] vious to the act, when she applied for the candle with which it was done, she said it was to set her husband's house on fire, because she wanted to burn him to death. On a case reserved upon the question, whether it was an offence within the 7 & 8 Geo. 4, c. 30, s. 2, for a wife to set fire to her husband's house for the purpose of doing him a personal injury, the conviction was held wrong, the learned judges thinking, that to constitute the offence, it was essential that there should be an intent to injure or defraud some third person, not one identified with herself. R. v. Marsh, 1 Moody, C. C. 182.

Where the intent laid is to defraud insurers, the insurance must be proved. To prove this the policy must be produced; evidence of the books of an insurance company not being admissible, unless notice has been given to produce the policy, or the non-production of the policy is accounted for. R. v. Doran, 1 Esp. 127. The policy is not inadmissible for want of a stamp. 17 & 18 Vict. c. 83, s. 37 (*ante*, p. 167). And it must be shown that the risk has attached. It has been held that the part-owner of a ship may be convicted of setting fire to it with intent to injure and defraud the other part-owners, although he has insured the whole ship, and promised that the other part-owners shall have the benefit of the insurance. R. v. Philp, 1 Moo. C. C. 263; R. v. Newill, Id. 458. A person may be convicted, under the 7 Wm. 4 & 1 Vict. c. 89, ss. 6 & 11, for setting fire to a vessel of which he was at the time part-owner. R. v. Wallace, Carr. & M. 200: 41 E. C. L. R. The underwriters on a policy of goods fraudulently made are within the statute. S. C. 2 Moo. C. C. 200.

Where a count in an indictment under the 7 & 8 Geo. 4, c. 30, s. 17, charged the prisoner with setting fire to a certain stack of straw, but without alleging any intent to injure, the judges held that, as that clause contained no words of intent, the count was good. R v. Newill, 1 Moo. C. C. 458. As to how the intent is to be laid, see 24 & 25 Vict. c. 97, s. 60, *supra*, p. 264.

What constitutes an attempt to set fire.] It is a sufficient overt act to render a person liable to be found guilty of attempting to set fire to a stack under this statute, if he go to the stack with the intention of setting fire to it, and light a lucifer match for that purpose, but abandon the attempt because he finds that he is being watched. Per Pollock, C. B., R. v. Taylor. 1 F & F. 511. See further, *infra*, p. 284.

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Impeding a person endeavoring to save himself or others from shipwreck.] By the 24 & 25 Vict. c. 100, s. 17, "Whosoever shall unlawfully and maliciously prevent or impede any person being on board of, or having quitted any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, in his endeavor to save his life, or shall unlawfully and maliciously prevent or impede any person in his endeavor to save the life of any such person, as in this section first aforesaid, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

[*274] **Shooting, or attempting to shoot, or wounding with intent to do grievous bodily harm.*] By s. 18, "Whosoever shall unlawfully and maliciously by any means whatsoever wound, or cause any grievous bodily harm to any person, or shoot at any person, or by drawing a trigger, or in any other manner attempt to discharge any kind of loaded arms at any person, with intent, in any of the cases aforesaid, to maim, disfigure, or disable any person, or to do some other grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of felony." The same punishment as in the last section.

What shall constitute loaded arms.] By s. 19, "Any gun, pistol, or other arms, which shall be loaded in the barrel with gunpowder or any other explosive substance, and ball, shot, slug, or other destructive material, shall be deemed to be loaded arms within the meaning of this act, although the attempt to discharge the same may fail from want of proper priming or from any other cause."

Inflicting bodily injury with or without weapons.] By s. 20, "Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any

other person, either with or without any weapon or instrument, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labor."

Attempting to choke in order to commit any indictable offence.] By s. 21, "Whosoever shall, by any means whatsoever, attempt to choke, suffocate, or strangle any other person, or shall, by any means calculated to choke, suffocate, or strangle, attempt to render any other person insensible, unconscious, or incapable of resistance, with intent in any of such cases thereby to enable himself or any other person to commit, or with intent in any of such cases thereby to assist any other person in committing, any indictable offence, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor."

Assaulting clergymen.] By s. 36, "Whosoever shall, by threats or force, obstruct or prevent, or endeavor to obstruct, or prevent, any clergyman or other minister in or from celebrating divine service, or otherwise officiating in any church, chapel, meeting-house, or other place of divine worship, or in or from the performance of his duty in the lawful burial of the dead in any churchyard or other burial-place, or shall strike or offer any violence to, or shall, upon any civil process, or under the pretence of executing any civil process, arrest any clergyman or other minister who is engaged in, or to the knowledge of the offender is about to engage in, any of the rites or duties in this section aforesaid, or who to the knowledge of the offender shall be going to perform the same or returning from the performance thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labor."

**Assaulting magistrates and other officers endeavoring to save shipwrecked* [*275] *property, &c.*] By s. 37, it is enacted, "Whosoever shall assault and strike, or wound any magistrate, officer, or other person whatsoever, lawfully authorized, in or on account of the exercise of his duty, in or concerning the preservation of any vessel in distress, or of any vessel, goods, or effects wrecked, stranded, or cast on shore, or lying under water, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor."

Assault with intent to commit felony and resist lawful apprehension.] By s. 38, "Whosoever shall assault any person with intent to commit felony, or shall assault, resist, or wilfully obstruct any peace officer in the due execution of his duty, or any person acting in aid of such officer, or shall assault any person with intent to resist or prevent the lawful apprehension or detainer of himself or of any other person for any offence, shall be guilty of a misdemeanor, and being convicted thereof shall be liable at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labor."(1)

(1) In an indictment against one for impeding an officer in the execution of his official duty, the allegation must show the nature of the duty, the manner of its execution, and the mode of resistance. The State v. Burt, 25 Vermont, 373; The People v. Gulick, Hill & Denio, 229.

Assaults with intent to obstruct sale or passage of grain.] By s. 39, "Whosoever shall beat, or use any violence or threat of violence to any person, with intent to deter or hinder him from buying, selling, or otherwise disposing of, or to compel him to buy, sell, or otherwise dispose of, any wheat or other grain, flour, meal, malt, or potatoes, in any market or other place, or shall beat or use any such violence or threat to any person having the care or charge of any wheat or other grain, flour, meal malt, or potatoes, whilst on the way to or from any city, market town, or other place, with intent to stop the conveyance of the same, shall, on conviction thereof before two justices of the peace, be liable to be imprisoned and kept to hard labor in the common gaol or house of correction for any term not exceeding three months: provided that no person who shall be punished for any such offence by virtue of this section shall be punished for the same offence by virtue of any other law whatsoever."

Assaults on seamen.] By s. 40, "Whosoever shall unlawfully and with force hinder or prevent any seaman, keelman, or caster from working at or exercising his lawful trade, business, or occupation, or shall beat or use any violence to any such person with intent to hinder or prevent him from working at or exercising the same, shall, on conviction thereof before two justices of the peace, be liable to be imprisoned and kept to hard labor in the common gaol or house of correction for any term not exceeding three months: provided that no person who shall be punished for any offence by reason of this section shall be punished for the same offence by virtue of any law whatsoever."

Assaults arising from combination.] By s. 41, "Whosoever, in pursuance of any unlawful combination or conspiracy to raise the rate of wages, or of any unlawful combination or conspiracy respecting any trade, business, or manufacture, or respecting [*276] any person concerned *or employed therein, shall unlawfully assault any person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labor."

Assaults punishable by summary conviction—when a bar to further proceedings.] By ss. 42 & 43, power is given to justices to punish summarily any common assault or assaults on females or on boys under fourteen years of age.

By s. 44, "If the justices, upon the hearing of any such case of assault or battery upon the merits, where the complaint was preferred by or on behalf of the party aggrieved, under either of the last two preceding sections, shall deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall forthwith make out a certificate under their hands stating the fact of such dismissal, and shall deliver such certificate to the party against whom the complaint was preferred."

By s. 45, "If any person, against whom any such complaint as in either of the last three preceding sections mentioned, shall have been preferred by or on the behalf of the party aggrieved, shall have obtained such certificate, or, having been convicted, shall have paid the whole amount adjudged to be paid, or shall have suffered the imprisonment or imprisonment with hard labor awarded, in every such case he shall be released from all further or other proceedings, civil or criminal, for the same cause."

Assault occasioning bodily harm.] By s. 47, "Whosoever shall be convicted upon an indictment of any assault occasioning actual bodily harm shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labor." A similar provision is also contained in s. 20.

Common assault.] By the same section, "Whosoever shall be convicted upon an indictment for a common assault shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding one year, with or without hard labor."

Indecent assaults on females.] By s. 52, "Whosoever shall be convicted of any indecent assault upon any female, or of any attempt to have carnal knowledge of any girl under twelve years of age, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labor."

Indecent assaults on males. By s. 62, "Whosoever shall attempt to commit the said abominable crime (buggery), or shall be guilty of any assault with intent to commit the same, or of any indecent assault upon any male person, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding ten years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor."

Prosecution for assault by guardians or overseers.] By s. 73, *"Where [*277] any complaint shall be made of any offence against section 26 of this act (*infra*, tit. Illtreating Apprentices), or of any bodily injury inflicted upon any person under the age of sixteen years, for which the party committing it is liable to be indicted, and the circumstances of which offence amount in point of law to a felony, or an attempt to commit a felony, or an assault with intent to commit a felony, and two justices of the peace before whom such complaint is heard, shall certify under their hands that it is necessary for the purposes of public justice that the prosecution should be conducted by the guardians of the union or place, or, where there are no guardians, by the overseers of the poor of the place, in which the offence shall be charged to have been committed, such guardians or overseers, as the case may be, upon personal service of such certificate or a duplicate thereof upon the clerk of such guardians, or upon any one of such overseers, shall conduct the prosecution, and shall pay the costs reasonably and properly incurred by them therein (so far as the same shall not be allowed to them under any order of the court) out of the common fund of the union, or out of the funds in the hands of the guardians or overseers, as the case may be; and, where there is a board of guardians, the clerk or some other officer of the union or place, and when there is no board of guardians one of the overseers of the poor may, if such justices think it necessary for the purposes of public justice, be bound over to prosecute."

Costs.] See as to costs 24 & 25 Vict. c. 100, ss. 74 & 75, *supra*, p 221.

Assault with intent to rob.] See 24 & 25 Vict. c 96, ss. 41, 42, & 43; *post*, tit. Robbery.

What amounts to an assault.] All crimes of violence to the person include an assault, and the nature of the crime depends much more frequently on the conse-

quences of the act than any peculiarity of the act itself. The decisions on the various crimes of violence will, therefore, frequently serve to illustrate the principle applicable to all. These cases are ranged under the heads of the crimes to which they refer.

An assault is any attempt or offer with force or violence to do a corporal hurt to another, whether from malice or wantonness, as by striking at him, or even holding up the fist to him in a threatening or insulting manner, or with such other circumstances as denote at the time an intention, coupled with a present ability, of actual violence against his person, as by pointing a weapon at him when he is within the reach of it.(1) 1 East, P. C. 406. Striking at another with a cane, stick, or fist, although the party striking misses his aim, 2 Roll. Abr. 545, l. 45; drawing a sword or bayonet, or throwing a bottle or glass with intent to wound or strike; presenting a gun at a man who is within the distance to which the gun will carry; pointing a pitchfork at him when within reach of it; or any other act, indicating an intention to use violence against the person of another, is an assault. 1 Hawk. c. 62, s. 1. It is an assault to point a loaded pistol at any one; but not an assault to point at another a pistol which is proved not to be so loaded as to be able to be discharged. R. v. James, 1 C. & K. 530: 47 E. C. L. R. But in R. v. St. George, 9 C. & P. 483: 38 E. C. L. R.; [*278] Parke, *B., held otherwise, saying that it was an assault to present a pistol at a man at all, whether loaded or not. Although to constitute an assault there must be a present ability to inflict an injury, yet if a man is advancing in a threatening attitude to strike another, so that the blow would almost immediately reach him if he were not stopped, and he is stopped, this is an assault. Stephens v. Myers, 4 C. & P. 349: 19 E. C. L. R. So there may be an assault by exposing a child of tender years, or a person under the control and dominion of the party, to the inclemency of the weather. R. v. Ridley, 2 Campb. 650; 1 Russ. by Grea. 752. See R. v. Marsh, 1 C. & K. 496: 47 E. C. L. R.

But a mere omission to do an act cannot be construed into an assault. Thus where a man kept an idiot brother, who was bed-ridden, in a dark room in his house, without sufficient warmth or clothing, Burrough, J., ruled, that these facts would not support an indictment for assault and false imprisonment; for although there had been negligence, yet mere omission, without a duty, would not create an offence indictable as an assault. R. v. Smith, 2 C. & P. 439: 12 E. C. L. R.

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(1) 1 Wheeler's C. C. 365; United States v. Ortega, 4 Wash. C. C. Rep. 534; State v. Davis et al., 1 Hill, 46; State v. Beck et al., Id. 363. It is an assault to attempt to run against the wagon of another on the highway. People v. Lee, 1 Wheeler's C. C. 364. It is not an assault to point a cane at one in the street in derision, and for the purpose of insult, but without an intention to strike. Goodwin's Case, 6 Rogers's Rec. 9.

If a pistol, purporting to be loaded, was presented so near as to have been dangerous to life if it had been loaded and gone off, it is an assault, though in fact the pistol was not loaded. The State v. Smith, 2 Humphreys, 457. It is not an assault to cause abortion upon a woman not yet quick with child, if done with her consent. It is only in cases of high crimes that the person assaulted is incapable of assenting. The State v. Cooper, 2 Zabriskie, 52; Bell v. Miller, 5 Ohio, 251.

An assault is an attempt with force or violence to do a corporal injury to another; and may consist of any act tending to such injury, accompanied with circumstances denoting an intent, coupled with a present ability, to use violence against the person. It is not essential, to constitute an assault, and there should be a direct attempt at violence. Hays v. The People, 1 Hill, 351.

An offer to strike by one person rushing upon another, will be an assault, though the assailant be not near enough to reach his adversary, if the distance be such as to induce a man of ordinary firmness, under the accompanying circumstances, to believe that he will instantly receive a blow, unless he strikes in self-defence. State v. Davis, 1 Iredell's N. C. Law Rep. 125.

Where A. being within striking distance raises a weapon for the purpose of striking B., and at the same time declares that if B. will perform a certain act, he will not strike him, and B. does perform the required act, in consequence of which no blow is given, this is an assault on A. State v. Morgan, 3 Iredell's N. C. Law Rep. 186.

Assault by drawing an empty pistol and threatening to shoot. State v. Smith. 2 Humphreys, 457.

The drawing of a pistol without presenting or cocking it is not an assault. Lawson v. The State, 30 Alabama, 14; The State v. Shepard, 10 Iowa, 126; Bloomer v. The State, 3 Sneed, 66; The Commonwealth v. Ford, 5 Gray, 475.

It was formerly held that, if a person puts a deleterious drug (as cantharides) into coffee, in order that another may take it, if it be taken he is guilty of an assault upon the party by whom it is taken. R. v. Button, 8 C. & P. 660: 34 E. C. L. R. But in R. v. Hanson, 2 C. & K. 912: 61 E. C. L. R., the contrary was held, per Williams and Cresswell, JJ.; and R. v. Walkden, 1 Cox C. C. 282, per Parke, B., and R. v. Dilworth, 2 C. & K. 912, per Coltman, J., are to the same effect. Nevertheless if death ensued, it would be manslaughter. 2 Hale, P. C. 436. See also 24 & 25 Vict. c. 100, s. 24, *infra*, tit. Poisoning.

Where the defendants took a newly born child, put it into a bag, and hung it on to some park palings at the side of a footpath, Tindal, C. J., held this to be an assault upon the child. R. v. Marsh, 1 C. & K. 496: 47 E. C. L R.

An unlawful imprisonment is also an assault. 1 Hawk. c. 62, s. 1.

It has been frequently said that every imprisonment includes a battery. B. N. P. 22; 1 Selw. N. P. Imprisonment, I. But this doctrine has been denied. Emmett v. Lyne, 1 N. R. 255.

If two parties go out to strike one another, and do so, it is said to be an assault in both, and that it is quite immaterial which strikes the first blow. R. v. Lewis, 1 C. & K. 419. See *infra*, p. 279.

Although it was formerly doubted, it is now clear, that no words, whatever nature they may be of, will constitute an assault. Hawk. P. C. b. 1, c. 62, s. 1; 1 Bac. Ab. Assault and Battery (A); 1 Russ. by Grea. 750. But words may sometimes be an important ingredient in ascertaining what is the intention of the party; thus they may qualify what would otherwise be an assault, by showing that the party intends no present corporal injury, as where a person meeting another, laid his hand upon his sword, saying, "If it were not assize time, I would not take such language from you;" for it shows that he had not a design to do the party any corporal hurt. Tuberville v. Savage, 1 Mod. 3; 2 Keb. 545.(1)

Consent.] In consequence of the natural desire not to permit a flagrant act of immorality to go unpunished, an attempt has frequently been made to treat that as an assault which is consented to *on the part of the person who is the [*279] subject of the act. But on examination it will be found that there is no authority for such a position. Thus in R. v. Nichols, Russ. & Ry. 130, which is sometimes quoted in support of such a doctrine, where a master took indecent liberties with a female scholar, to which she did not resist, Mr. Baron Graham distinctly told the jury that there was some evidence to show that the acts of the prisoner were against the girl's will. And in R. v. Day, 9 C. & P. 722, a similar case, Coleridge, J., pointed out the distinction between *consent* and *submission*. He said, "Every consent involves a submission; but it by no means follows that a mere submission involves consent. It would be too much to say that an adult submitting quietly to an outrage of this description was not consenting; on the other hand the mere submission of a child, when in the power of a strong man, and most probably acted upon by fear, can by no means be taken to be such a consent as will justify the prisoner in point of law." In R. v. Martin, 2 Moo. C. C. 123, where the prisoner was convicted of an assault with intent to carnally know a girl above ten and under twelve years of age,

(1) Commonwealth v. Eyre, 1 Serg & Rawle, 347.
When the defendant, at the time he raised his whip and shook it at plaintiff, though within striking distance, made use of the words, "Were you not an old man. I would knock you down," this does not import a present purpose to strike, and does not in law amount to an assault. State v. Crow, 1 Iredell's N. C. Law Rep. 376.

the girl assenting, the judges, on a case reserved, held that the conviction could not be supported; and the same was held by the Court of Criminal Appeal, in R. v. Read, Den. C. C. 377.

Having carnal knowledge of a girl under the age of ten years, even with her consent, is a rape (see *post*, tit. Rape); though, theoretically, a rape includes an assault; but this is an acknowledged anomaly, and no inference can be drawn therefrom in opposition to the above express decisions.

If the consent of the injured person has been obtained by fraud, then the outrage is considered as not the less an assault because it is consented to. Thus in R. v. Saunders, 8 C. & P. 265: 34 E. C. L. R., where a man, pretending to be her husband, went to bed with a married woman, and she, believing him to be her husband, permitted him to have connection with her; this was held by Gurney, B., to be an assault. And the same was held by Alderson, B., in R. v. Williams, Id. 286.

It has also been said, though the law is not so clear upon this point, that where the act is in itself unlawful, it will, though consented to, be punishable as an assault. Coleridge, J., in R. v. Lewis, 1 C. & K. 419, said, that if two parties go out to strike one another, and do so, that it was an assault in both, and that it was quite immaterial who struck the first blow. There does not appear to be any other direct authority for this position. It is indeed said, in Buller's N. P. 16; that in an action for assault and battery, it is no defence that the plaintiff and defendant fought by consent, for that the fighting being unlawful, the plaintiff would still be entitled to a verdict for the injury done him. But in Christopherson v. Bere, 17 L. J. Q. B. 109, the Court of Queen's Bench held that a plea of leave and license to an action of assault, amounted to a plea of not guilty.

Lawful chastisement.] If a parent in a reasonable manner chastise his child, or a master his servant, being actually his servant at the time, or a schoolmaster his scholar, or a gaoler his prisoner, or if one confine a friend who is mad, and bind and beat him, in such circumstances, it is no assault.(1) Hawk. P. C. b. 1, c. 90, s. 23; Com. Dig. Pleader (3 M. 13). A defendant may justify even a *mayhem*, if done [*280] *by him as an officer of the army for disobedience of orders, and he may give in evidence the sentence of a council of war, upon a petition against him by the plaintiff; and if by the sentence the petition is dismissed, it will be conclusive evidence in favor of the defendant. Lane v. Degberg, B. N. P. 19. In all cases of chastisement it must, in order to be justifiable, appear to have been reasonable. 1 East, P. C. 406; and see *post*, tit. Murder.

Self-defence.] A blow or other violence necessary for the defence of a man's person against the violence of another, will not constitute a battery. Thus if A. lift up his stick, and offer to strike B., it is a sufficient assault to justify B. in striking A.; for he need not stay till A. has actually struck him. B. N. P. 18. But every assault will not justify every battery, and it is matter of evidence whether the assault was proportionable to the battery; an assault may indeed be of such a nature as to justify a *mayhem;* but where it appeared that A. had lifted the form upon which B. sat, whereby the latter fell, it was held no justification for B.'s biting off A.'s finger. B.

(1) A master has no right to correct his hired servant. Commonwealth v. Baird, 1 Ashmead, 267. The authority of the master to correct his apprentice is personal. The People v. Phillips, 1 Wheeler's C. C. 159. As to the case of a schoolmaster, see Morris's Case, 1 Rogers's Rec. 53; The Commonwealth v. Randall, 4 Gray, 36. Of an assault by a parent on a child. Jacob v. The State, 3 Humphreys, 493; Johnson v. The State, 2 Ibid. 283.

N. P. 18. In cases of assault, as in other cases of trespass, the party ought not, in the first instance, to beat the assailant, unless the attack is made with such violence as to render the battery necessary. Weaver v. Bush, 8 T. R. 78; 1 Russ. by Grea. 754. Where a man strikes at another within a distance capable of the latter being struck, he is justified in using such a degree of force as will prevent a repetition. Per Parke, B., Anon. 2 Lewin, C. C. 48. But a blow struck after all danger is past, is an assault. R. v. Driscoll, Car. & M. 214: 41 E. C. L. R., per Coleridge, J. If the violence used be more than necessary to repel the assault, the party may be convicted of an assault. R. v. Mabel, 9 C. & P. 474: 38 E. C. L. R.

The rule on this point is well laid down by a writer on Scotch law: "Though fully justified in retaliating, the party must not carry his resentment to such a length as to become the assailant in his turn, as by continuing to beat the aggressor after he has been disabled, or has submitted; or by using a lethal or ponderous weapon, as a knife, poker, hatchet or hammer, against a fist or cane, or in general pushing his advantage, in point of strength or weapon, to the uttermost. In such cases the defence degenerates into aggression, and the original assailant is entitled to demand punishment for the *new assault* committed on him, after his original attack had been duly chastised."(1) Alison's Princ. Cr. Law of Scot. 177; 1 Hume, 335.

Defence of other persons.] It would seem that a person has no right to commit an assault merely in defence of other persons, unless he stand in a particular relation to the person assaulted. Such relations are, husband and wife, and *vice versâ;* parent and child, and *vice versâ;*(2) and a servant in defence of his master, but not a master in defence of his servant. The law is so laid down in Dalton's Justice, ch. 121; though he treats the last point as doubtful. He also says that neither can the farmer or tenant justify such an act in defence of his landlord, nor a citizen in defence of the mayor of the city or town corporate where he dwelleth. Hawkins, bk. 2, c, 60, s. 4, follows Dalton exactly. It is true that both these writers are speaking of the forfeiture of recognizances to keep the peace, but probably what is said would be applicable to prosecutions for assault also.

*Whether the interference can be justified on the ground that a breach of [*281] the peace is being committed, see *infra*.

Prevention of unlawful acts.] There can be no doubt that any person may interfere to prevent the commission of a felony or any breach of the peace, and that he may proceed to any extremity which may be necessary to effect that object; commencing of course with a request to the offender to desist, then if he refuses gently laying hands on him to restrain him; and if he still resist, then with force compelling him to submit. Precisely the same rules apply as in cases of self-defence, it being in every case a question for the jury whether or no the degree of force actually used was necessary for the object which renders it legitimate; if there be any excess the party using it will be guilty of an assault.

It has been attempted in some cases to draw a distinction between laying hands

(1) The State v. Wood, 1 Bay, 282; Elliott v. Brown, 2 Wendell, 497. The law does not justify any assault by way of retaliation or revenge for a blow previously received. The State v. Gibson, 10 North Carolina, 214. Proof that the prosecutor struck the first blow will not justify an enormous battery. The State v. Quin, 3 Brevard. 515.

Son assault demesne is no excuse, if the retaliation by the defendant be excessive and bears no proportion to the necessity or provocation received. Cotton v. The State, 4 Texas, 260; Gallagher v. The State, 3 Minnesota, 270.

(2) Sharp v. The State, 19 Ohio, 379.

upon a person in order to restrain him; and proceeding to use force in order to attain that object. Seward v. Barclay, 1 Ld. Raym. 62; 1 Hawk. c. 60, s. 33; but there seems no ground for such a distinction; the slightest imposition of hands if not justified is an assault; and the necessity of a greater or less degree of violence depends on the circumstances of the case, to be judged of by the jury.

Whether the assault may be carried to the extent of depriving the offending party of his life may perhaps be doubtful. See *post*, tit. Murder.

There does not seem any express authority that to prevent any unlawful act other than a felony or breach of the peace an assault may be committed, and it may perhaps be doubtful whether an assault can be justified on this ground.

Of course the right to apprehend persons who have committed offences stands on a different footing. As to this see *supra*, tit. Apprehension.

A man may justify an assault in defence of his house or other property even though no felony or breach of the peace is threatened.(1)

Proof of the aggravating circumstances.] The aggravating circumstances frequently consist in the intent. Sometimes, however, the consequences alone are sufficient to subject the prisoner to the more serious punishment; thus a man who commits an assault, the result of which is to produce grievous bodily harm, is liable to be convicted under s. 47 of the 24 & 25 Vict. c. 100, though the jury think that the grievous bodily harm formed no part of the prisoner's intention. R. v. Sparrow, 30 L. J. M. C. 43.(2)

Subsequent proceedings after complaint for a common assault.] By the 24 & 25 Vict. c. 100, ss. 44, 45 & 46, three alternatives are given to justices with respect to charges of assault over which they have jurisdiction; they may convict the defendant, or they may dismiss the charge, or they may direct the party to be indicted. In R. v. Walker, 2 Moo. & R. 446, it was held on the similar words of the 9 Geo. 4, c. 31, s. 27, that a conviction before justices for a common assault was a bar to a subsequent indictment for feloniously stabbing. That case was recognized, in R. v. Erbington, 31 L. J. M. C. 14, where it was also held by the Court of Queen's Bench that a cer- [*282] tificate of dismissal was a bar to an indictment for unlawful wounding, and *for causing actual bodily harm arising out of the same cause as the assault.

It was also held on the former statute that the granting of the certificate by the justices on one of the grounds mentioned in the statute was not discretionary or a judicial act, but ministerial only, and that it was valid, although not applied for when the summons was heard. Hancock v. James, 28 L. J. M. C. 196. And again, that the word "forthwith" did not mean "forthwith upon the hearing of the summons," but "forthwith on the application of the party." Costar v. Hetherington, 28 L. J. M. C. 198. The Court of Queen's Bench in R. v. Robinson, 10 L. J. M. C. 9, seem to have acted on an opinion at variance with these decisions, but Lord Campbell, in Hancock v. James, said that he could not approve of the reasoning in that case.

As to what constitutes Wounding, or Grievous Bodily Harm, see those titles; as to Apprehension, see that title, and also tit. Murder.

(1) The force used must not exceed the necessity of the case. Baldwin v. Haydon et al., 6 Conn. 453; State v. Lazarus, 1 Rep. Const. Ct. 34; Wartrous v. Steel, 4 Verm. 629; Shain v. Markham, 4 J. J. Marsh. 578. It is a good defence, to an indictment for an assault and battery, that the defendant struck the prosecutor to prevent his taking away the defendant's goods and chattels, the prosecutor professing to seize them as a constable, by virtue of an execution, but not having been lawfully appointed a constable. The State v. Briggs, 3 Iredell, 357; The Commonwealth v. Goodwin, 3 Cushing, 154; The State v. Gibson, 10 Iredell, 214.

(2) Norton v. The State, 14 Texas, 387.

*ATTEMPTS TO COMMIT OFFENCES.

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At common law.] AT common law every attempt to commit a felony or misdemeanor is in itself a misdemeanor. So long as the act rests in bare intention it is not punishable. But if that intention be unequivocally manifested by some overt act, then it becomes an offence cognizable by the law. And the mere soliciting another to commit a felony is a sufficient overt act to constitute the misdemeanor of attempting to commit a felony. Thus to solicit a servant to steal his master's goods is a misdemeanor, though it be not charged in the indictment that the felony was actually committed. Per Grose, J., R. v. Higgins, 2 East, 8. So an *endeavor* to provoke another to send a challenge to fight has been held to be a misdemeanor. R. v. Phillips, 6 East, 464. And it makes no difference whether the offence which is attempted be one which is an offence at common law, or created by statute. Per Parke, B., R. v. Brodrick, 7 C. & P. 795 : 32 E. C. L. R. So it has been frequently held that attempts to bribe, and attempts to suborn a person to commit perjury, are indictable misdemeanors. 1 Russ. Cr. 47, *post*, tit. Bribery and Perjury. And by the 14 & 15 Vict. c. 100, s. 9, *infra*, p. 284, a prisoner may be found guilty of this common law offence of the attempt upon an indictment for the principal offence.(1)

By statute.] Many attempts to commit offences are provided for by statute. Most of them would be offences at common law, but, by statute, severe penalties are attached to them, or they are even made independent felonies. Thus by the 24 & 25 Vict. c. 100, ss. 14, 18 (*supra*, p. 274), the attempt to commit any of the offences therein mentioned is made a felony. By s. 15 of the same statute, "Whosoever shall, by any means other than those specified in any of the preceding sections of this act, attempt to commit murder, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement"

In s. 21 (*supra*, p. 274), the attempt to choke, &c., is specially mentioned. By s. 62 (*supra*, p. 276), any attempt to commit an infamous crime is specially provided for.

In almost all cases provisions for the offence of setting fire to various kinds of property are followed by provisions directed against the attempt to commit the same offence. See 24 & 25 Vict. c. 97, ss. 8, 10, 18, 27, 38, 44, *supra*, tit. Arson.

**Conviction for attempt on indictment for principal offence.*] By the 14 [*284] & 15 Vict. c. 100, s. 9, "If upon the trial of any person charged with any felony or

(1) An assault with intent to kill is no felony at common law, though anciently it was so considered. Commonwealth v. Barlow, 4 Mass 439.

In crimes which require force as an element in their commission, there is no material difference between an assault with intent and an assault with attempt, to commit the crime. Johnson v. The State, 14 Georgia, 55; Prince v. The State, 35 Alabama, 367.

In an indictment for an assault with an intent to commit a murder, the intent must be specifically proved. The State v. Neal, 37 Maine, 468; King v. The State, 21 Georgia, 220; The State v. McClun, 25 Missouri, 338; Hopkinson v. The People, 18 Illinois, 264.

misdemeanor, it shall appear to the jury upon the evidence that the defendant did not complete the offence charged, but that he was guilty only of an attempt to commit the same, such person shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is not guilty of the felony or misdemeanor charged, but is guilty of an attempt to commit the same, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for attempting to commit the particular felony or misdemeanor charged in the said indictment; and no person so tried as herein-lastly mentioned shall be liable to be afterwards prosecuted for an attempt to commit the felony or misdemeanor for which he was so tried."

Nature of the attempt.] It is not always easy to decide whether or not an indictable attempt has been committed. The following cases may serve to illustrate the subject: In R. v. Carr, Russ. & Ry. 377, the prisoner was indicted under the 7 Wm. 4 and 1 Vict. c. 85, s. 3, for attempting to discharge a loaded gun at a person with intent to murder; the jury found that the gun was loaded, but not primed; it was held that the prisoner could not be convicted. So where the touch-hole was plugged, so that the arm could not be discharged. R. v. Harris, 5 C. & P. 153: 24 E. C. L. R. In R. v. Williams, 1 Den. C. C. 39, the prisoner was indicted under the last-mentioned section for attempting to administer poison. It appeared that he had delivered poison to V. and desired him to put it into B.'s beer; V. delivered the poison to B. and told him what had passed. It was held that the prisoner could not be convicted on this indictment. But *quære* if this is not an attempt indictable at common law; see the case of R. v. Higgins, *supra*. In R. v. St. George, 9 C. & P. 483: 38 E. C. L. R., the prisoner was indicted under the 7 Wm. 4 and 1 Vict. c. 85, s. 4, for an attempt to shoot; he had put his finger on the trigger of a loaded fire-arm with the intention of shooting, but was prevented from doing so; this was held by Parke, B., not to be an attempt to shoot within the statute. This opinion was delivered after a careful consideration and consultation with Williams, J. In R. v. Taylor, 1 F. & F. 5, the prisoner was indicted for attempting to set fire to a stack. It appeared that the prisoner, after a quarrel with the prosecutor, and a threat "to burn him up," went to a neighboring stack, and, kneeling down close to it, struck a lucifer match, but, discovering that he was watched, blew out the match and went away. Pollock, C. B., told the jury that, if they thought the prisoner intended to set fire to the stack, and that he would have done so if he had not been interrupted, this was, in his opinion, a sufficient attempt to set fire to the stack within the meaning of the statute. "It is clear," said the learned judge, "that every act committed by a person with the view of committing the felonies therein mentioned is not within the statute; as, for instance, buying a box of lucifer matches with intent to set fire to a house. The act must be one immediately and directly tending to the execution of the principal crime, and committed by the prisoner under such circumstances as that he has the power of carrying his intention into execution. If two persons were [*285] to agree to commit a felony, and one of them were, in execution *of his share in the transaction, to purchase an instrument for the purpose, that would be a sufficient overt act in an indictment for conspiracy, but not in an indictment of this nature. In R. v. McPherson, Dears. & B. C. C. 197, the prisoner was indicted for breaking and entering a dwelling-house and stealing therein certain goods specified in the indictment. It appeared that at the time the house was being broken into, the goods specified were not in the house, but there were other goods there belonging to the prosecutor. The jury found the prisoner guilty of breaking and entering the

dwelling-house and attempting to steal the goods therein. But the Court of Criminal Appeal held that the conviction could not be supported. Cockburn, C. J., said, "I think attempting to commit a felony is clearly distinguishable from intending to commit it. An attempt must be to do that, which, if successful, would amount to the felony charged. Here the attempt never could have succeeded, as the goods which the indictment charges the prisoner with stealing had been removed."

The prisoner had procured from an innocent agent certain implements and dies for the purpose, and with the intention of making counterfeit Peruvian dollars, but the prisoner only intended to make a few dollars in England, by way of experiment, and then send the apparatus out to Peru. The prisoner was indicted for procuring coining instruments, with intent to use them for the purpose of making counterfeit foreign coin, and so attempting to make such counterfeit coin. Another count charged him with attempting to coin counterfeit Peruvian half-dollars by procuring coining instruments, with intent to use them in coining such counterfeit coin; a third count was for attempting to coin Peruvian half-dollars, without stating the means. The question was reserved for the Court of Criminal Appeal, whether the prisoner, by procuring the instruments mentioned in the indictment, with the intention of using them in the manner above stated, was guilty of an offence against the law of this country, and whether any or either of the above counts sufficiently alleged such offence. The conviction was upheld. The only question argued was, whether the attempt was sufficiently connected with the offence to constitute an attempt to commit a felony, and the court held that it was, as there was a clear criminal intent, indicated by an overt act, which was unequivocal. R. v. Roberts, 1 Dear. C. C. 539.

The prisoner was servant to a contractor for the supply of meat to the camp at Shorncliffe. It was the course of business for the contractor to send the meat to the quartermaster, who, with the assistance of the prisoner or some other servant of the contractor, weighed the meat with his own weights and scales, and served it out to the different messes, a soldier attending from each mess for the purpose of receiving it. On the day in question the prisoner put the weights in the scales, and would, in the usual way, have removed what was over, after all the messes had been served, which amounted, on this occasion, to about sixty pounds. Before this was done, however, it was found that short weight had been served, in consequence of the prisoner having removed the quartermaster's 14lb. weight, and substituted a false one. Held, that this was a sufficient attempt to steal the meat. R. v. Cheesman, 10 W. R. 255.

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*BANKRUPT, OFFENCES BY. [*286]

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Statutory provisions as to proof of proceedings.] As to the proof of documents relating to proceedings in bankruptcy, see 24 & 25 Vict. c. 134, s. 203, *supra*, p. 159. By s. 204, "All courts, judges, justices, and persons judicially acting, and

other officers, shall take judicial notice of the signature of any commissioner or registrar of the courts, and of the seal of the courts subscribed or attached to any judicial or official proceeding or document to be made or signed under the provisions of this act."

By s. 206, "A copy of any petition filed in the court for relief of insolvent debtors in England, or in any court having jurisdiction for the relief of insolvent debtors, or in bankruptcy, in any of her Majesty's dominions, colonies or dependencies, and of any vesting order, schedule, order of adjudication, or other proceeding purporting to be signed by the officer in whose custody the same shall be, or his deputy, certifying the same to be a true copy of such petition, vesting order, schedule, order of adjudication, or other order or proceedings, and appearing to be sealed with the seal of such court, shall at all times be admitted under this act as sufficient evidence of the same, and of such proceedings respectively having taken place, without any other proof whatever given of the same."

Offences against the bankrupt laws.] By s. 221, "Any bankrupt who shall do any of the acts or things following, with intent to defraud or defeat the rights of his creditors, shall be guilty of a misdemeanor, and shall be liable, at the discretion of the court before which he shall be convicted, to punishment by imprisonment for not more than three years, or to any greater punishment attached to the offence by any existing statute."

1. If he shall not, upon the day limited for his surrender, and before three of the clock of such day, or at the hour and upon the day allowed him for finishing his examination, after notice thereof in writing, to be served upon him personally, or left at his usual or last-known place of abode or business, and after the notice herein directed in the London Gazette, surrender himself to the court, having no lawful impediment allowed by the court, and sign or subscribe such surrender, and submit to be examined before such court from time to time.

[*287] *2. If he shall not, upon his examination, fully and truly discover to the best of his knowledge and belief all his property, real and personal, inclusive of his rights and credits, and how and to whom, and for what consideration, and when he disposed of, assigned or transferred any part thereof (except such part as has been really and *bonâ fide* before sold or disposed of in the way of his trade or business, if any, or laid out in the ordinary expense of his family), or shall not deliver up to the court or dispose as the court directs of all such part thereof as is in his possession, custody, or power (except the necessary wearing apparel of himself, his wife and children), and deliver up to the court all books, papers and writings in his possession, custody, or power, relating to his property or affairs.

3. If he shall, after adjudication, or within sixty days prior to adjudication, with intent to defraud his creditors, remove, conceal, or embezzle any part of his property to the value of ten pounds or upwards.

4. If, in case of any person having to his knowledge or belief proved a false debt under his bankruptcy, he shall fail to disclose the same to his assignees within one month after coming to the knowledge or belief thereof.

5. If he shall, with intent to defraud, wilfully and fraudulently omit from his schedule any effects or property whatsoever.

6. If he shall, after the filing of the petition for adjudication, with intent to conceal the state of his affairs, or to defeat the object of the law of bankruptcy, conceal, prevent or withhold the production of any book, deed, paper or writing relating to his property, dealings or affairs.

7. If he shall, after the filing of the petition for adjudication, or within three

months next before adjudication, with intent to conceal the state of his affairs, or to defeat the objects of the law of bankruptcy, part with, conceal, destroy, alter, mutilate or falsify, or cause to be concealed, destroyed, altered, mutilated or falsified any book, paper, writing or security, or document relating to his property, trade, dealings or affairs, or make or be privy to the making of any false or fraudulent entry or statement in, or omission from any book, paper, document or writing relating thereto.

8. If within the like time he shall, knowing that he is at the time unable to meet his engagements, fraudulently and with intent to diminish the sum to be divided amongst the general body of his creditors, have made away with, mortgaged, incumbered or charged any part of his property of what kind soever, or if, after adjudication, he shall conceal from the court or his assignee any debt due to or from him.

9. If being a trader he shall, under his bankruptcy, or at any meeting of his creditors, within three months next preceding the filing of the petition for adjudication, have attempted to account for any of his property by fictitious losses or expenses.

10. If being a trader he shall, within three months next before the filing of the petition for adjudication, under the false pretence and color of carrying on business and dealing in the ordinary course of trade, have obtained on credit from any person any goods or chattels with intent to defraud.

11. If being a trader he shall, with intent to defraud his creditors, within three months next before the filing of the petition for adjudication, pawn, pledge, or dispose of, otherwise than by *bonâ fide* *transactions in the ordinary way of his [*288] trade, any of his goods or chattels, which have been obtained on credit and remain unpaid for.

Proof of valid bankruptcy.] It is necessary to prove on an indictment for this offence all the ingredients of a valid bankruptcy. R. v. Jones, 4 B. & Ad. 345: 24 E. C. L. R.; R. v. Lands, 25 L. J. M. C. 14. The provisions contained in ss. 203, 204, and 206, were intended to facilitate this proof.

By the 12 & 13 Vict. c. 106, s. 233, which is still in force, if the bankrupt do not appear within a certain time, notice in the London Gazette is made conclusive evidence of the bankruptcy as against him. This provision has been held to apply to criminal proceedings against the bankrupt, per Coleridge, J., in R. v. Hall, Newcastle Spring Assizes, 1846, M. S.; but not against other parties: R. v. Harris, 4 Cox C. C. 140; in which case Platt, B., also held that it was a condition precedent to the admissibility of the Gazette that the prosecutor should give *some* evidence that the bankrupt had not taken any steps to annul the fiat.

If any of the documents put in contain erasures and interlineations, they will not thereby be rendered inadmissible in evidence, although no proof be given when they were made; the presumption in such cases being against fraud and misconduct. R. v. Gordon, 25 L. J. M. C. 19.

When it appeared upon the petition that it was assigned by ballot to Mr. Commissioner Goulburn, but the subsequent proceedings were either before Mr. Commissioner Holroyd or Mr. Commissioner Fonblanque, it was held that this did not render the proceedings invalid. Id.

Proof of the act of bankruptcy.] As there can be no valid bankruptcy not founded on an act of bankruptcy, this, unless the necessity of so doing is superseded by the 12 & 13 Vict. c. 106, s. 233, must be proved in the same way as in civil cases. See Rose. Dig. Ev. N. P. 689, 9th ed.; 12 & 13 Vict. c. 106, ss. 67, 99; 24 & 25 Vict. c. 134, ss. 70, 99.

Proof of the trading.] If the indictment be founded on any of the provisions which apply to traders only, then the trading must be proved. See Ros. Dig. Ev. N. P. 688, 9th ed.; 12 & 13 Vict. c. 106, s. 65.

Proof of the notice to the bankrupt.] The words of the present statute as to notice of time to surrender are "after notice thereof in writing, to be served upon him personally, or left at his usual or last known place of abode or business, and after the notice herein directed (see 12 & 13 Vict. c. 106, s. 104), in the London Gazette." The corresponding words of the 12 & 13 Vict. c. 106, s. 251, are, "after notice thereof in writing, to be served upon him personally, or left at the last usual or known place of abode or business of such person, or personal notice in case such person be then in prison, and notice given in the London Gazette of the issuing of the fiat, or filing of the petition for adjudication of bankruptcy against him, as the case may be, and of the sittings of the court." In R. v. Gordon, 25 L. J. M. C. 19, a case under the old [*289] act, it was proved that the *adjudication was against the prisoner and another jointly, and that one paper containing a duplicate adjudication in bankruptcy of the day limited for surrender had been left at a counting-house in Mincing Lane, being the usual and last known place of business of the bankrupts, on the 21st of June. On the same day all the papers and property of the bankrupts were removed therefrom, and the place locked up by the assignees, but this paper was left there, and remained there for a fortnight or three weeks. On the 26th of July one other paper, containing a notice of the days limited for surrender, and for finishing the examination, was proved to have been left at the same counting-house, which was unlocked for that purpose, and then locked up again. The objection was taken that two duplicate adjudications, and two notices of the time for surrender ought to have been left; and the majority of the Court of Criminal Appeal, Campbell, C. J., Wightman, Crompton, Cresswell, and Vaughan Williams, JJ., Parke and Alderson, BB., held that the objection was valid. Jervis, C. J., Erle and Willes, JJ., and Platt, B., thought that the statute had been complied with.

Where the notice of surrender required the bankrupt to surrender on two several days, one of which was passed at the time of the service of the notice, it was held to be a good notice, under sections 101 and 251 of the earlier statute. Id.

Proof of notice in the Gazette.] The Gazette is proved by its production, without evidence of its having been bought at the Gazette printers or elsewhere. R. v. Forsyth, Russ. & Ry. 277. A variance between the adjudication and the notice in the Gazette in the description of the place of business of the bankrupt, in the one the description being of "West Ham Lane, Middlesex," in the other of "West Ham Lane, Essex," is immaterial. R. v. Gordon, 25 L. J. M. C. 19.

Proof of the not surrendering, concealment, &c.] With respect to the proof that the bankrupt did not surrender, in R. v. Dealtry, 1 Den. C. C. R. 287, the facts were these. The bankrupt was indicted for not surrendering to the District Court of Bankruptcy at Manchester. The court was presided over by two judges, Mr. J. and Mr. S., and (practically) comprised two courts. The summons was issued and signed by Mr. J., and required the bankrupt to appear before the commissioner acting in prosecution of the fiat at the Manchester District Court of Bankruptcy. Mr. J. was the commissioner acting in prosecution of this fiat. It was proved that the bankrupt had not appeared pursuant to the said summons at the said court at all, nor before Mr. J. elsewhere; but there was no proof of his having appeared or not

before Mr. S. elsewhere. It was held by the judges that the proof of non-appearance was sufficient.

If a bankrupt has once surrendered, it appears that any subsequent omission to attend on the part of the bankrupt is not within the statute. Per Erle, J., in R. v. Kenrick, 1 Cox, C. C. 146.

With respect to a concealment of his property by the bankrupt, in order to bring the prisoner within the statute, it must appear that there was a criminal intent in his refusing to disclose his property. Thus where the prisoner was indicted under the 5 Geo. 2, c. 30, for not submitting to be examined, and truly disclosing, &c., and the evidence was, that on the last day of examination he appeared before the *commissioners and was sworn and examined, but as to certain parts of his [*290] property refused to give any answer, stating that this was not done to defraud his creditors, but under legal advice to dispute the validity of his commission, and the prisoner was convicted, the judges, on a case reserved, held the conviction wrong. R. v. Page, Russ. & Ry. 392; 1 Brod. & B. 308: 5 E. C. L. R.

In R. v. Harris, 1 Den. C. C. R. 461; S. C. 19 L. J. M. C. 11, the indictment charged that the bankrupt surrendered himself, &c., and was then and there duly sworn, &c., and duly submitted himself to be examined, &c., and that at the time of his said examination, &c., he was possessed of a certain real estate, to wit, &c., and that at the time of his said examination, and being so sworn as aforesaid, he then and there feloniously did not discover when he disposed of, assigned, and transferred the said real estate, &c. It was held that the indictment was bad for repugnancy, as it charged the prisoner with not discovering at the time of his examination when he disposed of an estate, which was averred to be in his possession at the time of his examination.

If on his examination the bankrupt refer to a document, as containing a full and true discovery of his estate and effects, it is incumbent on the prosecutor to produce that book, or to account for its nonproduction; for otherwise it cannot be known whether the effects have been concealed or not. R. v. Evan, 1 Moody, C. C. 70. It is not necessary that the concealment should have been effected by the hands of the prisoner himself, or that he should be shown to have been in the actual possession of the goods concealed, after the issuing of the commission; it is sufficient if another person, having the possession of the effects as the agent of the prisoner, and holding them subject to his control, is the instrument of the concealment. See Ib. A secreting by a bankrupt of his goods is sufficient to constitute a concealment, although a full disclosure is afterwards made to the commissioners before the bankrupt's last examination. Courterion v. Meunier, 6 Ex. 74; S. C. 20 L. J. Ex. 104, overruling R. v. Walters, 5 C. & P. 133: 24 E. C. L. R. But the concealment must be wilful; an accidental omisssion will not be within the statute. Id.

The evidence of the concealment, and of the guilty intent with which the act is done, consists of the conduct of the prisoner with reference to the goods concealed from the time when he became, or was likely to become, bankrupt. Concealment of goods in the houses of neighbors or of associates, or in secret places in the bankrupt's own house, or sending them away in the night, endeavoring to escape abroad with part of his effects, &c., constitute the usual proofs in cases of this description.

Proof of the value of the effects.] Where the prosecution is on the ground of concealing effects, it must be proved that those effects were of the value of 10*l.* And where the value is attached to all the articles collectively, as "one table, six chairs, and one carpet, of the value of 10*l.* and upwards," it is necessary to make out the

offence as to every one of the articles, for, if any are rejected, there is no sufficient averment of the value in the indictment. R. v. Forsyth, Russ. & Ry. 274; 2 Russ. by Grea. 231. But this might now be amended.

[*291] *Proof of intent to defraud.*] Lastly, the prosecutor must prove *the intent of the bankrupt to defraud his creditors. This will in general appear from the whole circumstances of the case. Evidence of it may likewise be gathered from the declarations of the prisoner.

Lord Denman, after consulting Patteson, J., held that an indictment, under the 6 Geo. 4, c. 16, s. 112, against a bankrupt for not surrendering, was bad, for not alleging that it was with intent to defraud his creditors: the words "with intent to defraud his creditors" applying to all the offences comprised in the section. R. v. Hill, 1 C. & K. 168: 47 E. C. L. R. The absconding of the bankrupt, with the view of avoiding the examination, is good evidence of the intent, although by reason of such absconding the bankrupt may have had no knowledge of the proceedings in bankruptcy. In R. v. Gordon, 25 L. J. M. C. 19, S. C. Dears. C. C. 586, an indictment for not surrendering, the jury found that there was no evidence that the prisoner had actual knowledge of the adjudication of the summons to surrender, but that the prisoner and his partner had left this country before the adjudication, believing that they should be made bankrupts, and that they stayed abroad with intent to defraud their creditors, by depriving them of their rights to examine the bankrupts and make them responsible. The court held that this finding was sufficient to support a conviction. In R. v. Ingham, 29 L. J. M. C. 18, an indictment for making false entries under s. 252 of the 12 & 13 Vict. c. 106, the jury found that the false entries were made by the bankrupt with intent to deceive his creditors as to the state of his accounts, and to prevent the examination and investigation of them in due course of bankruptcy, and to save him from having to account for a deficiency which appeared in the genuine account; but they also found that it was not done to defraud the creditors of any money or property, or in any way to prevent them from recovering or receiving any part of his estate, or to conceal any misappropriation by him. The Court of Criminal Appeal quashed the conviction, on the ground that, though there might be an intention to deceive, the jury had expressly negatived an intention to defraud. See also R. v. Hughes, 1 F. & F. 726, *acc.*

Venue.] An indictment for not surrendering cannot be sustained in a different county from that in which the bankrupt was a trader, or in which he committed an act of bankruptcy. Per Maule, J., in R. v. Milner, 2 C. & K. 310: 61 E. C. L. R.

See, as to *False declarations* relating to matters in bankruptcy, that title, *infra*, p. 428.

[*292] *BARRATRY.

A BARRATOR is defined to be a common mover, exciter, or maintainer of suits or quarrels, either in courts or in the country, and it is said not to be material whether the courts be of record or not, or whereby such quarrels relate to a disputed title or possession or not; but that all kinds of disturbances of the peace, and the spreading of false rumors and calumnies, whereby discord and disquiet may grow amongst neighbors, are as proper instances of barratry as the taking or keeping possession of lands in controversy. But a man is not a barrator in respect of any number of false

actions brought by him in his own right, unless, as it seems, such actions should be entirely groundless and vexatious, without any manner of color. Nor is an attorney a barrator, in respect of his maintaining his client in a groundless action, to the commencement of which he was in no way privy. Hawk. P. C. b. 1, c. 81, ss. 1, 2, 3, 4; Russ. by Grea. 184.

Barratry is a cumulative offence, and the party must be charged as a *common barrator*. It is, therefore, insufficient to prove the commission of one act only. Hawk. P. C. b. 1, c. 81, s. 5. For this reason the prosecutor is bound, before the trial, to give the defendant a note of the particular acts of barratry intended to be insisted on, without which the trial will not be permitted to proceed. Ibid. s. 13. The prosecution will be confined by these particulars.(1) Goddard v. Smith, 6 Mod. 262; see Car. Supp. 321, *supra*, p. 178.

The punishment of this offence is fine and imprisonment, and being held to good behavior, and in persons of any profession relating to the law, the further punishment is added of being disabled to practice for the future. Hawk. P. C. b. 1, c. 81, s. 14; 34 Geo. 3, c. 1.

By the 12 Geo. 1, c. 29, s. 4, made perpetual by the 21 Geo. 1, c. 3, if any person convicted of common barratry shall practice as an attorney, solicitor, or agent, in any suit or action in England, the judge or judges of the court where such suit or action shall be brought, shall, upon complaint or information, examine the matter in a summary way in open court, and if it shall appear that the person complained of has offended, shall cause such offender to be transported for seven years. This act was revived and made perpetual by 21 Geo. 1, c. 3. 1 Russ. by Grea. 185 (*n*).

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By statute.] THE offence of bigamy was originally only of ecclesiastical cognizance, but was made a felony by the 1 Jac. 1, c. 11. By the second section of that statute,

(1) State v. Chitty, 1 Bailey, 379; Commonwealth v. Cooper, 15 Mass. 187; Commonwealth v. Davis, 11 Pick. 434; 1 Russell, C. & M. 185, *et seq.*, b. 2, c. 23, 3d Am. ed.

it was provided that the act should not extend to any person or persons whose husband or wife should be continually remaining beyond the seas by the space of seven years together, or whose husband or wife should absent him or herself, the one from the other, by the space of seven years together, in any parts within his Majesty's dominions; the one of them not knowing the other of them to be living within that time. By section 3 it was provided that the act should not extend to any person or persons that are, or shall be, at the time of such marriage, divorced by any sentence in the ecclesiastical court, or to any person or persons where the former marriage shall be by sentence in the ecclesiastical court declared to be void and of no effect, nor to any person or persons in or by reason of any former marriage had or made within age of consent.

By the 35 Geo. 3, c. 67, persons guilty of bigamy were made liable to the same punishment as persons convicted of fraud or petit larceny.

By the 9 Geo. 4, c. 31 (E.), both of the above statutes were repealed, and other provisions substituted in their place.

[*294] *This statute is also now repealed, and by the 24 & 25 Vict. c. 100, s. 57, "Whosoever, being married, shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England, or Ireland, or elsewhere, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years; or to be imprisoned for any term not exceeding two years with or without hard labor; and any such offence may be dealt with, inquired of, tried, determined, and punished in any county or place in England or Ireland where the offender shall be apprehended, or be in custody, in the same manner in all respects as if the offence had been actually committed in that county or place; provided, that nothing in this section contained shall extend to any second marriage contracted elsewhere than in England and Ireland by any other than a subject of her Majesty; or to any person marrying a second time whose husband or wife shall have been continually absent from such person for the space of seven years then last passed, and shall not have been known by such person to be living within that time; or shall extend to any person who at the time of such second marriage shall have been divorced from the bond of the first marriage, or to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction."

Proof.] Upon an indictment for bigamy, the prosecutor must prove: 1. The two marriages; 2. The identity of the parties.

Proof of valid marriage.] Very considerable difficulties occur, in some cases, in ascertaining how far either or both marriages must be shown to be valid. So far as relates to the first marriage, the question, what marriages will be considered void for the purpose of bigamy, will be found discussed *infra*, p. 295 sqq.(1) With regard to the necessity of proving the validity of the second marriage, the following is a very important decision. It was held, that where a woman already married, and having a husband alive, marries with the widower of her deceased sister, she was guilty of bigamy, though by the 5 & 6 Wm. 4, c. 54, such a marriage is declared to be null and void to all intents and purposes whatsoever. In deciding the point, Lord Den-

(1) Proof of first marriage by cohabitation. Langtry v. The State, 30 Alabama, 536.
In bigamy, confessions of defendant are not enough to prove the first marriage, though supported by evidence of cohabitation and reputation; proof of actual marriage, either by the record or an eye-witness, is requisite. Gahagan v. The People, 1 Parker's Crim. Rep. 378.

man, C. J., said, "I have no doubt whatever that this marriage was null and void under the act mentioned; but that circumstance does not in my opinion affect the charge against the female prisoner. Her offence consisted, not in the contracting that which, but for the existence of her husband, would have been a legal marriage, but in her going through the ceremony of marriage, and appearing to contract that which was a legal and biuding union, at the time when she already had a husband living. That single fact constitutes the crime, and the proof of it, and whether the union secondly contracted would or would not be null and void, if contracted under other circumstances, is a matter wholly immaterial to the inquiry. If it were otherwise in this case, the same argument would apply in all other cases; for if the second marriage be not null and void, the crime of bigamy cannot be committed. I am, therefore, decidedly of opinion that Jane Bawm committed bigamy by marrying with Thomas Webbe, though it was within the prohibited degrees of affinity." R. v. Bawm, 1 C. & K. 144: 47 E. C. L. R. If the language *here used be taken [*295] in the general sense which it appears to bear, nothing more is necessary, with reference to the second marriage, than to prove that a valid ceremony was performed. See Burt v. Burt, 8 W. R. 532, where Cresswell, J. O., Martin, B., and Willes, J., held that on a petition for dissolution of marriage on the ground of bigamy coupled with desertion, there must be proof of such a ceremony as, but for the former marriage, would have constituted a valid marriage.

Proof of a valid marriage—not presumed.] The law will not in cases of bigamy presume a valid marriage to the same extent as in civil cases. Smith v. Huson, 1 Phillim. 257; R. v. Jacob, 1 Moo. C. C. 140.

Proof of valid marriage—prisoner's admission.] In R. v. Newton, 2 Moo. & Rob. 503, Wightman, J., held that the prisoner's admissions, deliberately made, of a prior marriage in a foreign country are sufficient evidence of such marriage, without proving it to have been celebrated according to the law of the country where it is stated to have taken place. And the same learned judge held the same in R. v. Simmonds, 1 C. & K. 164: 47 E. C. L. R.; but in R. v. Flaherty, 2 C. & K. 782: 61 E. C. L. R., where a man went to a police station, and stated that he had committed bigamy, and when and where the first marriage took place, and while in custody signed a statement to the same effect, Pollock, C. B., thought this, though some evidence of the first marriage, was not sufficient. Probably this opinion was founded on some suspicion, in the particular case, of the truth of the admission.

Proof of a valid marriage—second wife a competent witness.] After proof of the first marriage, the second wife is a competent witness, for then it appears that the second marriage is void. Bull. N. P. 287; 1 East, P. C. 469.

Proof of a valid marriage—proof that valid ceremony was performed—marriages in England.] Whatever may be the case as to the second marriage (*supra*, p. 291), it is clear that unless the first be valid, the crime of bigamy cannot be committed. Where the marriage has taken place in England, it may have been celebrated either in a church or chapel where marriages have been actually solemnized, or which is duly licensed by a bishop, according to the rites of the Church of England, or in a duly registered chapel according to such form as the parties please, before some registrar of the district and two witnesses, or before a superintendent registrar and some registrar of the district.

With regard to the first, it is sufficient to call a person who was present at the ceremony, and it will be presumed to have been in all respects duly performed; or, without calling any person who was present at the marriage, it will be sufficient to produce either the register or an examined copy of the register, or a sealed copy of the register from the general registry office, which is made evidence by the 6 & 7 Wm. 4, c. 85, s. 38. And a marriage in a chapel where marriages have been usually solemnized, or duly licensed, will stand on the same footing as a marriage in a church. See as to non-parochial registers, 21 & 22 Vict. c. 35; as to licensing by a bishop, 6 & 7 Wm. 4, c. 85, s. 36.

[*296] *If the marriage have taken place in a chapel where marriages have not been usually celebrated, then it is necessary that the chapel should have been duly registered for that purpose under 6 & 7 Wm. 4, c. 85, s. 18, and that the marriage took place with open doors between the hours of eight and twelve in the forenoon, in the presence of some registrar of the district in which the chapel is situate, and of two or more credible witnesses. Id. s. 20. The marriage may be performed between the parties according to such form and ceremony as they see fit to adopt. Id. But, during some part of the ceremony, and in the presence of the registrar and witnesses, each of the parties must declare as follows: "I do solemnly declare, that I know not of any lawful impediment why I, A. B., may not be joined in matrimony to C. D." And each of the parties must say to the other, "I call upon these persons here present to witness that I, A. B., do take thee, C. D., to be my lawful wedded wife [or husband]." By s. 23, the registrar is bound forthwith to register every marriage solemnized in his presence in a marriage register book, of which, under 6 & 7 Wm. 4, c. 85, s. 38, a sealed copy may be given in evidence. The certificate was held to be sufficient *prima facie* evidence of the marriage having been duly performed in R. v. Hawes, 1 Den. C. C. 279; but it has nevertheless been the general practice to adduce some evidence both of the presence of the registrar and that the chapel was duly registered. We have, however, the opinion of Williams, J., and Watson, B., in R. v. Manwaring, Dear. C. C. 132, that the certificate and the presence of the registrar being proved, the registration of the chapel may be presumed. If it should be necessary to prove that the chapel in which the maraiage took place was registered, it may be proved by an examined or certified copy of the register. See 14 & 15 Vict. c. 99, s. 14. Where a witness was called, who produced a certificate by which the superintendent registrar certified that the chapel was duly registered, which certificate did not purport to be an extract from or copy of the register, but which the witness said he received from the superintendent registrar at his office, and which he compared with the register book and found to be correct, this was held to be sufficient evidence of the due registration of the chapel. R. v. Manwaring, *supra*.

If the marriage have taken place before the superintendent registrar, under 6 & 7 Wm. 4, c. 85, s. 21, then the marriage must have taken place in the presence of that officer, and of some registrar of the district, and of two witnesses, with open doors, and between the hours of eight and twelve in the forenoon; and the parties must make the declaration and use the form of words above mentioned. The marriage is registered, like other marriages, under s. 23, of which, as has already been said, a sealed copy may be given in evidence. How far the validity of the ceremony would be presumed upon the production of the certificate does not appear to have been yet discussed.

Proof of valid marriage—proof that valid ceremony was performed—Jews and Quakers.] These persons stand upon a peculiar footing. They have long been in the habit of celebrating marriages according to well-established rituals of their own,

and such marriages have been recognized by the legislature. They are excepted out of the operation of the 4 Geo. 4, c. 76, by s. 31; and by the 6 & 7 Wm. 4, *c. [*297] 85, s. 2, it is provided, "That the society of Friends, commonly called Quakers, and all persons professing the Jewish religion, may continue to contract and solemnize marriage according to the usages of the said society and of the said persons respectively; and every such marriage is hereby confirmed and declared good in law, provided that the parties to such marriage be both members of the said society, or both persons professing the Jewish religion respectively: provided also, that notice to the registrar shall have been given, and the registrar's certificate shall have been issued in manner hereinafter provided." By 7 Wm. 4 & 1 Vict. c. 22, s. 1, for "registrar" is to be read "superintendent registrar" in this section. By the 19 & 20 Vict. c. 119, s. 21, marriages between Jews and Quakers respectively may be solemnized by license granted by the superintendent registrar in the form given in schedule (C) to that act. See 23 & 24 Vict. c. 18.

Proof of valid marriage—proof that valid ceremony was performed—marriages in Wales.] By the 7 Wm. 4 and 1 Vict. c. 22, s. 23, provision is made for an authentic translation of the form of words given in the 6 & 7 Wm. 4, c. 85, s. 20, *ante*, into the Welsh tongue.

Proof of valid marriage—proof that valid ceremony was performed—marriages in India.] These are regulated by the 14 & 15 Vict. c. 40. By s. 12, certificates of such marriages are to be transmitted periodically to the secretary to the government of India, and by him to be transmitted to the registrar-general in England. By s. 22, such certificates are to be subject to the provisions of the 6 & 7 Wm. 4, c. 85, so that a copy, which purports to be sealed with the seal of the general register office, is evidence without further proof.

Proof of valid marriage—proof that valid ceremony was performed—marriages abroad.] The general principle with regard to marriages contracted in a foreign country, *so far as forms are concerned*, is, that if contracted according to a form which would constitute a valid marriage in the place where it is celebrated, it is a valid marriage here (1) Per Lord Robertson, in Fergusson on Marriage and Divorce, p. 397; Bishop on Marriage and Divorce, chap. 7; Brook v. Brook, 3 Sm. & Giff. 481.

Another general rule is, that a marriage contracted according to a form which would not constitute a valid marriage in the country where it was celebrated, is invalid. But there are to this rule certain exceptions, which are thus stated by Mr. Bishop, in the work already alluded to, ss. 134 and 99. 1. Where parties are sojourning in a foreign country, where the local law makes it impossible for them to contract a lawful marriage under it: see *acc.* Lord Cloncurry's Case, Cruise on Dig-

(1) 1 Wheeler's C. C. 117.

The validity of a marriage is to be determined by the law of the place where it was celebrated; if valid there, it is valid everywhere. Phillips v. Gregg, 10 Watts, 158; Dumarsely v. Fishby, 3 Marsh. 369; Medway v. Needham, 16 Mass. 167.

In those of the United States, where there are no marriage acts, consent alone by words *de præsenti* or by words *de futuro*, followed by a cohabitation, makes a valid marriage. Milford v. Worcester. 7 Mass. 48; Londonderry v. Chester, 2 N. Hamp. 267, 268; Cheseldine v. Brewer, 1 Har. & McHen. 152; Fenton v. Reed, 4 Johns. 22; Benton v. Benton, 1 Day, 111; Haate v. Sealy, 6 Binn. 405; Dumarsely v. Fishby, 2 Marsh. 370.

The defendant's confession is evidence. See Commonwealth v. Murtagh, 1 Ashmead, 272; Forney v. Hallacher, 8 Serg. & Rawle, 159; Cayford's Case, 7 Greenl. 57. *Contra*, Commonwealth v. Littlejohn, 15 Mass. 163.

nities, 276, per Lord Eldon; where a marriage, celebrated at Rome by a Protestant clergyman, between two Protestants, was held valid, *because* a witness swore that, at Rome, two Protestants could not marry according to the *lex loci*. See also R. v. Mellis, 10 Cl. & F. 534, per Lord Campbell. 2. Where, by the law of the country in which the parties are sojourning, a mode of marriage is recognized as valid for the sojourners differing from that which is prescribed for citizens. See, per Lord Stowell, in Ruding v. Smith, 2 Hagg. Cons. R. 371, 384. This is only an apparent excep- [*298] tion. 3. Where the parties to the marriage belong *to an invading army, and they are married according to the forms of the country to which the invading army belongs. Ruding v. Smith, *supra*.

Proof of valid marriage—proof that valid ceremony was performed—marriages in colonies.] Colonists carry with them so much of the common law, and of the statute law in existence at the time of their formation, as is applicable to their situation. Clark on Col. Law, p. 8; Black. Com. 108. And it appears that the marriage law is included in this. Lautour v. Teasdale, 8 Taunt. 830: 4 E. C. L. R. If the colonial law has been modified, either by the supreme or colonial legislature, this modification must, of course, be attended to. Marriages in India are regulated by the 14 & 15 Vict. c. 40, *supra;* marriages in Newfoundland by the 5 Geo. 4, c. 68, repealing 57 Geo. 3, c. 51; marriages in the Ionian Islands by the 23 & 24 Vict. c. 86.

Proof of valid marriage—proof that valid ceremony was performed—marriages in Scotland.] These are subject to the same general considerations as marriages abroad: *i. e.*, the *lex loci* must be looked to. But by s. 1 of the 19 & 20 Vict. c. 96, "after the 31st of December, 1856, no irregular marriage contracted in Scotland by declaration, acknowledgment, or ceremony, shall be valid, unless one of the parties had at the date thereof his or her usual place of residence there, or had lived in Scotland for twenty-one days next preceding such marriage, any law, usage, or custom to the contrary notwithstanding."

Proof of valid marriage—proof that valid ceremony was performed—marriages in Ireland.] These are subject also to the same general considerations as marriages abroad. It seems not to have been formerly essential to the validity of marriage in Ireland that the ceremony should take place in a church. Where it had been performed by a dissenting minister, in a private room, the recorder was clearly of opinion that it was valid, on the ground that, as before the marriage act a marriage might have been celebrated in England in a house, and it was only necessary by positive law to celebrate it in a church, some law should be shown requiring dissenters to be married in a church; whereas one of the Irish statutes, 21 & 22 Geo. 3, c. 25, enacts, that all marriages between Protestant dissenters, celebrated by a Protestant dissenting teacher, shall be good, without saying at what place they shall be celebrated. Anon. O. B. *coram*, Sir J. Silvester, 1 Russ. by Grea. 214. So, where a marriage was celebrated at a private house in Ireland, by a clergyman of the Church of England, the curate of the parish, Best, C. J., held it to be valid. He said, "When I find that this marriage was performed by a gentleman who had officiated as curate of the parish for eighteen years, I must presume it to have been correctly performed according to the laws of that country, and I shall not put the defendant [it was an action in which coverture was pleaded] to the production of a license, or to any further proof. It is true, that in a case for bigamy, tried before Mr. Justice Bayley,

on the northern circuit, an acquittal was directed, because the first marriage, which took place in Ireland, was performed in a private house; but I have reason to know that that learned judge altered his opinion afterwards, and was satisfied of the validity of the first marriage." Smith v. Maxwell, Ry. & Moo. *N. P. C. 80: 21 E. [*299] C. L. R. The case referred to by Best, C. J., appears to be that of R. v. Reilly, 3 Chetw. Burn. 726, in which there was no direct evidence that the law of Ireland permitted a marriage to be celebrated at a private house. In Ireland, the marriage of two Roman Catholics by a Roman Catholic priest is good. Where a person who has a wife living at the time of the second marriage declared himself to be a Roman Catholic, and the woman was a Roman Catholic, Alderson, B., held that this was a good marriage as against him, and that he would not, on being indicted for bigamy, or in respect of such second marriage, be allowed to set up, as a defence to the charge, that he was a Protestant. To prove the second marriage the second wife was called, who stated that A. acted as a Roman Catholic priest, and that the marriage took place in his house, as was usual with the marriages of Roman Catholics in Ireland; that before the commencement of the marriage service, the priest asked the prisoner if he was a Roman Catholic, and he answered that he was; that a part of the ceremony was in Latin, and the remainder in English, and that the priest having asked the prisoner if he would take the witness as his wife, and having asked her if she would take the prisoner for her husband, and each having answered in the affirmative, he pronounced them married. Held, that the marriage was sufficiently proved. R. v. Orgill, 9 C. & P. 80: 38 E. C. L. R. Where the first marriage was in Ireland, and it appeared that one of the parties was under age, and no consent of parents was proved, the judges, after referring to the Irish marriage act, 9 Geo. 2, c. 11, were of opinion that, though that act has words to make such a marriage void, yet other parts of the statute show that it is voidable only, and any proceedings to avoid it must be taken within a year; and they therefore held the first marriage binding. R. v. Jacob, 1 Moody, C. C. 140.

The 5 & 6 Vict. c. 113, and the 6 & 7 Vict. c. 39, were passed to confirm marriages by Protestants and other dissenting ministers.

Marriages in Ireland are now regulated by the 7 & 8 Vict. c. 81, an act for marriages in Ireland, and for registering such marriages. That statute (which was passed in consequence of the case of R. v. Millis, 10 C. & F. 534, in which the question was, as to the validity of a present contract of marriage performed by a Presbyterian minister) is similar to the 6 & 7 Wm. 4, c. 85 (*ante*, p. 296), which relates to England. It specially provides for marriages in Ireland between parties, one or both of whom are Presbyterians, permitting such marriages to be solemnized in certified meeting-houses. It allows the celebration of marriage, under certain forms and regulations, to take place in registered buildings, and before the registrar at his office. By s. 3, however, it is enacted, "That nothing in this act contained shall affect any marriages by any Roman Catholic priest which may now be lawfully celebrated, nor extend to the registration of any Roman Catholic chapel, but such marriages may continue to be celebrated in the same manner, and subject to the same limitations and restrictions, as if this act had not been passed." By ss. 45, 46, and 47, persons unduly solemnizing marriage, and registrars unduly issuing certificates of marriage, in Ireland, are made guilty of felony.

Proof of valid marriage—proof that valid ceremony was performed—marriages abroad in houses of ambassadors, &c.] It appears that *before the passing [*300] of the statute 4 Geo. 4, c. 91, a marriage celebrated in the house of an English am-

bassador abroad was held valid. R. v. Brampton, 10 East, 286; Ruding v. Smith, 2 Hagg. Cons. Rep. 371. And now, by the first section of that statute, reciting that "it is expedient to relieve the minds of all his majesty's subjects from any doubt of the validity of marriages, solemnized by a minister of the Church of England in the chapel or house of any British ambassador, or minister residing within the country to the court of which he is accredited, or in the chapel belonging to any British factory abroad, or in the house of any British subject residing at such factory, as well as from any possibility of doubt concerning the validity of marriages solemnized within the British lines, by any chaplain, or officer, or other person officiating under the orders of the commanding officer of a British army serving abroad;" it is enacted, "That all such marriages shall be deemed and held to be as valid in law as if the same had been solemnized within his majesty's dominions, with a due observance of all forms required by law."

Sect. 2 provides that the act shall not confirm, or impair, or affect the validity of any marriage solemnized beyond the seas, save and except such as are solemnized as therein specified and recited.

Proof of valid marriage—proof that a valid ceremony was performed—marriages abroad before a consul.] By the 12 & 13 Vict. c. 68, it is provided, that all marriages abroad solemnized between parties either of whom may be a British subject, in the manner pointed out by that act, shall be valid. The provisions in this act accord almost precisely with those in the 6 & 7 Wm. 4, c. 85, relating to a marriage before the superintendent registrar; the British consul at the place where the marriage takes place being substituted for that officer. By ss. 11 and 12, the consul is required to register all such marriages, and send the register to the secretary of state, to be by him transmitted to the registrar-general. There does not appear to be any provision in this act analogous to that in 14 & 15 Vict. c. 40, s. 22, *supra*, which brings these certificates within the provision of 6 & 7 Wm. 4, c. 86.

Proof of valid marriage—preliminary ceremonies.] Sometimes, in addition to the actual ceremony by which the marriage is required to be celebrated, some preliminary ceremony is necessary to the validity of the marriage, as a license, banns, &c. It is a general rule that, where a marriage is shown to have been regularly celebrated, the performance of the preliminary conditions will be presumed; and it is for the party who seeks to repudiate the marriage to show that they were not fulfilled. As to when the absence of these preliminary ceremonies avoids the marriage, see *post*.

What marriages are void.] There are many marriages which for civil purposes are *voidable*, but not *void*. That is, they are valid until some step has been taken to annul them. But many such marriages might be valid for the purposes of bigamy. Whether or no a marriage is void for the purposes of bigamy would sometimes raise very difficult questions. It is clear that all marriages within the prohibited degrees would be invalid. But it appears from R. v. Bawm, 1 C. & K. 144: 47 E. C. L. R., that, if the first marriage be valid, it makes no difference that the second mar- [*301] riage was within the prohibited *degrees. *Vide supra*, p. 294. On the other hand, if a man marry his deceased wife's sister, and in the latter's lifetime marry another woman, he cannot then be indicted for bigamy. R. v. Chadwick, 11 Q. B. 173: 63 E. C. L. R.; S. C. 17 L J. M. C. 33.

Although it was formerly held that the marriage of an idiot was valid, yet, accord-

ing to modern determination, the marriage of a lunatic, not in a lucid interval, is void. 1 Bl. Com. 438, 439; 1 Russ. by Grea. 216. And by the 15 Geo. 2, c. 30 (see also 51 Geo. 3, c. 37), if persons found lunatics under a commission, or committed to the care of trustees by any act of Parliament, marry before they are declared of sound mind by the lord chancellor, or the majority of such trustees, the marriage shall be totally void.

It was held, under the former law, that where the second marriage was contracted in Ireland, or abroad, it was not bigamy, on the ground that that marriage, which alone constituted the offence, was a fact done in another jurisdiction, and though inquirable here for some purposes, like all transitory acts, was not, as a crime, cognizable by the rules of the common law. 1 Hale, P. C. 692; 1 East, P. C. 465; 1 Russell, 183. But now the offence is the same, whether the second marriage shall take place in England or elsewhere.

What marriages are void—marriages by banns.] By the 22d section of the marriage act, Geo. 4, c. 76, "If any persons shall knowingly and wilfully intermarry in any other place than a church or such public chapel wherein banns may be lawfully published, unless by a special license, or shall knowingly and wilfully intermarry without a publication of banns, or license from a person or persons having authority to grant the same first had and obtained, or shall knowingly and wilfully consent to, or acquiesce in the solemnization of such marriage by any person not being in holy orders, the marriage of such persons shall be null and void."

With regard to the chapels in which banns may be lawfully published, it is enacted, by the 6 Geo. 4, c. 92, s. 2, that it shall be lawful for marriages to be in future solemnized in all churches and chapels erected since the 26 Geo. 2, c. 33, and consecrated, in which churches and chapels it has been customary and usual before the passing of that act (6 Geo. 4), to solemnize marriages, and the registers of such marriages, or copies thereof, are declared to be evidence. By sect. 3 of the marriage act, 4 Geo. 4, c. 76, "the bishop of the diocese, with the consent of the patron and incumbent of the church of the parish in which any public chapel having a chapelry thereunto annexed, may be situated, or of any chapel situated in an extra-parochial place, signified to him under their hands and seals respectively, may authorize by writing under his hand and seal the publication of banns, and the solemnization of marriages in such chapels for persons residing in such chapelry or extra-parochial place respectively; and such consent, together with such written authority, shall be registered in the registry of the diocese."

To render a marriage without due publication of banns void, it must appear that it was contracted with a knowledge by *both* parties that no due publication had taken place. R. v. Wroxton, 4 B. & Ad. 640. And, therefore, where the intended husband procured the banns to be published in a christian and surname which the woman had never borne, but she did not know that fact until after the *solemnization [*302] of the marriage, it was held to be a valid marriage. Id.; and see Wiltshire v. Prince, 3 Hagg. Ecc. R. 332. If the prisoner has been instrumental in procuring the banns of the second marriage to be published in a wrong name, he will not be allowed, on an indictment for bigamy, to take advantage of that objection to invalidate such second marriage. The prisoner was indicted for marrying Anna T., his former wife being alive. The second marriage was by banns, and it appeared that the prisoner wrote the note for the publication of the banns, in which the wife was called Anna, and that she was married by that name, but that her real name was Susannah. On a case reserved, the judges held unanimously, that the second marriage was sufficient

to constitute the offence, and that after having called the woman Anna in the note, it did not lie in his mouth to say that she was not as well known by the name of Anna, as by that of Susannah, or that she was not rightly called by the name of Anna in the indictment. R. v. Edwards, Russ. & Ry. 283; 1 Russell, by Grea. 209. This principle was carried still further in a case before Mr. Baron Gurney. The second wife, who gave evidence on the trial, stated that she was married to the prisoner by the name of Eliza *Thick*, but that her real name was Eliza Brown; that she had never gone by the name of *Thick*, but had assumed it when the banns were published, in order that her neighbors might not know that she was the person intended. It being objected, on behalf of the prisoner, that this was not a valid marriage, Gurney, B., said, "that applies only to the first marriage, and I am of opinion that the parties cannot be allowed to evade the punishment for the offence by contracting an invalid marriage." R. v. Penson, 5 C. & P. 412: 24 E. C. L. R. In another case, where the prisoner contracted the second marriage in the maiden name of his mother, and the woman he married had also made use of her mother's maiden name, it was unanimously resolved, on a reference to the judges, that the prisoner had been rightly convicted on this evidence. R. v. Palmer, *coram* Bayley, J., Durham, 1827, 1 Deacon's Dig. C. L. 147. A person whose name was *Abraham Langley* was married by banns by the name of *George Smith*; he had been known in the parish where he resided and was married by the latter name only; the Court of Queen's Bench held that this was a valid marriage under the 26 Geo. 2. R. v. Billingshurst, 3 M. & S. 250. As to the distinction between a name assumed for other purposes, and a name assumed for the purpose of practising a fraud upon the marriage laws, see the case of R. v. Burton-on-Trent, *infra*. Where the banns were published in the name of *William*, the real name being *William Peter*, and the party being known by the name of *Peter*, and the suppression was for the purpose of effecting a clandestine marriage with a minor, the marriage was declared null and void. Pouget v. Tomkins, 1 Phillimore, 449. See also Fellowes v. Stewart, 2 Phillimore, 257; Middlecroft v. Gregory, Id. 365. So where the wife at the time of her marriage personated another woman, in whose name banns had been previously published for an intended marriage with her husband. Stayte v. Farquharson, 2 Add. 282. See Midgley v. Wood, 30 L. J. D. & M. 57.

What marriages are void—marriages by minors.] Under the former marriage act, 26 Geo. 2, it was held, that if the marriage was by license, and the prisoner proved that he was a minor at the time, it lay on the prosecutor to show that the consent [*303] required by the 11th *section of the above act had been obtained, or that otherwise the marriage was void. R. v. Butler, Russ. & Ry. 61; R. v. Morton, Id. 19 (*n*); R. v. James, Id. 17; Smith v. Huson, 1 Phillimore, 287. The law on this point has been altered by the marriage act, 4 Geo. 4, c. 76, s. 14, which merely requires consent, and has no words making marriages solemnized without such consent *void*. The statute therefore is regarded as *directory* only, and a marriage by a minor without the consent of his father, then living, has been held valid. R. v. Birmingham, 8 B. & C. 29: 15 E. C. L. R.; 2 Man. & Ry. 230. So in the interval between the time of the 3 Geo. 4, c. 75 (by which certain parts of the 26 Geo. 2, relating to consent of parents, &c., were repealed), receiving the royal assent, and the time when it began to operate, a marriage by license solemnized without consent, was held valid. R. v. Waully, 1 Moo. C. C. 163.

By the 6 & 7 Wm. 4, c. 85, s. 10, the like consent shall be required to any marriage in England solemnized by license, as would have been required by law to marriages solemnized by license immediately before the passing of the act; and every

person whose consent to the marriage by license is required by law, is thereby authorized to forbid the issue of the superintendent registrar's certificate, whether the marriage is intended to be by license, or without license. By s. 25, after solemnization, consent is to be presumed.

The 1 Jac. 1, c. 11, contained an exception with regard to persons within what was then considered the age of consent, namely, fourteen years in a male, and twelve years in a female. 1 Bl. Com. 436; R. v. Gordon, Russ. & Ry. 48. The subsequent statutes defining the crime of bigamy do not contain this exception. But probably a marriage within that age would be considered as wholly void, the presumption being that the parties are incapable of sexual intercourse.

What marriages are void—marriage by license in an assumed name.] A man who had deserted from the army, for the purpose of concealment, assumed another name. After a residence of sixteen weeks in the parish he was married by license in his assumed name, by which only he was known in the place where he then resided. Lord Ellenborough said, "If this name had been assumed for the purpose of fraud, in order to enable the party to contract marriage, and to conceal himself from the party to whom he was about to be married, that would have been a fraud on the marriage act and the rights of marriage, and the court would not have given effect to any such corrupt purpose. But where a name has been previously assumed, so as to become the name which the party has acquired by reputation, that is, within the meaning of the act, the party's real name." R. v. Burton-upon-Trent, 3 M. & S. 537. See Bevan v. McMahon, 30 L. J. D. & M. 61.

What marriages are void—marriages abroad.] Whether or no a marriage which has taken place abroad, according to a form which would be considered valid there, and therefore valid here, but between parties who, though competent there, would in this country be incompetent to contract a valid marriage, is to be considered void or not in this country, is a very difficult question. The question was very elaborately discussed in the case of Brook v. Brook, 3 Sm. & Gif. 481; S. C. 27 L. J., Ch. 401; and all the authorities will be found *in the learned judgment of Sir Cress- [*304] well Cresswell, in giving his opinion in that case. There an English subject had married his deceased wife's sister at Altona, in Denmark, and it was held that, assuming the marriage to be valid there, it was nevertheless null and void in this country, by reason of the provisions in the 5 & 6 Wm. c. 54. See also In the goods of Bernhard Mette, 1 Swab. & Trist. 112. But the difference already alluded to between holding a marriage void for civil purposes, and for the purposes of a prosecution for a bigamy, must be borne in mind.(1)

Foreign law—how proved.] In proving a marriage which has taken place abroad, evidence must be given of the law of the foreign state, in order to show its validity. For this purpose, a person skilled in the laws of the country should be called. Lindo v. Belisario, 2 Hagg. 248; Middleton v. Janvers, 2 Hagg. 441. Some doubt has existed with regard to the mode of proving foreign laws in English courts. The rule, as at present understood, appears to be, that the written law of a foreign state must be proved by a copy duly authenticated. Clegg v. Levy, 3 Campb 166. With regard to the mode of authenticating it, the following case has occurred. In order to prove the law of France respecting marriage, the French vice-consul was called, who

(1) Sneed v. Ewing, 5 J. J. Marsh. 447.

produced a copy of the Cinq Codes, which, he stated, contained the customary and written laws of France, and was printed under the authority of the French government. R. v. Sir Thomas Picton, 30 How. St. Tr. 514, was referred to as an authority in favor of admitting this evidence, but it appears that there the evidence was received by consent. Abbott, J., said that the general rule certainly was, that the written law of a foreign country must be proved by an examined copy, before it could be acted on in an English court, but according to his recollection, printed books on the subject of the law of Spain were referred to and acted on in argument in R. v. Sir T. Picton, as evidence of the law of that country, and therefore he should act on that authority, and receive the evidence. Lacon v. Higgins, Dowl. & Ry. N. P. C. 38: 16 E. C. L. R.; 3 Stark. 178. The House of Lords, in the Sussex Peerage Case, 11 Cl. & Fin. 134, held that a witness to foreign law must be a person *peritus virtute officii*, or *virtute professionis*. And it was held that a Roman Catholic bishop, holding in this country the office of coadjutor to a vicar apostolic, and, as such, authorized to decide on cases arising out of marriages affected by the law of Rome, was therefore in virtue of his office a witness admissible to prove the law of Rome as to marriages. In the same case it was held, that a professional or official witness giving evidence as to foreign law may refer to foreign law books to refresh his memory, or to correct or confirm his opinions, but the law itself must be taken from his evidence. See also R. v. Povey, 1 Dear. C. C. 32; S. C. 22 L. J. M. C. 19; where, in order to prove that a marriage in Scotland was valid according to the law of Scotland, it was held that the witness must be one conversant with the law of Scotland as to marriages. Therefore, where a woman was called as a witness, who said, that she was present at a ceremony performed in a private house in Scotland by a minister of some religious denomination, that she herself was married in the same way, and that parties always married in Scotland in private houses, this was held by the Court of Criminal Appeal insufficient, and the conviction was quashed.

[*305] *The practice with regard to the proof of foreign laws in the United States is as follows: The usual modes of authenticating foreign laws there are by an exemplification under the great seal of state; or by a copy proved to be a true copy, or by the certificate of an officer authorized by law, which certificate itself must be duly authenticated. But foreign unwritten laws, customs, and usages, may be proved, and indeed must ordinarily be proved, by parol evidence. The usual course is to make such proof by the testimony of competent witnesses, instructed in the law, under oath; sometimes, however, certificates of persons in high authority have been allowed as evidence. Story on the Conflict of Laws, 530.

Identity of parties.] The identity of the parties named in the indictment must be proved. Upon an indictment for bigamy, it was proved by a person who was present at the prisoner's second marriage, that a woman was married to him by the name of Hannah Wilkinson, the name laid in the indictment, but there was no other proof that the woman in question was Hannah Wilkinson, or that she had ever called herself so. Parke, J., held the proof to be insufficient, and directed an acquittal. He subsequently expressed a decided opinion that he was right; and added, that to make the evidence sufficient, there should have been proof that the prisoner "was then and there married to a certain woman *by the name of, and who called herself, Hannah Wilkinson*," because the indictment undertakes that a Hannah Wilkinson was the person, whereas, in fact, there was no proof that she had ever before gone by that name; and if the banns had been published in a name which was not her

own, and which she had never gone by, the marriage would be invalid. R. v. Drake, 1 Lew. C. C. 25.

If in a case of bigamy there be a discrepancy between the christian name of the prisoner's first wife, as laid in the indictment, and as stated in the copy of the register which is produced to prove the first marriage, the prisoner must be acquitted; *unless* that discrepancy can be explained, or unless it can be shown that the first wife was known by both names. R. v. Gooding, Carr. & M. 297: 41 E. C. L. R.

Marriage confirmation acts.] Many acts of Parliament have been passed expressly to confirm and render valid marriages about which doubts might have existed: such as the 44 Geo. 3, c. 77; 48 Geo. 3, c. 127; 58 Geo. 3, c. 84 (India); 4 Geo. 4, c. 5; 4 Geo. 4, c. 91 (marriages abroad); 6 Geo. 4, c. 92; 11 Geo. 4 and 1 Wm. 4, c. 18; 3 & 4 Wm. 4, c. 45 (Hamburgh); 5 & 6 Wm. 4, c. 54 (deceased wife's sster); 10 & 11 Vict. c. 58 (Jews and Quakers); 12 & 13 Vict. c. 40, s. 20; 21 & 22 Vict. c. 46.

Venue.] The 24 & 25 Vict. c. 100, s. 57, *supra*, p. 293, like the 9 Geo. 4, c. 31, and the 1 Jac. 1, c. 11, enacts that the prisoner may be tried in the county in which he is apprehended.(1)

Upon the latter statute, it was held that the prisoner, having been apprehended for larceny in the county of W., and a true bill having been found against him while in custody under that charge for bigamy, he might be tried for the latter offence in the county of W. R. v. Jordan, Russ. & Ry. 48. The second marriage was at Manchester, and a warrant was issued by a magistrate there to apprehend the prisoner. He, having removed to London, surrendered to one of the *police magistrates [*306] there, who admitted him to bail. On his trial at the Old Bailey, the court, on an objection taken by his counsel, were of opinion, that as *the warrant* had not been produced, and as it had not been proved that the prisoner was *apprehended* in the county of Middlesex, the court had no jurisdiction to try him. R. v. Forsyth, 2 Leach, 826. But now the prisoner may be tried in the county in which he is *in custody*.

But on a crown case reserved, eleven of the judges being present, it was decided (Parke, B., Alderson, B., and Maule, B., *dissentibus*), that an indictment for bigamy, found in a different county from that where the offence was committed, need not allege that the prisoner was in custody at the time of the finding the inquisition in the county of the finding. Reg. v. Whiley, 2 Moo. C. C. 186. "In the marginal note of this case given by the reporter, the word 'not' is omitted, and it is in other respects erroneously reported." Per Parke, B., in R. v. Smythies, 1 Den. C. C. R. 499.

Under the former law the offence of bigamy was not committed if the second marriage took place out of the jurisdiction of the criminal courts of this country. 1 Hale, P. C. 692; 1 East, P. C. 645; 1 Russ. Cr. by Gr. 183. But by the present statute this is specially provided for.

A British subject resident in England married a second wife in the lifetime of the first; both marriages took place in Scotland: it was held that he might be indicted and convicted of bigamy in England. R. v. Topping, 25 L. J. M. C. 72.

Proof from the prisoner under the exceptions.] The prisoner may prove under the first exception in the statute that he or she is not a subject of his majesty, *and* that the second marriage was contracted out of England.

(1) Bigamy is not punishable as an offence when the second marriage took place out of the State, though the husband brought his second wife here and lived with her. The People v. Mosher, 2 Parker, C. R. 195.

Secondly, the prisoner may prove that the other party to the first marriage has been continually absent from home for the space of seven years last past, *and* was not known to be living within that time. The question, whether a prisoner, setting up this defence, ought to show that he has used reasonable diligence to inform himself as to the other party being alive, and whether, if he neglects the palpable means of availing himself of such information, he will stand excused, does not appear to be decided. 1 East, P. C. 467; 1 Russ. by Grea. 187. It seems that the true construction of the exception is, not that the party charged, to be deprived of the benefit of its provision as a defence, must be proved to have known at the time when he contracted the second marriage, that the first wife had been alive during some part of the seven years preceding, but that to enable him to claim the benefit of that provision he must have been ignorant, during the whole of those seven years, that she was alive. Reg. v. Cullen, 9 C. & P. 681: 38 E. C. L. R. But the difficulty still remains of how that ignorance is to be shown. Where the prisoner's first wife had left him sixteen years, and the second wife proved that she had known him for about ten years living as a single man, and that she had never heard of the first wife, who appeared to have been living seventeen miles from where the prisoner resided, Cresswell, J., held that he was entitled to be acquitted under the foregoing exception. R. v. Jones, Carr. & M. 614: 41 E. C. L. R.

In R. v. Briggs, Dear. & B. C. C. 98, S. C. 26 L. J. M. C. 7, the prisoner had been continually absent from her first husband for the seven years next preceding the [*307] second marriage, on which *occasion she represented herself as a single woman, and was married by her maiden name. The jury being asked to consider whether she knew her husband to be alive at the time of the second marriage, and if not, whether she had the means of acquiring the knowledge, found that they had no evidence of her knowledge, but were of opinion that she had the means of acquiring knowledge, if she had chosen to make use of them. It was held that upon this finding a conviction could not be sustained, as the jury stopped short of finding that the woman actually knew that her first husband was alive. But the court expressly refrained from deciding upon whom the onus of proving knowledge lay, saying that it was a difficult and most important question. In R. v. Cross, 1 F. & F. 510, no direct evidence was given on either side as to the prisoner's knowledge that his wife was alive, but it was proved that they had separated by agreement in 1843; the second marriage took place in 1855, and in 1857, when it was to the prisoner's interest to do so, he produced his first wife. Cockburn, C. J., left it to the jury to say, whether or no the prisoner was ignorant that his first wife was alive at the time of the second marriage.

The third exception is, where the party, at the time of the second marriage, has been divorced from the bond of the first marriage. The words of the 1 Jac. 1, c. 11, were, "Divorced by the sentence of any ecclesiastical court," and were held to extend to a divorce *à mensâ et thoro*. 1 Hale, P. C. 694; 4 Bl. Com. 164; 1 East, P. C. 467. But now a divorce *à vinculo matrimonii* must be proved. It is not always sufficient to prove a divorce out of England, where the first marriage was in this country. The prisoner was indicted for bigamy under the statute of Jac. 1. It appeared that he had been married in England, and that he went to Scotland and procured there a divorce *à vinculo matrimonii*, on the ground of adultery, before his second marriage. This, it was insisted for the prisoner, was a good defence under the third exception in the statute 1 Jac. 1; but on a case reserved, the judges were unanimously of opinion that no sentence or act of any foreign country could dissolve an English marriage *à vinculo matrimonii*, for ground on which it was not liable to be dissolved *à vinculo matrimonii* in England, and that no divorce of an ecclesiastical

court was within the exception in sec. 3 of 1 Jac. 1, unless it was the divorce of a court within the limits to which the 1 Jac. 1 extends. R. v. Lolley, Russ. & Ry. 237.

The fourth exception is, where the former marriage has been declared void by the sentence of any court of competent jurisdiction. The words in the statute of 1 Jac. 1, c. 11, were, "By sentence in the ecclesiastical court;" and under these it was held that a sentence of the spiritual court against marriage, in a suit of jactitation of marriage, was not conclusive evidence, so as to stop the counsel for the crown from proving the marriage, the sentence having decided on the validity of the marriage only collaterally, and not directly. Duchess of Kingston's Case, 11 St. Tr. 262, fo. ed.; 20 How. St. Tr. 355; 1 Leach, 146.(1)

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*BRIBERY. [*308]

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Nature of the offence.] BRIBERY is a misdemeanor punishable at common law. Bribery, in strict sense, says Hawkins, is taken for a great misprision of one in a judicial place taking any valuable thing, except meat and drink, of small value of any man who has to do before him in any way, for doing his office or by color of his office. In a large sense, it is taken for the receiving or offering of any undue reward by or to any person whomsoever whose ordinary profession or business relates to the administration of justice, in order to incline him to do a thing against the known rules of honesty and integrity. Also bribery sometimes signifies the taking or giving a reward for offices of a public nature. Hawk. P. C. b. 1, c. 67, ss. 1, 2, 3.

An attempt to bribe is a misdemeanor, as much as the act of successful bribery, as where a bribe is offered to a judge, and refused by him. 3 Inst. 147. So it has been held, that an attempt to bribe a cabinet minister for the purpose of procuring an office, is a misdemeanor. Vaughan's Case, 4 Burr. 2494. So an attempt to bribe, in the case of an election to a corporate office, is punishable. Plumpton's Case, 2 Ld. Raym. 1377.

Bribery at elections for members of Parliament.] This offence is now regulated by the 17 & 18 Vict. c. 102, which, by sect. 2, defines the offence of bribery by enacting that the following persons shall be deemed guilty of bribery: 1. Every person who shall, directly or indirectly, by himself, or by any other person on his behalf, give, lend, or agree to give or lend, or shall offer, promise, or promise to procure, any money or valuable consideration, to or for any voter, or to or for any person on behalf of any voter, or to or for any other person, in order to induce any voter to vote or refrain from voting, or shall corruptly do any such act as aforesaid, on account of such voter having voted or refrained from voting at any election. 2. Every person who shall, directly or indirectly, by himself or by any other person on his behalf, give or procure, or agree to give or procure, or offer, promise, or promise to procure or to en-

(1) On an indictment for bigamy, evidence that the defendant's marriage with the second wife had not been consummated by carnal knowledge of her body, is irrelevant. The State v. Patterson, 2 Iredell, 346.

deavor to procure, any office, place, or employment, to or for any voter, or to or for any person on behalf of any voter, or to or for any other person, in order to induce such voter to vote or refrain from voting, or shall corruptly do any such act as aforesaid, on account of any voter having voted or refrained from voting at any election. 3. Every person who shall, directly or indirectly, by himself or by any other person on his behalf, make any such gift, loan, offer, promise, procurement, or agreement, as aforesaid, to or for any person, in order to induce such person to procure, or endeavor to procure, the return of any person to serve in Parliament, or the vote of any voter at any election. 4. Every person who shall, upon or in consequence of any such gift, loan, offer, promise, procurement, or agreement, procure or engage, promise or endeavor [*309] to procure, the return of any person to serve in Parliament, *or the vote of any voter at any election. 5. Every person who shall advance or pay, or cause to be paid, any money to or to the use of any other person, with the intent that such money or any part thereof shall be expended in bribery at any election, or who shall knowingly pay or cause to be paid any money to any person in discharge or repayment of any money wholly or in part expended in bribery at any election.

By the same section, every person so offending is made guilty of a misdemeanor, punishable by fine or imprisonment.

By s. 3, the following persons are also to be deemed guilty of bribery: 1. Every voter who shall, before or during any election, directly or indirectly, by himself or by any other person on his behalf, receive, agree, or contract for any money, gift, loan, or valuable consideration, office, place, or employment, for himself or for any other person, for voting or agreeing to vote, or for refraining or agreeing to refrain from voting at any election. 2. Every person who shall, after any election, directly or indirectly, by himself or by any other person on his behalf, receive any money or valuable consideration on account of any person having voted or refrained from voting, or having induced any other person to vote or refrain from voting at any election.

By s. 4, treating is defined, and is made an *offence*, for which a penalty may be recovered, but it is not a misdemeanor.

By s. 5, every person who shall, directly or indirectly, by himself or any other person on his behalf, make use of or threaten to make use of any force, violence, or restraint, or inflict or threaten the infliction, by himself or by or through any other person, of any injury, damage, harm, or loss, or in any other manner practise intimidation upon or against any person in order to induce or compel such person to vote or refrain from voting, or on account of such person having voted or refrained from voting at any election, or who shall, by abduction, duress, or any fraudulent device or contrivance, impede, prevent, or otherwise interfere with the free exercise of the franchise of any voter, or shall thereby compel, induce, or prevail upon any voter, either to give or to refrain from giving his vote at any election, shall be deemed to have committed the offence of undue influence, and shall be guilty of a misdemeanor, and in Scotland of an offence punishable by fine or imprisonment, and shall also be liable to forfeit the sum of £50 to any person who shall sue for the same, together with full costs of suit.

By s. 14, it is provided that no person shall be liable to any penalty or forfeiture imposed by the act, unless some prosecution, action, or suit for the offence committed, shall be commenced within six calendar months after such offence being committed. This act is at present only annual.

In R. v. Leatham, 30 L. J. Q. B. 205, many questions were raised upon this act of Parliament. The defendant was indicted for having on the 26th of April, 1859, paid to one J. G. money with the intent that it should be applied in bribery at an

election. There were several other counts in which the defendant was charged with actual bribery of several persons named in those counts. The defendant was found guilty generally. Upon a motion for a new trial, it was objected that the offence was committed, if at all, more than a year before the filing of the information, and issuing the process on it. With respect to this objection the Court of Queen's *Bench said that, as it was upon the record, and advantage could be taken of [*310] it in arrest of judgment, or by a writ of error, they would not interfere; but a strong opinion was expressed that sect. 14 did not apply to criminal proceedings, but only to the recovery of a penalty or forfeiture in a civil suit. The second objection was that as the defendant was found guilty upon the first count, he could not also be guilty of the offences charged in the other counts, as it appeared that there was but one act, namely, the payment of the money by the prisoner to the agent, but the court thought that this objection, if available at all, was only available at the trial by application to compel the prosecutor to elect upon which of the charges he would proceed; and the court said that it was quite possible that one act might produce several distinct offences. The third objection, that as it appeared from the evidence that the defendant had paid the money to T. G., and T. G. had employed subordinate agents to bribe, the defendant could not be found guilty of having bribed the voters himself. But the court thought that bribing by an agent was the same thing as bribing directly. At a later stage of the proceedings in the same case it was held that, because the defendant had, at the inquiry before the commissioners into the proceedings at his election, stated the substance of two letters between himself and one G., which were afterwards produced before the commissioners on their demand, these letters were not thereby rendered inadmissible against him on an indictment for bribery, under the proviso to the 15 & 16 Vict. c. 57, s. 8, *supra*.

Bribery at elections for members of Parliament is also an offence at common law, punishable by indictment or information, and it was held that the statute 2 Geo. 2, c. 24, which imposes a penalty upon such offence, did not affect that mode of proceeding. R. v. Pitt, 3 Burr. 1339; 1 W. Bl. 380. The following cases were decided before the recent statute. Where money is given it is bribery, although the party giving it take a note from the voter, giving a counter note, to deliver up the first note when the elector has voted. Sulston v. Norton, 3 Burr. 1235; 1 W. Bl. 317. So also a wager with a voter, that he will not vote for a particular person. Lofft, 552; Hawk. P. C. b. 1, c. 67, s. 10 (*n*).

Where a voter received money after an election for having voted for a particular candidate, but no agreement for any such payment was made before the election, it was held not to be an offence within the 2 Geo. 2, c. 24, s. 7. Lord Huntingtower v. Gardiner, 1 B. & C. 297: 8 E. C. L. R.

As to the payment of the travelling expenses of voters, see 1 Russ. by Grea. 159; the cases there cited. Cooper v. Slade, 25 L. J. Q. B. 324; and 21 & 22 Vict. c. 87.

By the 4 & 5 Vict. c. 57, on a charge of bribery before a committee of the House of Commons, evidence of bribery may be given without first proving agency.

Bribery in other cases.] As to bribery at municipal elections, see 5 & 6 Wm. 4, c. 76, s. 54; 22 Vict. c. 35; and Harding v. Stokes, Tyr. & Gr. 599; 2 M. & W. 233.

As to bribing officers of the customs, see 3 & 4 Wm. 4, c. 51, s. 8; and R. v. Everett, 8 B. & C. 114: 15 E. C. L. R.; 16 & 17 Vict. c. 107, s. 262.

As to the offence of attempting to bribe officers of justice, see 1 Russ. Cr. by Greaves, 154.

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Indictment for not repairing.] UPON an indictment for a nuisance to a public bridge, whether by obstructing or neglecting to repair it, the prosecutor must prove, first, that the bridge in question is a public bridge; and secondly, that it has been obstructed or permitted to be out of repair; and in the latter case, the liability of the defendants to repair.

Proof of the bridge being a public bridge.] A distinction between a public and a private bridge is taken in the 2d Institute, p. 701, and made to consist principally in a public bridge being built for the common good of all the subjects, as opposed to a bridge made for private purposes, and though the words "public bridges," do not occur in the 22 Hen. 8, c. 5 (called the statute of bridges), yet as that statute empowers the justices of the peace to inquire of "all manner of annoyances of bridges broken *in the highways*," and applies to bridges of that description, in all its subsequent provisions, it may be inferred that a bridge *in a highway* is a public bridge for all purposes of repair connected with that statute. 1 Russ. by Grea. 385. A public bridge may be defined to be such a bridge as all his majesty's subjects have used freely, and without interruption, as of right, for a period of time competent to protect themselves, and all who should thereafter use them, from being considered as wrong-doers in respect of such use, in any mode of proceeding, civil or criminal, in which the legality of such use may be questioned. Per Lord Ellenborough, R. v. Inhab. of Bucks, 12 East, 204. With regard to bridges newly erected, the general rule is, that if a man builds a bridge, and it becomes useful to the county in general, it shall be deemed a public bridge (but see the regulations prescribed by the 43 Geo. 3, c. 59, s. 5, *post*, p. 316), and the county shall repair it. But where a man builds a bridge for his own private benefit, although the public may occasionally participate [*312] with him in the use of it, yet it does not *become a public bridge. R. v. Inhab. of Bucks, 12 East, 203, 204. Though it is otherwise if the public have constantly used the bridge, and treated it as a public bridge. R. v. Inhab. of Glamorgan, 2 East, 356 (*n*). Where a miller, on deepening a ford through which there was a public highway, built a bridge over it which the public used, it was held that the county was bound to repair. R. v. Inhab. of Kent, 2 M. & S. 513. A question has sometimes arisen whether arches adjacent to a bridge, and under which there is passage for water in times of flood, are to be considered either as forming part of the bridge, or as being themselves independent bridges. Where arches of this kind existed more than 300 feet from a bridge, on an indictment against the county for

non-repair of them, and a case reserved, the Court of King's Bench held that the county was not liable. R. v. Inhab. of Oxfordshire, 1 Barn. & Ald. 297 (*n*). The rule laid down by Lord Tenterden, C. J., in the latter case was, that the inhabitants of a county are bound, by common law, to repair bridges erected over such water only as answers the description of *flumen vel cursus aquæ*, that is, *water flowing in a channel between banks more or less defined*, although such channel may be occasionally dry. But where a structure, called Swarkestone Bridge, was 1275 yards long; at the eastern end were five arches under which the river Trent flowed; at the western end eight arches, under one of which a stream constantly flowed; the rest of the space consisted of a raised causeway, at different intervals in which there were twenty-nine arches, under most of which there were pools of water at all times, and under all of which the water of the Trent flowed in time of flood There was no interval of causeway between the arches of the length of 300 feet. The county of Derby had immemorially repaired the whole structure. On an indictment against the inhabitants of the county for the non-repair of the structure, describing the whole as a bridge, it was held that it was properly so described, and that the verdict was properly entered for the crown. R. v. Inhab. of Derbyshire, 2 Gale & Dav. 97. Before the 43 Geo. 3, c. 59, a bridge had been built over a stream of water. The stream was never known to be dry, but in the winter its depth only averaged two and a half feet. It was part of a sheet of water crossing low land, and at the place where the bridge crossed it, it was confined by embankments to prevent it from overflowing the adjoining meadows. Cresswell, J., left it to the jury, whether this structure was a bridge, for, if so, their verdict must be for the crown. If it had been erected for the convenience of the public in passing over the stream of water, it was a county bridge, and rendered the county liable to repair it, though the bridge might not have been necessary for the convenience of the public when it was built. R. v. The Inhab. of Gloucestershire, Carr. & M. 506: 41 E. C. L. R. In the following case a question arose whether a bridge for foot-passengers, which had been built adjoining to an old bridge for carriages, was parcel of the latter. The carriage bridge had been built before 1119, and certain abbey lands were charged with the repairs. The proprietors of those lands had always repaired the bridge so built. In 1765, the trustees of a turnpike road, with the consent of a certain number of the proprietors of the abbey lands, constructed a wooden foot-bridge along the outside of the parapet of the carriage-bridge, partly connected with it by brickwork and iron pins, and partly resting on the stonework of the bridge. Held that the foot-bridge *was not a parcel of [*313] the old carriage-bridge, but a distinct structure, and that the county was bound to repair it. R. v. Inhab. of Middlesex, 3 B. & Ad. 201: 23 E. C. L. R.

Where the trustees under a turnpike act built a bridge across a stream where a culvert would be sufficient, yet if the bridge become upon the whole more convenient to the public, the county cannot refuse to repair it. R. v. Inhab. of Lancashire, 2 B. & Ad. 813: 22 E. C. L. R.

Semble, that an arch of nine feet span without battlements at either end, over a stream usually about three feet deep, is a culvert and not a bridge to be repaired by the county; and if the parish have pleaded guilty to a former indictment, which described it as a part of the road, they are concluded by having so done. R. v. Whitney, 3 Ad. & E. 69: 30 E. C. L. R.; 7 C. & P. 208: 32 E. C. L. R., S. C.

But a foot-bridge consisting of three oak planks, about nine or ten feet long, and carrying a public footpath over a small stream, is not such a bridge as the county is bound to repair as a county bridge. R. v. Inhab. of Southampton, 21 L. J. M. C. 201.

The public may enjoy a limited right only of passing over a bridge; as where a bridge was used at all times by the public, on foot, and with horses, but only occasionally with carriages, viz., when the ford below was unsafe to pass, and the bridge was sometimes barred against carriages by means of posts and a chain; it was held that this was a public bridge, with a right of passage limited in extent, yet absolute in right. R. v. Inhab. of Northampton, 2 M. & S. 262. A bar across a public bridge locked, except in times of flood, has been ruled to be conclusive evidence that the public have only a limited right to use the bridge at such times, and it is at variance to state that they have a right to use it "at their free will and pleasure." R. v. Marquis of Buckingham, 4 Camp. 189. But where a bridge passed over a ford, and was only used by the public in times of floods, which rendered the ford impassable, yet, as it was at all times open to the public, Abbot, C. J., ruled that the county was bound to repair. R. v. Inhab. of Devon, Ry. & Moo. N. P. C. 144: 21 E. C. L. R.

Proof of the bridge being a public bridge—highway at each end.] At common law the county is bound *prima facie* to repair the highway at each end of a public bridge, and by the statute 22 Hen. 8, c. 5, the length of the highway to be thus repaired is fixed at 300 feet. If indicted for the non-repair of such portion of the highway, they can only excuse themselves by pleading specially, as in the case of the bridge itself, that some other person is bound to repair by prescription, or by tenure. R. v. Inhab. of West Riding of Yorkshire, 7 East, 588; S. C. 5 Taunt. 284. The inhabitants of Devon erected a new bridge within 300 feet next adjoining to an old bridge in the county of Dorset; which 300 feet the county of Dorset was bound to repair. It was held, nevertheless, that Devon was bound to repair the new bridge, which was a distinct bridge, and not to be considered as an appendage to the old bridge. R. v. Inhab. of Devon, 14 East, 477.

A party who is liable by prescription to repair a bridge is also *prima facie* liable to repair the highway to the extent of 300 feet from each end; and such presumption is not rebutted by proof that the party has been known only to repair the fabric of [*314] the bridge, and *that the only repairs known to have been done to the highway have been performed by commissioners under a turnpike road act. R. v. City of Lincoln, 8 A. & E. 65: 35 E. C. L. R.; 3 N. & P. 273.

Now by the 5 & 6 Wm. 4, c. 50, s. 21, "If any bridge shall hereafter be built (*i. e.*, after the 20th of March, 1836), which bridge shall be liable by law to be repaired by and at the expense of any county, or part of any county, then and in such case all highways leading to, passing over, and next adjoining to such bridge, shall be from time to time repaired by the parish, person, or body politic or corporate, or trustees of a turnpike road, who were by law before the erection of the said bridge bound to repair the said highway: provided, nevertheless, that nothing herein contained shall extend, or be construed to extend, to exonerate or discharge any county, or any part of any county, from repairing or keeping in repair the walls, banks, or fences of the raised causeway and raised approaches to any such bridge, or the land arches thereof."

Dedication of a bridge to the public.] As there may be a dedication of a road to the public (see *post*, Highways), so in the case of a bridge, though it be built by a private individual, in the first instance for his convenience, yet it may be dedicated by him to the public, by his suffering them to have the use of it, and by their using it accordingly. See Glassburne Bridge Case, 5 Burr. 2594; R. v. Inhab. of Glamor-

gan, 2 East, 356; R. v. Inhab. of West Riding of York, 2 East, 342; *post*, p. 316. And though where there is such a dedication, it must be absolute, yet it may be definite in point of time. See R. v. Inhab. of Northampton, 2 M. & S. 262; and the other cases cited *ante*, p. 313; also 11 Russ. by Grea. 387. A canal company may dedicate a bridge to the public: Grand Surrey Canal v. Hall, 1 M. & Gr. 393; where it was held that there was nothing in the constitution of the company, or in the nature of their property, to prevent them from making such a dedication.

Proof of the bridge being out of repair.] The county is only chargeable with *repairs*, and cannot be indicted for not widening or enlarging a public bridge, which has become from its narrowness inconvenient to the public. Not being bound to make a new bridge, the county is not bound to enlarge an old one, which is, *pro tanto*, the erection of a new bridge. R. v. Inhab. of Devon, 4 B. & C. 670: 10 E. C. L. R.

Those who are bound to repair bridges must make them of such height and strength, as may be answerable to the course of the water, whether it continue in the old channel or make a new one. Hawk. P. C. b. 1, c. 77, s. 1.

Proof of the liability of the defendants—by the common law.] All public bridges are *primâ facie* repairable at common law, by the inhabitants of the county, and it lies upon them, if the fact be so, to show that others are bound to repair. R. v. Inhab. of Salop, 13 East, 95; 2 Inst. 700, 701; R. v. Inhab. of Oxfordshire, 4 B. & C. 196.

Where a bridge was locally situated within the limits of a borough, which was enlarged by 2 & 3 Wm. 4, c. 64, but before the passing of that act was situated without the limits of the borough, and in a *county which had up to that [*315] time always repaired it; it was held that the county was still liable to repair it. Reg. v. New Sarum, 7 Q. B. 241: 53 E. C. L. R.; S. C. 15 L. J. M. C. 15; see Reg. v. Brecon, 15 Q. B. 813: 69 E. C. L. R.; 19 L. J. M. C. 203. By the 13 & 14 Vict. c. 64, s. 5, after reciting that by the 5 & 6 Wm. 4, c. 76, certain bridges and parts of bridges had been included within the boundaries of cities and boroughs, and were thereby subject to the jurisdiction of such cities or boroughs, which bridges, before the passing of such act, were maintained, as to the whole or such parts thereof as were within the limits of such cities and boroughs, by the inhabitants thereof, and the remaining bridges and parts of bridges which were not situate within such limits were maintained by the inhabitants of the counties or ridings respectively adjoining thereto; and that doubts had arisen respecting the future repairs and maintenance of such bridges, it is enacted, that every bridge which is wholly or in part included within the boundary of any such city or borough, the inhabitants whereof, before the passing of the said recited act, were, by prescription or otherwise, liable to, and did maintain the bridges and parts of bridges within their respective cities and boroughs, shall, as to the whole of such bridges, if the same is wholly within the limits of such city or borough, or as to such part as is within the limits of such city or borough, if part only is within such limits, be maintained, altered, widened, and repaired, improved, or rebuilt, under the sole management and control of the council of such city or borough.

But a parish or township, or other known portion of a county, may, by usage and custom, be chargeable to the repair of a bridge erected in it. Per cur. R. v. Ecclesfield, 1 B. & A. 359. So where it is within a franchise. Hawk. P. C. b. 1, c. 77, s 1. The charge may be cast upon a corporation aggregate, either in respect of the tenure of certain lands, or of a special prescription, and in the same manner it may be cast

upon an individual, *ratione tenuræ*. Id. Where an individual is so liable, his tenant for years in possession is under the same obligation. R. v. Bucknall, 2 Ld. Raym. 792. Any particular inhabitant of a county, or any of several tenants of lands charged with such repairs, may be indicted singly for not repairing, and shall have contribution from the others. Hawk. P. C. b. 1, c. 77, s. 3; 2 Ld. Raym. 792. The inhabitants of a district cannot be charged *ratione tenuræ*, because they cannot, as such, hold lands. R. v. Machynlleth, 2 B. & C. 166: 9 E. C. L. R. But a parish, as a district, may at common law be liable to repair a bridge, and may therefore be indicted for the not repairing, without stating any other ground of liability than immemorial usage. R. v. Inhab. of Hendon, 4 B. & Ad. 628: 24 E. C. L. R. An indictment charged that there was in township A. an immemorial public bridge, and that the inhabitants of A. had been used, &c., from time whereof, &c., to repair the said bridge. Plea, not guilty. On the trial it appeared that the inhabitants had repaired an immemorial bridge, but that in one year within memory they had widened the roadway of the bridge from nine to sixteen feet: it was held, that whether the added part were repairable or not, there was no variance between the indictment and the evidence. *Semble*, per Lord Denman, C. J., and Patteson, J., that the township was liable to repair the added part. R. v. The Inhab. of Adderbury, 5 Q. B. 187: 48 E. C. L. R.

[*316] *The liability of a county to the repairs of a bridge is not affected by an act of Parliament imposing tolls, and directing the trustees to lay them out in repairing the bridge. This point arose, but was not directly decided, in the case of R. v. Inhab. of Oxfordshire, 4 B. & C. 194, 10 E. C. L. R., the plea in that case not averring that the trustees had funds; but Bayley, J., observed, that even then a valid defence would not have been made out, for the public had a right to call upon the inhabitants of the county to repair, and *they* might look to the trustees under the act. With regard to highways, it has been decided that tolls are in such cases only an auxiliary fund, and that the parish is primarily liable. (See *post*, Highways.) And as the liability of a county resembles that of a parish, these decisions may be considered as authorities with regard to the former.

Proof of the liability of the defendants—by the common law—new bridges.] Although a private individual cannot by erecting a bridge, the use of which is not beneficial to the public, throw upon the county the *onus* of repairing it, yet if it become useful to the county in general, the county is bound to repair it. Glasburne Bridge Case, 5 Burr. 2594; R. v. Ely, 15 Q. B. 827: 69 E. C. L. R.; S. C. 19 L. J. M. C. 223. Thus, where to an indictment for not repairing a public bridge, the defendants pleaded that H. M. being seized of certain tin works, for his private benefit and utility, and for making a commodious way to his tin works, erected the bridge, and that he and his tenants enjoyed a way over the bridge for their private benefit and advantage, and that, therefore, he ought to repair; and on the trial the statements in the plea were proved, but it also appeared that the public had constantly used the bridge from the time of its being built; Lord Kenyon directed the jury to find a verdict for the crown, which was not disturbed. R. v. Inhab. of Glamorgan, 2 East, 356 (*n*).

Where a new bridge is built, the acquiescence of the public will be evidence that it is of public utility. As to charge the county, the bridge must be made on a highway, and as, while the bridge is making, there must be an obstruction of the highway, the forbearing to prosecute the parties for such obstruction is an acquiescence by the county in the building of the bridge. See R. v. Inhab. of St. Benedict, 4 B.

& A. 450 : 6 E. C. L. R. The evidence of user of a *bridge* by the public, differs from the evidence of user of a highway, for as a bridge is built on a highway, the public using the latter must necessarily use the former, and the proof of adoption can hardly be said to arise, but the user is evidence of acquiescence, as showing that the public have not found or treated the bridge as a nuisance. See R. v. Inhab. of West Riding of York, 2 East, 342. Where a bridge is erected under the authority of an act of Parliament, it cannot be supposed to be erected for other purposes than the public utility. Per Lawrence, J., Id. 352. If a bridge be built in a slight or incommodious manner, it cannot be imposed as a burden on the county, but may be treated altogether as a nuisance, and indicted as such. Per Lord Ellenborough, Ibid.

And by the 43 Geo. 3, c. 59, s. 5, no bridge to be thereafter erected or built in any county, by or at the expense of any individual or private person or persons, body politic or corporate, shall be deemed or taken to be a county bridge or a bridge which the inhabitants of any county shall be compellable or liable to maintain *or [*317] repair, unless such bridge shall be erected in a substantial and commodious manner, under the direction, or to the satisfaction of the county surveyor, or persons appointed by the justices of the peace, at their general quarter sessions assembled, or by the justices of the county of Lancaster, at their annual general sessions.

The words of this act comprehend every kind of person by whom, or at whose expense, a bridge shall be built. Trustees appointed under a local turnpike act are "individuals" or "private persons" within the statute, and therefore a bridge erected by such trustees after the passage of the act, and not under the direction of the county surveyor, is not a bridge which the county is bound to repair. R. v. Inhabitants of Derby, 3 B. & Ad. 147 : 23 E. C. L. R. A bridge built before the above statute, but widened since, is not a new bridge within the act. R. v. Lancashire, 2 B. & Ad. 813 : 22 E. C. L. R. So where the woodwork of a bridge was washed away, leaving the stone abutments, and the parish repaired the bridge partly with the old wood and partly with new, this was held not to be a bridge "erected or built" within the above statute, but an old bridge repaired, and the county was held liable. R. v. Inhab. of Devon, 5 B. & Ad. 383 : 27 E. C. L. R.; 2 N. & M. 212.

Proof of the liability of the defendants—public companies.] In some cases where public companies have been authorized by the legislature to erect or alter bridges, a condition has been implied that they shall keep such bridges in repair. The proprietors of the navigation of the river Medway were by their act empowered to alter or amend such bridges and highways as might hinder the navigation, *leaving them, or others as convenient, in their room.* Having deepened a ford in the Medway, the company built a bridge in its place, which being washed away, they were held bound to rebuild. Lord Ellenborough said that the condition to repair was a continuing condition, and that the company having taken away the ford, were bound to give another passage over the bridge, and to keep it in repair. R. v. Inhab. of Kent, 13 East, 220. The same point was ruled in the case of The King v. The Inhab. of Lindsay, 14 East, 317, in which the company had made a cut through a highway, and built a bridge over it. An act of Parliament empowered the commissioners for making navigable the river Waveney, to cut, &c., but was silent as to making bridges. The commissioners having cut through a highway, and rendered it impassable, a bridge was built over the cut, along which the public passed, and the bridge was repaired by the proprietors. Being out of repair, the proprietor of the navigation was held liable to the repairs. The court said that the cut was made, not for public purposes, but for private benefit; and the county could not be called upon to repair, for it was of no

advantage to them to have a bridge instead of solid ground. R. v. Kerrison, 3 M. & S. 326; see also R. v. Inhab. of Somerset, 16 East, 305; Grand Surrey Canal v. Hall, 1 M. & Gr. 392: 39 E C. L R.; R. v. Ely, 15 Q. B. 827: 69 E. C. L. R.; S. C. 19 L. J. M. C. 223; R. v. Brecon, 15 Q. B. 813; S. C. 19 L. J. M. C. 203.

A corporation aggregate, or a railway company, are liable to be indicted in their corporate capacity for the non-repair of bridges which it is their duty to repair. Per Parke, B., R. v. Birmingham & Gloucester R. Co., 9 C. & P. 469: 38 E. C. L. R.; S. C. 3 Q. B. 223: 43 E. C. L. R.

[*318] **Proof of the liability of the defendants—individuals.*] *Ratione tenuræ* implies immemoriality. 2 Saund. 158 d. (*n*). And therefore upon an indictment against an individual for not repairing, by reason of the tenure of a mill, if it appear that the mill was built within the time of legal memory, he must be acquitted. R. v. Hayman, Moo. & M. 401: 22 E. C. L. R. Any act of repairing, on the part of an individual, is *primâ facie* evidence of his liability. Thus, it is said, that if a bishop has once or twice, of alms, repaired a bridge, this binds not, yet it is evidence against him that he ought to repair, unless he proves the contrary. 2 Inst. 700.

Patteson, J., in R. v. Antrobus, 6 C. & P. 790: 25 E. C. L R., held, that reputation was not evidence on an indictment against an individual for not repairing a bridge *ratione tenuræ*. See also R. v. Wavertree, 2 M. & R. 253.

But on an indictment for the non-repair of a bridge *ratione tenuræ*, it was held, that a record of 18 Edw. 3, setting out a presentment of the bishop of Lincoln for non-repair of the bridge, and his acquittal by the jury, which was shortly followed by a grant of pontage from the crown, on the ground that it had been found, by inquest, that no one was liable to repair the bridge, was admissible in evidence to negative any immemorial liability to repair *ratione tenuræ;* and the jury, after finding a verdict of acquittal, also found that the bridge had been recently built, and that no one was liable to repair it. *Semble*, that such finding by a jury, in ancient times, was admissible as reputation on a question as to the liability to repair *ratione tenuræ*. R. v. Sutton, 3 N. & P. 569; 8 A. & E. 516, S. C.: 35 E. C. L. R. In this conflict of authorities, the question came before the Court of Queen's Bench in the recent case of R. v. Bedford, 24 L. J. Q. B. 81, when the court decided, that on the trial of an indictment against the county of B., to which they pleaded that A. was liable *ratione tenuræ* to repair a portion of the bridge, evidence of reputation that A. and his predecessors were liable to do the repairs to that part, was admissible. See Baker v. Greenhill, 5 Q. B. 148: 48 E. C. L. R.; R. v. Sir J. Ramsden, 28 L. J. M. C. 296, as to whether the liability to repair *ratione tenuræ* falls upon the owner or occupier.

Proof in defence—by counties.] Where a county is indicted, and the defence is that a parish or other district, or a corporation or individual, is liable to the repairs, this defence must be specially pleaded, and cannot be given in evidence under the general issue of *not guilty*. R. v Inhab. of Wilts, 1 Stark. 359; 2 Lord Raym. 1174; 1 Russ. by Grea. 404; 2 Stark. Ev. 191, 2d ed. Upon that plea the defendants can only give evidence in denial of the points which must be established on the part of the prosecution, viz, 1, that the bridge is a public one; 2, that it is within the county; and 3, that it is out of repair. 2 Stark. Ev. 191, 2d ed. With a view to the first point, the inhabitants of a county may show, under *not guilty*, that a district or individual is bound to repair, as a medium of proof that the bridge is not a public bridge. Ibid. R v. Inhab. of Northampton, 2 M. & S. 262. For repairs done by an indi-

vidual are to be ascribed rather to motives of interest in his own property than to be presumed to be done for the public benefit. Per Lord Ellenborough, Ibid.

Upon a special plea by a county, that some smaller district or some individual is liable to repair, the evidence on the part of the *county to prove the obliga- [*319] tion seems to be the same as upon an indictment against the smaller district or individual. 2 Stark. Ev. 192, 2d ed.

The 5 & 6 Wm. 4, c. 76, enlarging the boundaries of certain cities and boroughs in England and Wales for the purposes therein mentioned, does not relieve a county from the repair of a bridge situated within the new limit of a borough, but which, previous to the act, was without the old limit, and repairable by the county at large. R. v. Inhab. of New Sarum, *ante*, p. 315.

Proof in defence—by minor districts, or individuals.] Where a parish, or other district, or a corporation, or individual, not chargeable of common right with the repairs of a bridge, is indicted, they may discharge themselves under the general issue. R. v. Inhab. of Norwich, 1 Str. 177. For as it lies on the prosecutor specially to state the grounds on which such parties are liable, they may negative those parts of the charge under the general issue. 1 Russ. by Grea. 404; *sed vide* R. v. Henden, 4 B. & Ad. 628: 24 E. C. L. R.; *ante*, p. 315.

Proof in defence—by corporations.] A corporation may be bound by prescription to repair a bridge, though one of their charters within time of legal memory use words of incorporation, and though the bridge may have been repaired out of the funds of a guild: for such repairs will be taken to have been made in case of the corporation. R. v. Mayor, &c., of Stratford-upon-Avon, 14 East, 348.

Venue and trial.] By the 1 Ann. st. 1, c. 18, s. 5, "All matters concerning the repairing and amending of the bridges and the highways thereunto adjoining shall be determined in the county where they lie, and not elsewhere." It seems that no inhabitant of a county ought to be a juror on a trial of an issue whether the county is bound to repair. Hawk. P. C. b. 1, c. 77, s. 6. In such cases, upon a suggestion, the *venire* will be awarded into a neighboring county. R. v. Inhab. of Wilts, 6 Mod. 307; 1 Russ. by Grea. 405.

Maliciously pulling down bridges, &c.] By the 24 & 25 Vict c 97, s. 33 (replacing the 7 & 8 Geo. 4, c. 30, s. 13, and the 9 Geo. 4, c. 56 (I.), s. 14), "Whosoever shall unlawfully and maliciously pull or throw down, or in anywise destroy any bridge (whether over any stream of water or not), or any viaduct or aqueduct, over or under which bridge, viaduct, or aqueduct, any highway, railway, or canal shall pass, or do any injury with intent, and so as thereby to render such bridge, viaduct, or aqueduct, or the highway, railway, or canal passing over or under the same, or any part thereof, dangerous or impassable, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years; or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and, if a male under the age of 16 years, with or without whipping."

In the former statute *public* bridges alone were mentioned, and the marginal abstract of the section in the new act speaks of *public* *bridges only. It [*320] may be doubtful whether the omission of the word "public" is not a typographical error.

As to *malice*, and possession of the property, see ss. 58 & 59 (*supra*, p. 264).

New trial.] As to when a new trial may be obtained in prosecutions for the non-repair of a bridge, see tit. Highways, *infra.*

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Offence at common law.] BURGLARY is a felony at common law, and a burglar is [*322] defined by Lord Coke as "he that in the night-time breaketh and entereth into a mansion-house of another, of intent to kill some reasonable creature, or to commit some other felony within the same, whether his felonious intent be executed or not." 3 Inst. 63. And this definition is adopted by Lord Hale. 1 Hale, P. C. 549; Hawk. P. C. b. 1, c. 38, s. 1.

By statute.] The former statute on this subject (the 7 & 8 Geo. 4, c. 29) is repealed. The provisions against this offence are contained in the 24 & 25 Vict. c. 96

Burglary by breaking out.] By s. 51, "Whosoever shall enter the dwelling-house of another with intent to commit any felony therein, or being in such dwelling-house shall commit any felony therein, and shall in either case break out of the said dwelling-house in the night, shall be deemed guilty of burglary."

Punishment of burglary.] By s. 52, "Whosoever shall be convicted of the crime of burglary shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

What building within the curtilage shall be deemed part of the dwelling-house.] By s. 53, "No building, although within the same curtilage with any dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house for any of the purposes of this act, unless there shall be a communication between such building and dwelling-house, either immediate, or by means of a covered and inclosed passage leading from the one to the other."

Entering a dwelling-house in the night with intent to commit felony.] By s. 54, "Whosoever shall enter any dwelling-house in the night, with intent to commit any felony therein, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Being found by night armed, &c., with intent to break into any house, &c.] By s. 58, "Whosoever shall be found by night armed with any dangerous or offensive weapon or instrument whatsoever, with intent to break or enter into any dwelling-house or other building *whatsoever, and to commit any felony therein, or [*323] shall be found by night having in his possession without lawful excuse (the proof of which shall lie on such person), any picklock key, crow-jack, bit or other implement of housebreaking, or shall be found by night having his face blackened, or otherwise disguised, with intent to commit any felony, or shall be found by night in any dwelling-house, or other building whatsoever, with intent to commit any felony therein, shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labor."

By s. 59, "Whosoever shall be convicted of any such misdemeanor, as in the last preceding section mentioned, committed after a previous conviction either for felony or such misdemeanor, shall, on such subsequent conviction, be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding ten years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor."

Proof of the breaking] What shall constitute a *breaking* is thus described by Hawkins: "It seems agreed, that such a breaking as is implied by law in every unlawful entry on the possession of another, whether it be open or be inclosed, and will maintain a common indictment, or action of trespass *quare clausum fregit*, will not satisfy the words *felonice et burglariter*, except in some special cases, in which it

is accompanied with such circumstances as make it as heinous as an actual breaking. And from hence it follows, that if one enter into a house by a door which he finds open, or through a hole which was made there before, and steals goods, &c., or draw anything out of a house through a door or window which was open before, or enter into the house through a door open in the daytime, and lie there till night, and then rob and go away without breaking any part of the house, he is not guilty of burglary."(1) Hawk. P. C. b. 1, c. 38, ss. 4, 5. But breaking a window, taking a pane of glass out by breaking or bending the nails or other fastenings, the drawing of a latch, when a door is not otherwise fastened, picking open a lock with a false key, putting back the lock of a door or the fastening of a window, with an instrument, turning the key where the door is locked on the inside, or unloosing any other fastening which the owner has provided; these are all proofs of a breaking. 2 East, P. C. 487; 1 Russ. by Grea. 786.(2)

By the 24 & 25 Vict. c. 96, s. 54 *supra*, entering a dwelling-house in the night with intent to commit a felony is made a substantive felony. In this case no breaking is necessary, and the offence is not, therefore, strictly speaking, burglary; but from its being in all other respects similar to that offence, it is classed under that head. A count framed on this section will frequently be useful where the breaking is doubtful.

Proof of the breaking—doors.] Entering the house through an open door is not, as already stated, such a breaking as to constitute a burglary. Yet if the offender enters a house in the night-time, through an open door or window, and when within the house turns the key of, or unlatches, a chamber-door with intent to commit [*324] felony, it is a burglary (3) Hale, P. C. 553. So where the prisoner *entered the house by a back door which had been left open by the family, and afterwards broke open an inner door and stole goods out of the room, and then unbolted the street-door on the inside and went out; this was held by the judges to be burglary. R. v. Johnson, 2 East, P. C. 488. So where the master lay in one part of the house, and the servants in another, and the stair-foot door of the master's chamber was latched, and a servant in the night unlatched that door, and went into his master's chamber with intent to murder him, it was held burglary. R. v. Haydon, Hutt. 20; Kel. 67; 1 Hale, P. C. 554; 2 East, P. C. 488.

Whether the pushing open the flap or flaps of a trap-door, or door in a floor, which closes by its own weight, is a sufficient breaking, was for some time a matter of doubt. In the following case it was held to be a breaking. Through a mill (within a curtilage) was an open entrance or gateway, capable of admitting wagons, intended for the purpose of loading them with flour through a large aperture communicating with the floor above. This aperture was closed by folding doors with hinges, which fell over it and remained closed with their own weight, but without any interior fastenings, so that persons without, under the gateway, could push them open at pleasure. In this manner the prisoner entered with intent to steal; and Buller, J., held that this was a sufficient breaking to constitute the offence of burglary. R. v. Brown, 2 East, P. C. 487. In another case, upon nearly similar facts, the judges were equally

(1) On the trial of an indictment for breaking and entering a building and stealing therefrom, a number of burglarious tools and implements found together in the possession of the defendant, at the time of his arrest, may be brought into court, and exhibited to the jury, although some of them only, and not the residue, are adapted to the commission of the particular offence in question. Commonwealth v. Williams, 2 Cushing, 582.

(2) So, removing a stick of wood from an inner cellar-door, and turning a button. Smith's Case, 4 Rogers's Rec. 63.

(3) State v. Wilson, 1 Coxe, 439.

divided in opinion. The prisoner broke out of a cellar by lifting up a heavy flap, whereby the cellar was closed on the outside next the street. The flap had bolts, but was not bolted. The prisoner being convicted of burglary, upon a case reserved, six of the judges, including Lord Ellenborough, C. J., and Mansfield, C. J., thought that this was a sufficient breaking; because the weight was intended as a security, this not being a common entrance; but the other six judges thought the conviction wrong. R. v. Callan, Russ. & Ry. 157. It has been observed, that the only difference between this and R. v. Brown (*supra*), seems to be, that in the latter there were no internal fastenings, which in Callan's Case there were, but were not used. Russ. & Ry. 158 (*n*). The authority of R. v. Brown has been since followed, and that decision may now be considered to be law.

Upon an indictment for burglary, the question was, whether there had been a sufficient breaking. There was a cellar under the house, which communicated with the other parts of it by an inner staircase: the entrance to the cellar from the outside was by means of a flap which let down: the flap was made of two-inch stuff, but reduced in thickness by the wood being worked up. The prisoner got into the cellar by raising the flap-door. It had been from time to time fastened with nails, when the cellar was not wanted. The jury found that it was not nailed down on the night in question. The prisoner being convicted, on a case reserved, the judges were of opinion that the conviction was right. R. v. Russell, 1 Moody, C. C. 377.

Unless a distinction can be drawn between breaking into a house and breaking out of it, this case seems to overrule. R. v. Lawrence, 4 C. & P. 231: 19 E. C. L. R., *post*.

Proof of the breaking—windows.] Where a window is open, and the offender enters the house, this is no breaking, as already stated, *ante*, p. 323. And where the prisoner was indicted for *breaking* and *entering a dwelling-house and [*325] stealing therein, and it appeared that he had effected an entrance by pushing up or raising the lower sash of the parlor-window, which was proved to have been, about twelve o'clock on the same day, in an open state, or raised about a couple of inches, so as not to afford room for a person to enter the house through that opening, it was said by all the judges that there was no decision under which this could be held to be a *breaking*. R. v. Smith, 1 Moody, C. C. 178. A square of glass in the kitchen-window (through which the prisoners entered) had been previously broken by accident, and half of it was out when the offence was committed. The aperture formed by the half square was sufficient to admit a hand, but not to enable a person to put in his arm, so as to undo the fastening of the casement. One of the prisoners thrust his arm through the aperture, thereby breaking out the residue of the square, and having so done, he removed the fastening of the casement; the window being thus opened, the two prisoners entered the house. The doubt which the learned judges (Alderson, J., consulting Patteson, J.) entertained, arose from the difficulty they had to distinguish satisfactorily the case of enlarging a hole already existing (it not being like a chimney, an aperture necessarily left in the original construction of the house), from enlarging an aperture by lifting up further the sash of the window, as in R. v. Smith, *supra;* but the learned judges thought it was worth considering whether in both cases the facts did not constitute, in point of law, a sufficient breaking. Upon a case reserved, all the judges who met were of opinion that there was a sufficient breaking, not by breaking the residue of the pane, but by unfastening and opening the window. R. v. Robinson, 1 Moody, C. C. 327. See R. v. Bird, 9 C. & P. 44: 38 E. C. L. R.

Where a house was entered through a window upon hinges, which was fastened by two nails which acted as wedges, but notwithstanding these nails the window would open by pushing, and the prisoner pushed it open, the judges held that the forcing the window in this manner was a sufficient breaking to constitute burglary. R. v. Hall, Russ. & Ry. 355. So pulling down the upper sash of a window which has no fastening, but which is kept in its place by the pulley-weight only, is a breaking, although there is an outer shutter which is not fastened. R. v. Haine, Russ. & Ry. 451. So raising a window which is shut down close, but not fastened, though it has a hasp which might be fastened.(1) Per Park and Coleridge, J.J., R. v. Hyam, 7 C. & P. 441 : 32 E. C. L. R.

Where a cellar window, which was boarded up, had in it an aperture of considerable size to admit light into the cellar, and through this aperture one of the prisoners thrust his head, and by the assistance of the others thus entered the house, Vaughan, B., ruled that this resembled the case of a man having a hole in the wall of his house large enough for a man to enter, and that it was not burglary. R. v. Lewis, 2 C. & P. 628 : 12 E. C. L. R. A shutter-box partly projected from a house, and adjoined the side of the shop window, which side was protected by wooden panelling lined with iron; held that the breaking and entering of the shutter-box without getting into the house did not constitute burglary. R. v. Paine, 7 C. &. P. 135 : 32 E. C. L. R.

Proof of the breaking—chimneys.] It was at one time considered doubtful whether getting into the chimney of a house in the night-time, with intent to commit [*326] a felony, was a sufficient *breaking* to *constitute burglary. 1 Hale, P. C. 552. But it is now settled that this is a breaking: for though actually open, it is as much inclosed as the nature of the place will allow. Hawk. P. C. b. 1, c. 38, s. 6; 2 East, P. C. 485. And accordingly it was so held, in a late case, by ten of the judges (contrary to the opinion of Holroyd, J., and Burrough, J.) Their lordships were of opinion that the chimney was part of the dwelling-house, that the getting in at the top was a breaking of the dwelling-house, and that the prisoner, by lowering himself in the chimney, made an entry into the dwelling-house.(2) R. v. Brice, Russ. & Ry. 450.

But an entry through a hole in a roof, left for the purpose of admitting light, is not a sufficient entry to constitute burglary; for a chimney is a necessary opening and requires protection, whereas if a man chooses to leave a hole in the wall or roof of his house, instead of a fastened window, he must take the consequences. R. v. Sprigg, 1 Moo. & R. 357.

Proof of the breaking—fixtures, cupboards, &c.] The breaking open of a movable chest or box in a dwelling-house, in the night-time, is not such a breaking as will make the offence burglary, for the chest or box is no part of the mansion-house.(3) Foster, 108; 2 East, P. C. 488. Whether breaking open the door of a cupboard let into the wall of a house, be burglary or not, does not appear ever to have been solemnly decided. In 1690, a case in which the point arose was reserved for the opinion of the judges, and they were equally divided upon it. Foster, 108.

(1) The windows of a dwelling-house, being covered with a netting of double twine nailed to the sides, top, and bottom, it was held, that cutting and tearing down the netting and entering the house through the window were a sufficient entry and breaking to constitute burglary. Commonwealth v. Stephenson, 8 Pick. 354.

(2) Robertson's Case, 4 Rogers's Rec. 63.

(3) The State v. Wilson, 1 Coxe, 439.

Lord Hale says that such a breaking will not make a burglary at common law. 1 Hale, P. C. 527. Though on the authority of R. v. Simpson, Kel 31; 2 Hale, P. C. 358, he considers it a sufficient breaking within the stat. 39 Eliz. c. 15. In the opinion of Mr. Justice Foster, however, R. v. Simpson does not warrant the latter position. Foster, 108; 2 East, P. C. 489. And see 2 Hale, P. C. 358 (*n*). Mr. Justice Foster concludes that such fixtures as merely supply the place of chests and other ordinary utensils of household, should for the purpose be considered in no other light than as mere movables. Foster, 109; 2 East, P. C. 489.

Proof of the breaking—walls.] Whether breaking a *wall*, part of the curtilage, is a sufficient breaking to constitute burglary, has not been decided. Lord Hale, after citing 22 Assiz. 95, which defines burglary to be "to break houses, churches, *walls*, *courts*, or *gates*, in time of peace," says—"by that book it should seem that if a man hath a wall about his house for its safeguard, and a thief in the night breaks the *wall* or the gate thereof, and finding the doors of the gate open enters into the house, this is burglary; but otherwise it had been, if he had come over the wall of the court and found the door of the house open, then it had been no burglary." 1 Hale, P. C. 559. Upon this passage an annotator of the Pleas of the Crown observes, "This was anciently understood only of the walls or gates *of the city* (*vide* Spelman, in *verbo Burglaria*). If so, it will not support our author's conclusion, wherein he applies it to the wall of a private house." Id. (*n.*) ed. 1778. It has been likewise observed upon this passage, that the distinction between breaking, and coming over the wall or gate, is very refined, for if it be part of the mansion, for the purpose of burglary, and be inclosed as much as *the nature of the thing will admit of, [*327] it seems to be immaterial whether it be broken or overleaped, and more properly to fall under the same consideration as the case of a chimney; and if it be not part of the mansion-house for this purpose, then whether it be broken or not is equally immaterial; in neither case will it amount to burglary. 2 East, P. C. 488. In these observations another writer of eminence concurs. 1 Russ. by Grea. 789.

Proof of the breaking—gates.] Where a gate forms part of the outer fence of a dwelling-house only, and does not open into the house, or into some building parcel of the house, the breaking of it will not constitute burglary. Thus, where large gates open into a yard in which was situated the dwelling-house and warehouse of the prosecutors, the warehouse extending over the gateway, so that when the gates were shut the premises were completely inclosed, the judges were unanimous that the outward fence of the curtilage, not opening into any of the buildings, was no part of the dwelling-house. R. v. Bennett, Russ. & Ry. 289. So where the prisoner opened the area gate of a house in London with a skeleton-key, and entered the house by a door in the area, which did not appear to have been shut, the judges were all of opinion that breaking the area gate was not a breaking of the dwelling-house, as there was no free passage in time of sleep from the area into the dwelling-house. R. v. Davis, Russ. & Ry. 322.

Proof of the breaking—constructive breaking—fraud.] In order to constitute such a breaking as will render the party subject to the penalties of burglary, it is not essential that force should be employed. There may be a constructive breaking by fraud, conspiracy, or threats, which will render the person who is party to it equally guilty as if he had been guilty of breaking with force. Where, by means of fraud, an entrance is effected into a dwelling-house in the night-time with a felonious intent,

it is burglary. Thieves came with a pretended hue and cry, and requiring the constable to go with them to search for felons, entered the house, bound the constable and occupier, and robbed the latter. So where thieves entered a house, pretending that the owner had committed treason; in both these cases, though the owner himself opened the door to the thieves, it was held burglary. 1 Hale, P. C. 552, 553. The prisoner knowing the family to be in the country, and meeting the boy who kept the key of the house, desired him to go with her to the house, promising him a pot of ale. The boy accordingly let her in, when she sent him for the ale, robbed the house, and went off. This, being in the night-time, was held by Colt, C. J., Tracy, J., and Bury, B., to be burglary. R. v. Hawkins, 2 East, P. C. 485. By the same reasoning, getting possession of a dwelling-house by a judgment against the casual ejector, obtained by false affidavits, without any color of title, and then rifling the house, was ruled to be within the statute against breaking the house and stealing goods therein. 2 East, P. C. 485. So where persons designing to rob a house, took lodgings in it, and then fell on the landlord and robbed him. Kel. 52, 53; Hawk. P. C. b. 1, c. 38, s. 9.

Proof of the breaking—constructive breaking—conspiracy.] A breaking may be effected by conspiring with persons within the house, by whose means those who are [*328] without effect an entrance. Thus, if *A., the servant of B., conspire with C. to let him in to rob B., and accordingly A. in the night-time opens the door and lets him in, this, according to Dalton (cap. 99), is burglary in C. and larceny in A. But according to Lord Hale, it is burglary in both; for if it be burglary in C. it must necessarily be so in A., since he is present and assisting C. in the committing of the burglary. 1 Hale, P. C. 553. John Cornwall was indicted with another person for burglary, and it appeared that he was a servant in the house, and in the night-time opened the street-door and let in the other prisoner, who robbed the house, after which Cornwall opened the door and let the other out, but did not go out with him. It was doubted, on the trial, whether this was a burglary in the servant, he not going out with the other; but afterwards, at a meeting of all the judges, they were unanimously of opinion that it was a burglary in both, and Cornwall was executed. R. v. Cornwall, 2 Str. 881; 4 Bl. Com. 227; 2 East, P. C. 486. But if a servant, pretending to agree with a robber, open the door and let him in for the purpose of detecting and apprehending him, this is no burglary, for the door is lawfully open. R. v. Johnson, Carr. & M. 218 : 41 E. C. L. R.

Proof of breaking—constructive breaking—menaces.] There may also be a breaking in law where, in consequence of violence commenced or threatened, in order to obtain entrance, the owner, either from apprehension of force or with a view more effectually to repel it, opens the door, through which the robbers enter. 2 East, P. C. 480. But if the owner only throw the money out of the house to the thieves who assault it, this will not be burglary. Id. Hawk. P. C. b. 1, c. 38, s. 3. Though if the money were taken up in the owner's presence, it would be robbery. But in all other cases, where no fraud or conspiracy is made use of, or violence commenced or threatened, in order to obtain an entrance, there must be an actual breach of some part or other of the house, though it need not be accompanied with any violence as to the manner of executing it. 2 East, P. C., 486; Hale, Sum. 80.

Proof of breaking—constructive breaking—by one of several.] Where several come to commit a burglary, and some stand to watch in adjacent places, and others

enter and rob, in such cases the act of one is, in judgment of law, the act of all, and all are equally guilty of the burglary. 1 Hale, P. C. 439, 534; 3 Inst. 63; 2 East, P. C. 486. So where a room-door was latched, and one person lifted the latch and entered the room, and concealed himself for the purpose of committing a robbery there, which he afterwards accomplished. Two other persons were present with him at the time he lifted the latch, to assist him to enter, and they screened him from observation by opening an umbrella. It was held by Gaselee, J., and Gurney, B., that the two were, in law, parties to the breaking and entering, and were answerable for the robbery which took place afterwards, though they were not near the spot at the time it was perpetrated. R. v. Jordan, 7 C. & P. 432: 32 E. C. L. R.

Where the breaking in is one night, and the entering the night after, a person present at the breaking, though not present at the entering, is, in law, guilty of the whole offence. Id.

Proof of the entry.] It is always necessary to prove an *entry*, *otherwise [*329] it is no burglary. 1 Hale, P. C. 555. If any part of the body be within the house, hand or foot, this is sufficient. Foster, 108; 2 East, P. C. 490. Thus, where the prisoner cut a hole through the window-shutters of the prosecutor's shop, and putting his hand through the hole, took out watches, &c., but no other entry was proved, this was held to be burglary. R. v. Gibbon, Foster, 108. So where the prisoner broke a pane of glass, in the upper sash of a window (which was fastened in the usual way by a latch), and introduced his hand within for the purpose of unfastening the latch, but while he was cutting a hole in the shutter with a centre-bit, and before he could unfasten the latch, he was seized, the judges held this to be a sufficient entry to constitute a burglary. R. v. Bailey, Russ. & Ry. 341. The prosecutor, standing near the window of his shop, observed the prisoner with his finger against part of the glass. The glass fell inside by the force of his finger. The prosecutor added, that standing as he did in the street, he saw the fore-part of the prisoner's finger on the shop-side of the glass. The judges ruled this a sufficient entry. R. v. Davis, Russ. & Ry. 499.

The getting in at the top of the chimney, as already stated, *ante*, p. 326, has been held to be a *breaking*, and the prisoner's lowering himself down the chimney, though he never enters the room, has been held to be an entry. R. v. Brice, Russ. & Ry. 451.

Proof of entry—introduction of fire-arms or instruments.] Where no part of the offender's body enters the house, but he introduces an instrument, whether that introduction will be such an entry as to constitute a burglary, depends, as it seems, upon the object with which the instrument is employed. Thus, if the instrument be employed, not merely for the purpose of making the entry, but for the purpose of committing the contemplated felony, it will amount to an entry, as where a man puts a hook or other instrument to steal, or a pistol to kill, through a window, though his hand be not in, this is an entry. 1 Hale, P. C. 555; Hawk. P. C. b. 1, c. 38, s. 11; 2 East, P. C. 490.

But where the instrument is used, not for the purpose of committing the contemplated felony, but only for the purpose of effecting the entry, the introduction of the instrument will not be such an entry as to constitute burglary. Thus, where thieves had bored a hole *through* the door with a *centre-bit*, and part of the chips were found inside the house, by which it was apparent that the end of the *centre-bit* had penetrated into the house; yet as the instrument had not been introduced for the purpose of taking the property or committing any other felony, the entry was ruled to be in-

complete. R. v. Hughes, 2 East, P. C. 491; 1 Leach, 406; Hawk. P. C. b. 1, c. 38, s. 12. A glass sash-window was left closed down, but was thrown up by the prisoners; the inside shutters were fastened, and there was a space of about three inches between the sash and the shutters, and the latter were about an inch thick. It appeared that after the sash had been thrown up, a crowbar had been introduced to force the shutters, and had been not only within the sash, but had reached to the inside of the shutters, as the mark of it was found there. On a case reserved, the judges were of opinion that this was not burglary, there being no proof that any part of the prisoner's hand was within the window. R. v. Rust, 1 Moody, C. C. 183.

[*330] **Proof of entry—by firing a gun into the house*] It has been already stated that if a man breaks a house and puts a pistol in at the window, with intent to kill, this amounts to burglary. 1 Hale, P. C. 555, *ante*, p. 329. "But," says Lord Hale, "if he shoots without the window, and the bullet comes in, this seems to be no entry to make burglary—*quære.*" Hawkins, however, states, that the discharging a loaded gun into a house is such an entry as will constitute burglary: Hawk. P. C. b. 1, c. 38, s. 11; and this opinion has been followed by Mr. East and Mr. Serjt. Russell. "It seems difficult," says the former, "to make a distinction between this kind of implied entry and that by means of an instrument introduced between the window or threshold, for the purpose of committing a felony, unless it be that the one instrument by which the entry is effected is held in the hand and the other is discharged from it. No such distinction, however, is anywhere laid down in terms, nothing further appearing than that the entry must be for the purpose of committing a felony." 2 East, P. C. 490; 1 Russ. by Grea. 795. It was ruled by Lord Ellenborough that a man who, from the outside of a field, discharges a gun into it, so that the shot must have struck the soil, was guilty of breaking and entering it. Pickering v. Rudd, 4 Campb. 220; 1 Stark. 58: 2 E. C. L. R.

Proof of entry—constructive entry—by one of several.] It is not necessary, in all cases, to show an actual entry by all the prisoners; there may be a constructive *entry*, as well as a constructive *breaking*. A., B., and C. come in the night, by consent, to break and enter the house of D., to commit a felony. A. only actually breaks and enters the house; B. stands near the door, but does not actually enter; C. stands at the lane's end, or orchard-gate, or field-gate, or the like, to watch that no help come to aid the owner, or to give notice to the others if help comes; this is burglary in all, and all are principals. 1 Hale, P. C. 555. So where a man puts a child of tender years in at the window of a house, and the child takes goods and delivers them to A., who carries them away, this is burglary in A., though the child that made the entry be not guilty on account of its infancy. Id. And so if the wife, in the presence of her husband, by his threats or coercion, break and enter a house in the night, this is burglary in the husband, though the wife, the immediate actor, is excused by the coercion of the husband. Id. 556; and see R. v. Jordan, *ante*, p. 328.

Proof of the premises being a dwelling-house] It must be proved that the premises broken and entered were either a dwelling-house or parcel of a dwelling-house. Every house for the dwelling and habitation of man is taken to be a dwelling-house, wherein burglary may be committed.(1) 3 Inst. 64–5; 2 East, P. C. 491.

A mere tent or booth, erected in a market or fair, is not a dwelling-house for the

(1) Armour v. The State, 3 Humphreys, 379.

purpose of burglary. 1 Hale, P. C 557; 4 Bl. Com. 225. But where the building was a permanent one of mud and brick, on the down at Weyhill, erected only as a booth for the purposes of a fair for a few days in the year, having wooden doors and windows, bolted inside, it was held, that as the prosecutor and his wife slept there every night of the fair (during one of which it was broken and entered), this was a dwelling-house. Per Park, J., R. v. Smith, 1 Moo. & Rob. 256.

**Buildings adjoining the dwelling-house.*] At common law, in cases where [*331] buildings were attached to a dwelling-house, and were more or less connected with it, it was frequently a matter of dispute whether they formed a part of the dwelling-house, so that an entering them would be burglary. The different tests proposed were principally three: 1, whether the building in question was within the same curtilage; 2, whether it was under the same roof; 3, whether it had an internal communication with the principal building.

Now, by the provisions of 24 & 25 Vict. c. 96, s. 53, *supra* (replacing the 7 & 8 Geo. 4, c. 29, s. 13, to the same effect), it is absolutely necessary that the building entered should have a *closed* internal communication with the principal building. The statute does not, however, say that every building having such a communication should be included, it only excludes those which have it not.

The following cases were decided previous to the 7 & 8 Geo. 4, c. 29, s. 13, which has prescribed what shall be considered a dwelling-house for the purpose of burglary.

The mere fact of a building in the neighborhood of a dwelling-house being occupied together with the dwelling-house, by the same tenant (not taking into consideration the question of the building being within the same curtilage, as to which, *vide post*), will not render the former building a *dwelling-house* in point of law. The prisoner broke and entered an outhouse in the possession of G. S., and occupied by him with his dwelling-house, but not connected therewith by any fence inclosing both. The judges held that the prisoner was improperly convicted of burglary. The outhouse being separated from the dwelling-house, and not within the same curtilage, was not protected by the bare fact of its being occupied with it at the same time. R. v. Garland, 2 East, P. C. 493. So where a manufactory was carried on in the centre building of a great pile, in the wings of which several persons dwelt, but which had no internal communication with these wings, though the roofs of all the buildings were connected, and the entrance to all was out of the same common inclosure; upon the centre building being broken and entered, the judges held that it could not be considered as part of any dwelling-house, but a place for carrying on a variety of trades, and no parcel of the house adjoining, with none of which it had any internal communication, nor was it to be considered as under the same roof, though the roof had a connection with the roofs of the houses. R. v. Eggington, 2 East, P. C. 494. The house of the prosecutor was in High Street, Epsom. There were two or three houses there, insulated like Middle Row, Holborn. At the back of the houses was a public passage nine feet wide. Across this passage, opposite to his house, were several rooms, used by the prosecutor for the purposes of his house, viz., a kitchen, a coach-house, a larder, and a brewhouse. Over the brewhouse a servant-boy always slept, but no one else; and in this room the offence was committed. There was no communication between the dwelling-house and these buildings, except a canopy or awning over the common passage, to prevent the rain from falling on the victuals carried across. Upon a case reserved, the judges were of opinion that the room in question was not parcel of the dwelling-house in which the prosecutor dwelt, because it did not adjoin to it, was not under the same roof, and had no

common fence. Graham, B., dissented, being of opinion that it was parcel of the [*332] house. But all the judges present thought that it was a *distinct dwelling of the prosecutor. R. v. Westwood, Russ. & Ry. 495.

In the following case the building, though not within the curtilage, and having no internal communication, was held to constitute part of the dwelling-house. The prosecutor, a farmer, had a dwelling-house in which he lived, a stable, a cottage, a cow-house, and barn, all in one range of buildings, in the order mentioned, and under one roof, but they were not inclosed by any yard or wall, and had no internal communication. The offence was committed in the barn, and the judges held this to be a burglary, for the barn, which was under the same roof, was parcel of, and enjoyed with, the dwelling-house. R. v. Brown, 2 East, P. C. 493. So where the premises, broken and entered, were not within the same external fence as the dwelling-house, nor had they any internal communication with it, yet they were held to be part of it. The prosecutor's dwelling-house was situate at the corner of two streets. A range of workshops adjoining the house at one side, and standing in a line with the end of the house, faced one of the streets. The roof of this range was higher than the roof of the house. At the end of this range, and adjoining to it, was another workshop projecting further into the street, and adjoining to that a stable and coach-house used with the dwelling-house. There was no internal communication between the workshops and the dwelling-house, nor were they surrounded by any external fence. Upon a case reserved, the judges were unanimously of opinion that the workshops were parcel of the dwelling-house. R. v. Chalking, Russ. & Ry. 334; see also R. v. Lithgo, Id. 357. In the case about to be mentioned, the premises broken and entered were within the curtilage, but without any internal communication with the dwelling-house. It does not appear whether the decision proceeded upon the same ground in the last case, or whether on the ground that the building in question was within the curtilage. The prosecutor had a factory adjoining to his dwelling-house. There was no internal communication, the only way from the one to the other (within the common inclosures) being through an open passage into the factory passage, which communicated with a lumber-room in the factory, from which there was a staircase which led into the yarn-room, where the felony was committed. On a case reserved, all the judges held, that the room in question was properly described as the dwelling-house of the prosecutor.(1) R. v. Hancock, Russ. & Ry. 171. See also R. v. Clayburn, Id. 360.

The following cases have been decided on the 7 & 8 Geo. 4, c. 29, s. 13, and will be applicable to the present statute: The prosecutor's house consisted of two long rooms, another room used as a cellar and wash-house on the ground-floor, and three bedrooms upstairs. There was no internal communication between the washhouse and any of the other rooms of the house, the door of the washhouse opening into the back yard. All the buildings were under the same roof. The prisoner broke into the washhouse, and the question reserved for the opinion of the judges was, whether this was burglary. Seven of their lordships thought that the washhouse was part of the dwelling-house, the remaining five thought it was not. R. v. Burrowes, 1 Moody, C. C. 274. The ground for holding the building not to be excluded by the statute

(1) The breaking open, in the night-time, of a store, at the distance of twenty feet from a dwelling-house, but not connected with it, is not burglary. People v. Parker, 4 Johns. 424. Nor when the only connection is a fence. State v. Ginns, 1 Nott & McCord, 583. But it has been held that it may be committed in a house standing near enough to the dwelling-house to be used with it as appurtenant to it, or standing in the same yard, whether the yard be open or inclosed. State v. Twitty, 1 Hayw. 102; State v. Wilson, Id. 242. So in a store, where there is a room communicating where a clerk sleeps. Wood's Case, 5 Rogers's Rec. 10.

appearing to be that the statute only applied to such buildings within the curtilage as were *not* part of the dwelling-house, and that this building was part of the dwelling-house. Such a construction *of the statute would seem to leave the ques- [*333] tion much as it stood before.

Behind the dwelling-house there was a pantry; to get to the pantry from the house it was necessary to pass through the kitchen into a passage; at the end of the passage there was a door, on the outside of which, on the left hand, was the door of the pantry. When the passage-door was shut, the pantry-door was excluded, and open to the yard; but the roof or covering of the passage projected beyond the door of the passage, and reached as far as the pantry-door. There was no door communicating directly between the pantry and the house, and the two were not under the same roof. The roof of the pantry was a "to-fall," and leaned against the wall of an inner pantry, in which there was a latchet window common to both, and which opened between them; but there was no door of communication. The inside pantry was under the same roof as the dwelling-house. The prisoner entered the outer pantry by a window which looked towards the yard, having first cut away the hair-cloth nailed to the window-frame. Taunton, J., held that the outer pantry was not part of the dwelling house within the above clause, and consequently that no burglary had been committed. R. v. Somerville, 2 Lew. C. C. 113; see also R. v. Turner, 6 C. & P. 407: 25 E. C. L. R.

In R. v. Higgs, 2 C. & K. 332, it appeared that adjoining to the prosecutor's dwelling-house was a kiln, one end of which was supported by the end wall of the dwelling-house, and that adjoining to the kiln was a dairy, one end of which was supported by the end wall of the kiln. There was no internal communication from the dwelling-house to the dairy, and the roof of the dwelling-house, kiln, and dairy were of different heights. Wilde, C. J., held that the dairy was not a part of the dwelling-house.

It would seem from the latter case that the decision in R. v. Burrowes has not been very strictly followed.

Proof of the premises being a dwelling-house—occupation.] It must appear that the premises in question were, at the time of the offence, occupied as a *dwelling-house*. Therefore, where a house was under repair, and the tenant had not entered into possession, but had deposited some of his goods there, but no one slept in it, it was held not to be a dwelling-house, so as to make the breaking and entering a burglary. R. v. Lyon, 1 Leach, 185; 2 East, P. C. 497. Nor will the circumstance of the prosecutor having procured a person to sleep in the house (not being one of his own family) for its protection, make any difference. Thus where a house was newly built and finished in every respect, except the painting, glazing, and flooring of one garret, and a workman, who was constantly employed by the prosecutor, slept in it for the purpose of protecting it, but no part of the prosecutor's domestic family had taken possession, it was held at the Old Bailey, on the authority of R. v. Lyon (*supra*), that it was not the dwelling-house of the prosecutor. R v. Fuller, 1 Leach, 186 (*n*). So where the prosecutor took a house, and deposited some of his goods in it, and not having slept there himself, procured two persons (not his own servants) to sleep there for the purpose of protecting the goods, it was held at the Old Bailey, that as the prosecutor had only in fact taken possession of the house so far as to deposit certain articles of his trade therein, but had neither slept in it himself, nor had any of his servants, it could not in contemplation of law be called his *dwelling-house*. *R. [*334] v. Harris, 2 Leach, 701; 2 East, P. C. 498. See also R. v. Hallard, *coram* Buller,

J., 2 Leach, 701 (*n*); R. v. Thompson, 2 Leach, 771. The following case, decided upon the construction of the statute 12 Anne, c. 7, is also an authority on the subject of burglary: The prosecutor, a publican, had shut up his house, which in the daytime was totally uninhabited, but at night a servant of his slept in it to protect the property left there, which was intended to be sold to the incoming tenant, the prosecutor having no intention of again residing in the house himself. On a case reserved, the judges were of opinion, that as it clearly appeared by the evidence of the prosecutor that he had no intention whatever to reside in the house, either by himself or his servants, it could not in contemplation of law be considered as his dwelling-house, and that it was not such a dwelling-house wherein burglary could be committed. R. v. Davies, *alias* Silk, 2 Leach, 876; 2 East, P. C. 499. Where some corn had been missed out of a barn, the prosecutor's servant and another person put a bed in the barn, and slept there, and upon the fourth night the prisoner broke and entered the barn; upon a reference it was agreed by all the judges, that this sleeping in the barn made no difference. R. v. Brown, 2 East, P. C. 497. So a porter lying in a warehouse, to watch goods, which is solely for a particular purpose, does not make it a dwelling-house. R. v. Smith, 2 East, P. C. 497.

Where no person sleeps in the house, it cannot be considered a dwelling-house. The premises where the offence was committed consisted of a shop and parlor, with a staircase to a room over. The prosecutor took it two years before the offence committed, intending to live in it, but remained with his mother, who lived next door. Every morning he went to his shop, transacted his business, dined, and stayed the whole day there, considering it as his home. When he first bought the house he had a tenant, who quitted it soon afterwards, and from that time no person had slept in it. On a case reserved, all the judges held, that this was not a dwelling-house. R. v. Martin, Russ. & Ry. 108. It seems to be sufficient if any part of the owner's family, as his domestic servants, sleep in the house. A. died in his house. B., his executor, put servants into it, who lodged in it, and were at board wages, but B. never lodged there himself. Upon an indictment for burglary, the question was, whether this might be called the mansion-house of B. The court inclined to think that it might, *because the servants lived there;* but upon the evidence there appeared no breach of the house. R. v. Jones, 2 East, P. C. 499.

Proof of the premises being a dwelling-house—occupation—temporary absence.] A house is no less a dwelling-house, because at certain periods the occupier quits it, or quits it for a temporary purpose. "If A.," says Lord Hale, "has a dwelling-house, and he and all his family are absent a night or more, and in their absence, in the night, a thief breaks and enters the house to commit felony, this is burglary." 1 Hale, P. C. 556; 3 Inst. 64. So if A. have two mansion-houses, and is sometimes with his family in one, and sometimes in the other, the breach of one of them, in the absence of his family, is burglary. Id. 4 Rep. 40, *a*. Again, if A. have a chamber in a college or inn of court, where he usually lodges in term time, and in his absence in vacation his chamber or study is broken open, this is burglary. R. v. Evans, Cro. Car. 473; 1 Hale, P. C. 556. The prosecutor being possessed of a house in West-
[*335] minster in *which he dwelt, took a journey into Cornwall, with intent to return and move his wife and family out of town, leaving the key with a friend to look after the house. After he had been absent a month, no person being in the house, it was broken open, and robbed. He returned a month after with his family, and inhabited there. This was adjudged burglary, by Holt, C. J., Treby, J., and four other judges. R. v. Murry, 2 East, P. C. 496; Foster, 77.

In these cases the owner must have quitted his house *animo revertendi*, in order to have it still considered as his mansion, if neither he nor any part of his family were in at the time of the breaking and entering. 2 East, P. C. 496. The prosecutor had a house at Hackney, which he made use of in the summer, his chief residence being in London. About the latter end of the summer he removed to his town house, bringing away a considerable part of his goods. The following November his house at Hackney was broken open, upon which he removed the remainder of his furniture, except a few articles of little value. Being asked whether at this time he had any intention of returning to reside, he said he had not come to any settled resolution, whether to return or not, but was rather inclined totally to quit the house and let it. The burglary happened in the January following, but the court (at the Old Bailey) were of opinion, that the prosecutor having left his house and disfurnished it, without any settled resolution to return, but rather inclining to the contrary, it could not be deemed his dwelling-house (1) R. v. Nutbrown, Foster, 77; 2 East, P. C. 496. See R. v. Flannagan, Russ. & Ry. 187.

Occupation, how to be described.] It is sometimes quite clear that the building is a dwelling-house, but doubtful in whose occupation it is; this is a point on which prosecutions for burglary frequently used to fail; but now that by the 14 & 15 Vict. c. 100, s. 1, the indictment might generally be amended (*supra*, p. 192), it is of much less importance. The following cases have been decided on the subject.

Occupation, how to be described—house divided, without internal communication, and occupied by several.] Where there is an actual severance in fact of the house, by a partition or the like, all internal communication being cut off, and each part being inhabited by several occupants, the part so separately occupied is the dwelling-house of the person living in it, provided he dwell there. If A. lets a shop, parcel of his dwelling-house, to B. for a year, and B. holds it, and works or trades in it, but lodges in his own house at night, and the shop is broken open, it cannot be laid to be the dwelling-house of A., for it was severed by the lease during the term; but if B. or his servants sometimes lodge in the shop, it is the mansion-house of B., and burglary may be committed in it. 1 Hale, P. C. 557; *vide* R. v. Sefton, *infra*. The prosecutors, Thomas Smith and John Knowles, were in partnership, and lived next door to each other. The two houses had formerly been one, but had been divided, for the purpose of accommodating the families of both partners, and were now perfectly distinct, there being no communication from one to the other, without going into the street. The housekeeping, servants' wages, &c., were paid by each partner respectively, but the rent and taxes of both the houses were paid jointly out of the partnership fund. The offence was committed in the house of the prosecutor Smith. On the trial, before Eyre, C. B, and *Gould, J., at the Old Bailey, it was [*336] objected that the burglary ought to have been laid to be in the dwelling-house of the prosecutor Smith only; and of this opinion was the court. R. v. Martha Jones, 1 Leach, 537; 2 East, P. C. 504. But it is otherwise where there is an internal communication. Thus where a man let part of his house, including his shop, to his son, and there was a distinct entrance into the part so let, but a passage from the

(1) Burglary may be committed in a house in the city, in which the prosecutor intended to reside on his return from his summer residence in the country, and to which, on going into the country, he had removed his furniture from his former residence in town; though neither the prosecutor nor his family had ever lodged in the house, in which the crime is charged to have been committed, but merely visited it occasionally. Commonwealth v. Brown, 2 Rawle, 207.

son's part led to the father's cellars, and they were open to the father's part of the house, and the son never slept in the part so let to him, the prisoner being convicted of a burglary in the shop, laid as the dwelling-house of the father, the conviction was held by the judges to be right, it being under the same roof, part of the same house, and communicating internally. But it was thought to be a case of much nicety. R. v. Sefton, 1 Russ. by Grea. 799; Russ. & Ry. 203. Chambers in the inns of court are to all purposes considered as distinct dwelling-houses, and therefore whether the owner happens to enter at the same outer door or not, will make no manner of difference. The sets are often held under distinct titles, and are, in their nature and manner of occupation, as unconnected with each other as if they were under separate roofs. 2 East, P. C. 505; 1 Hale, P. C. 556.

Occupation, how to be described, where there is an internal communication, but the parts are occupied by several, under different titles.] Although in the case of lodgers and inmates who hold under one general occupier, the whole of the house continues to be his dwelling-house, if there be an internal communication, and the parties have a common entrance, *vide infra*, yet it is otherwise where several parts of a building are let under distinct leases. The owner of a dwelling-house and warehouse under the same roof, and communicating internally, let the house to A. (who lived there), and the warehouse to A. and B., who were partners. The communication between the house and warehouse was constantly used by A. The offence was committed in the warehouse, which was laid to be the dwelling-house of A. On a case reserved, the judges were of opinion that this was wrong, A. holding the house in which he lived under a demise to himself alone, and the warehouse under a distinct demise to himself and B. R. v. Jenkins, Russ. & Ry. 244.

Occupation, how to be described—lodgers.] Where separate apartments were let in a dwelling-house to lodgers, it seems formerly to have been doubted whether they might not in all cases be described as the mansion-house of the lodgers. 2 East, P. C. 505; Hawk. P. C. b. 1, c. 38, ss. 13, 14. But the rule is now taken to be according to the opinion of Kelynge (p. 84), that if the owner, who lets out apartments in his house to other persons, sleeps under the same roof, and has but one outer door common to himself and his lodgers, such lodgers are only inmates, and all their apartments are parcel of the dwelling-house of the owner. But if the owner do not lodge in the same house, or if he and his lodgers enter by different outer doors, the apartments so let are the mansion, for the time being, of each lodger respectively. And accordingly it was so ruled by Holt, C. J., at the Old Bailey, in 1701, although in that case the rooms were let for a year, under a rent, and Tanner, an ancient clerk in court, said that this was the constant course and practice. 2 East, P. C. 505; 1 Leach, 90 (*n*). Where one of two partners is the lessee of a shop and house, and [*337] the *other partner occupies a room in the house, he is only regarded as a lodger. Morland and Gutteridge were partners; Morland was the lessee of the whole premises, and paid all the rent and taxes for the same. Gutteridge had an apartment in the house, and allowed Morland a certain sum for board and lodging, and also a certain proportion of the rent and taxes for the shop and warehouses. The burglary was committed in the shop, which was held to be the dwelling-house of Morland, and the judges held the description right. R. v. Parmenter, 1 Leach, 537 (*n*). In the following cases the apartments of the lodger were held to be his dwelling-house: The owner let the whole of a house to different lodgers. The prosecutor rented the first floor, a shop and a parlor on the ground-floor, and a cellar underneath the shop, at

12*l.* 10*s.* a year. The owner took back the cellar to keep lumber in, for which he allowed a rebate of 40*s.* a year. The entrance was into a passage, by a door from the street, and on the side of the passage one door opened into the shop, and another into the parlor, and beyond the parlor was the staircase, which led to the upper apartments. The shop and parlor doors were broken open, and the judges determined that these rooms were properly laid to be the dwelling-house of the lodger, for it could not be called the mansion of the owner, as he did not inhabit any part of it, but only rented the cellar for the purpose before mentioned. R. v. Rogers, 1 Leach, 89, 428; 2 East, P. C. 506, 507; Hawk. P. C. b. 1, c. 38, s. 29.

The house in which the offence was committed belonged to one Nash, who did not live in any part of it himself, but let the whole of it out, in separate lodgings, from week to week. John Jordan, the prosecutor, had two rooms, viz., a sleeping-room and a workshop in the garret, which he rented by the week as tenant-at-will to Nash. The workshop was broken and entered by the prisoner. Ten judges, on a case reserved, were unanimously of opinion that as Nash, the owner of the house, did not inhabit any part of it, the indictment properly charged it to be the dwelling-house of Jordan. R. v. Carrell, 1 Leach, 237, 429; 2 East, P. C. 506. The prisoner was indicted under the 3 & 4 Wm. & M. c. 9, s. 1, for breaking and entering a dwelling-house and stealing therein. The house was let out to three families, who occupied the whole. There was only one outer door, common to all the inmates. J. L. (whose dwelling-house it was laid to be) rented a parlor on the ground-floor and a single room up one pair of stairs, where he slept. The judges were of opinion that the indictment rightly charged the room to be the dwelling-house of J. L. R. v. Trapshaw, 1 Leach, 427; 2 East, P. C. 506, 780.

It follows, from the principle of the above cases, that if a man lets out part of his house to lodgers, and continues to inhabit the rest himself, if he breaks open the apartment of a lodger and steals his goods, it is felony only, and not a burglary; for it cannot be burglary to break open his own house. 2 East, P. C. 506; Kel. 84.

Occupation, how to be described—by wife or family.] The actual occupation of the premises by any part of the prosecutor's domestic family will be evidence of its being his dwelling-house. The wife of the prosecutor had, for many years, lived separate from her husband. When she was about to take the house in which the offence was afterwards committed, the lease was prepared in her husband's name; *but he refused to execute it, saying, he would have nothing to do with it; [*338] in consequence of which, she agreed with the landlord herself, and constantly paid the rent herself. Upon an indictment for breaking open the house, it was held to be well laid to be the dwelling-house of the husband. R. v. Farre, Kel. 43, 44, 45. In a similar case, where there was the additional fact that the wife had a separate property vested in trustees, the judges were clear that the house was properly laid to be the dwelling-house of the husband. It was the dwelling-house of some one. It was not the wife's, because, at law, she could have no property; it was not the trustees', because they had nothing to do with it; it could then only be the husband's. R. v. French, Russ. & Ry. 491. So where the owner of a house, who had never lived in it, permitted his wife, on their separation, to reside there, and the wife lived there in adultery with another man, who paid the expenses of housekeeping, but neither rent nor taxes, this was held by the judges to be properly described as the dwelling-house of the husband. R. v. Wilford, Russ. & Ry. 517; and see R. v. Smyth, 5 C. & P. 203: 24 E. C. L. R. Where a prisoner was indicted for breaking into the house of Elizabeth A., and it appeared that her husband had been convicted of felony, and

was in prison under his sentence when the house was broken into, it was held, on a case reserved, that the house was improperly described, although the wife continued in possession of it. R. v. Whitehead, 9 C. & P. 429: 38 E. C. L. R. But if a case should arise in which the law would adjudge the separate property of the mansion to be in the wife, she having also the exclusive possession, it should seem that in such case the burglary would properly be laid to be committed in her mansion-house, and not in that of her husband. 2 East, P. C. c. 15, s. 16; 1 Russ. by Grea. 808.

Occupation, how to be described—by clerks and agents in public offices, companies, &c.] An agent or clerk employed in a public office, or by persons in trade, is in law the servant of those parties, and if he be suffered to reside upon the premises, which belong to the government, or to the individuals employing him, the premises cannot be described as his dwelling-house. Three persons were indicted for breaking into the lodgings of Sir Henry Hungate, at Whitehall, and the judges were of opinion that it should have been laid to be the king's mansion-house at Whitehall. R. v. Williams, 1 Hale, P. C. 522, 527. The prisoner was indicted for breaking into a chamber in Somerset House, and the apartment was laid to be the mansion-house of the person who lodged there; but it was held bad, because the whole house belonged to the queen-mother. R. v. Burgess, Kel. 27. The prisoner was indicted under the 12 Anne, c. 7, for stealing a gold watch in the dwelling-house of W. H. Bunbury, Esq. The house was the invalid office at Chelsea, an office under government. The ground-floor was used by the paymaster-general, for the purpose of conducting the business relating to the office. Mr. Bunbury occupied the whole of the upper part of it; but the rent and taxes of the whole were paid by the government. The court (at the Old Bailey) held, that it was not the dwelling-house of Mr. Bunbury. R. v. Peyton, 1 Leach, 324; 2 East, P. C. 501. The prisoner was indicted for burglary in the mansion-house of Samuel Story. It appeared that the house belonged to the African Company, and that Story was an officer of the company, and had separate [*339] apartments, *and lodged and inhabited there; but Holt, C. J., Tracy, J., and Bury, B., held this to be the mansion-house of the company, for though an aggregate corporation cannot be said to inhabit anywhere, yet they may have a mansion-house for the habitation of their servants. R. v. Hawkins, 2 East, P. C. 501; Foster, 38. So it was held with regard to the dwelling-house of the East India Company, inhabited by their servants. R. v. Picket, 2 East, P. C. 501. The prisoner was indicted for breaking and entering the house of the master, fellows, and scholars of Benne't College, Cambridge. The fact was, he broke into the buttery of the college, and there stole some money, and it was agreed by all the judges to be burglary. R. v. Maynard, 2 East, P. C. 501. The governor of the Birmingham workhouse was appointed under contract for seven years, and had the chief part of the house for his own occupation; but the guardians and overseers who appointed him, reserved to themselves the use of one room for an office, and of three others for store-rooms. The governor was assessed for the house, with the exception of these rooms. The office being broken open, it was laid to be the dwelling-house of the governor; but upon a case reserved, the judges held the description wrong. R. v. Wilton, Russ. & Ry. 115. So a club-house is wrongfully described as the dwelling-house of the house-steward, who sleeps in the club-house, and has the charge of and is responsible for the plate in it. R. v. Ashley, 1 C. & K. 198: 47 E. C. L. R.

The following case appears to be at variance with previous authorities, and it may be doubted whether it is to be considered as law: The prosecutor, Sylvester, kept a blanket warehouse in Goswell Street, and resided with his family in the house over

the warehouse, which was on the ground-floor, and consisted of four rooms, the second of which was the room broken open. There was an internal door between the warehouse and the dwelling-house. The blankets were the property of a company of blanket manufacturers at Witney, in Oxfordshire, none of whom ever slept in the house. The whole rent, both of the dwelling-house and warehouse, was paid by the company, to whom Sylvester acted as servant or agent, and received a consideration for his services from them, part of which consideration, he said, was his being permitted to live in the house rent free. The lease of the premises was in the company. The court (Graham, B., and Grose, J.) were clearly of opinion, that it was rightly charged to be the dwelling-house of Sylvester; for though the lease of the house was held, and the whole rent reserved paid by the company in the country, yet, as they had never used it in any way as their habitation, it would be doing an equal violence to language and to common sense to consider it as their dwelling-house, especially as it was evident that the only purpose in holding it was to furnish a dwelling to their agent, and warerooms for the commodities therein deposited. It was the means by which they in part remunerated Sylvester for his agency, and was precisely the same thing as if they had paid him as much more as the rent would amount to, and he had paid the rent. The bargain, however, the court observed, took another shape. The company preferred paying the rent of the whole premises, and giving their agent and his family a dwelling therein toward the salary which he was to receive from them. It was, therefore, essentially and truly, the dwelling of the person who occupied it. The punishment of burglary was intended to protect the actual occupant from the terror of disturbance during the hours of darkness and repose; *but [*340] it would be absurd to suppose that the terror, which is of the essence of this crime, could, from the breaking and entering in this case, have produced an effect at Witney. R. v. Margett, 2 Leach, 930. It has been observed, that the accuracy of the reason given in the above judgment with regard to protecting the actual occupant, may, perhaps, be questionable. The punishment of burglary will attach equally, and the actual occupant will not be less protected, though the offence should be laid in the indictment as committed in the dwelling-house of the real owner. And with respect to the terror in this case not having affected the company at Witney, the same might have been said of the terror to the East India Company or the African Company, in the cases of burglary in their houses. In the course of this case, Mr. Justice Grose inquired if there had not been a prosecution at the Old Bailey for a burglary in some of the halls of the city of London, in which it was clear that no part of the corporation resided, but in which the clerks of the company generally lived; and Mr. Knapp informed the court that his father was clerk to the Haberdashers' Company, and resided in the hall, which was broken open, and in that case the court held it to be his father's house. 2 Leach, 931 (*n*). The case of R. v. Margett, however, appears to be supported by a more recent decision. The prosecutor was secretary to the Norwich Union Insurance Company, and lived with his family in the house used as the office of the company, who paid the rent and taxes. The burglary was in breaking into a room used for the business of the company. The recorder, on the authority of R. v. Margett, and the case of the clerk of the Haberdashers' Company there mentioned, thought the indictment correct, but reserved the point for the judges, who were of opinion that the house was rightly described as the prosecutor's, since he, his family, and servants were the only persons who dwelt there; and they only were liable to be disturbed by a burglary. Though their lordships would not say that it might not have been described as the company's

house, they thought it might, with equal propriety, be described as the prosecutor's. R. v. Witt, 1 Moody, C. C. 248.

Occupation, how to be described—by servants occupying as such.] Where a servant occupies a dwelling-house, or apartments therein, as a *servant*, his occupation is that of his master, and the house is the dwelling-house of the latter. But it is otherwise, where the servant occupies *suo jure* as tenant. Thus, apartments in the king's palaces, or in the houses of noblemen, for their stewards and chief servants, can only be described as the dwelling-house of the king or noblemen. Kel. 27; 1 Hale, P. C. 522, 527. Graydon, a farmer, had a dwelling-house and cottage under the same roof, but they were not inclosed by any wall or court-yard, and had no internal communication. Trumbull, a servant of Graydon, and his family, resided in the cottage by agreement with Graydon when he entered his service. He paid no rent, but an abatement was made in his wages on account of the cottage. The judges (Buller, J., *dub.*) held, that this was no more than a license to Trumbull to lodge in the cottage, and did not make it his dwelling-house. R. v. Brown, East, 2 P. C. 501.

The prosecutors were partners as bankers, and also as brewers, and were the owners of the house in question, used in both concerns. There were three rooms with only one entrance by a door from the street. No one slept in these rooms. The upper [*341] rooms of the house *were inhabited by John Stevenson, the cooper employed in the brewing concern. He was paid half a guinea a week, and permitted to have these rooms for the use of himself and family. There was a separate entrance from the street to these rooms. There was no communication between the upper and lower floor, except by a trap-door (the key of which was left with Stevenson) and ladder, not locked or fastened, and not used. Stevenson was assessed to the window-tax for his part of the premises, but the tax was paid by his masters. It being objected, that the place where the burglary was committed was not the dwelling-house of the prosecutors, the point was reserved, when eight of the judges thought that Stevenson was not a tenant, but inhabited only in the course of his service. Four of the judges were of a contrary opinion. Lord Ellenborough, C. J., said: "Stevenson certainly could not have maintained trespass against his employers if they had entered these rooms without his consent. Does a gentleman, who assigns to his coachman the rooms over his stables, thereby make him a tenant? The act of the assessors, whether right or wrong in assessing Stevenson for the windows of the upper rooms, can make no difference; nor is it material which of the two trades the prosecutors carried on; Stevenson was servant, for the property in both partnerships belonged to the same persons. As to the severance, the key of the trap-door was left with Stevenson, and the door was never fastened, and it can make no difference whether the communication between the upper and lower rooms was through a trap-door or by a common staircase." R. v. Stockton and Edwards, 2 Leach, 1015; 2 Taunt. 339; S. C. under the name of R. v. Stock and another, 1 Russ. & Ry. 185. See 1 Russ. by Grea. 809; R. v. Flannagan, Russ. & Ry. 187, *infra*.

In order to render the occupation of a servant the occupation of the master, it must appear that the servant is, properly speaking, such, and not merely a person put into the house for the purpose of protecting it. The prosecutor left the dwelling-house, keeping it only as a warehouse and workshop, without any intention of again residing in it. In consequence of his thinking it not prudent to leave the house without some one in it, two women, employed by him as workwomen in his business, and not as domestic servants, slept there to take care of the house, but did not take their meals there or use the house for any other purpose than that of sleeping there.

Upon an indictment for stealing goods to the amount of more than 40*s.*, in the dwelling-house of the prosecutor, the judges held, that this could not be considered his dwelling-house. R. v. Flannagan, Russ. & Ry. 187. It is difficult to distinguish this case from that of R. v. Stockton, 2 Leach, 1015, *supra*, which received an opposite decision. Still, though the object of the owner of the house in putting in his servants be to protect his property only, yet if *they live there*, their occupation will be deemed his occupation, and the house may be described as his dwelling-house. The shop broken open was part of a dwelling-house which the prosecutor had inhabited. He had left the dwelling-house and never meant to live in it again, but retained the shop and let the other rooms to lodgers; after some time he put a servant and his family into two of the rooms, lest the place should be robbed, and they lived there. Upon a case reserved, the judges thought, that putting in a servant and his family *to live*, was very different from putting them in merely to sleep, and that this was still to be deemed the prosecutor's house. R. v. Gibbon, 1 Russ. by *Grea. [*342] 806. J. B. worked for one W., who did carpenter's work for a public company, and had put J. B. into the house in question to take care of it and of some mills adjoining, J. B. receiving no more wages after than before he went to live in the house; it was held that the house was not rightly described as the house of J. B. R. v. Rawlins, 7 C. & P. 150: 32 E. C. L. R. See R. v. Ashley, 1 C. & K. 198: 47 E. C. L. R., *ante*, p. 339.

Occupation, how to be described—by servants—as tenants.] Where a servant occupies part of the premises belonging to his master, not as in the cases above mentioned, *ante*, p. 340, in the capacity of *servant*, but in the character of tenant, the premises must be described as his dwelling-house. Greaves & Co. had a house and building where they carried on their trade. Mottran, their warehouseman, lived with his family in the house, and paid 11*l.* per annum for rent and coals (the house alone being worth 20*l.* per annum). Greaves & Co. paid the rent and taxes. The judges were of opinion that this could not be said to be the dwelling-house of Greaves & Co. They thought that as Mottran stood in the character of tenant (for Greaves & Co. might have distrained upon him for his rent, and could not arbitrarily have removed him), Mottran's occupation could not be deemed their occupation. R. v. Jarvis, 1 Moody, C. C. 7.

Nor is it necessary, in order to invest the servant with the character of tenant, that he should pay a rent, if, from other circumstances of the case, it appears that he holds as tenant. The prosecutor (Gent), a collier, resided in a cottage built by the owner of the colliery for whom he worked. He received 15*s.* a week as wages, besides the cottage, which was free of rent and taxes. The prisoner being indicted for burglary in the dwelling-house of the prosecutor, Holroyd, J., was of opinion, that though the occupation and enjoyment of the cottage were obtained by reason of Gent being the servant of the owner, and coextensive only with the hiring, yet that his inhabiting the cottage was not, as in the cases referred to (2 East, P. C. 500), correctly speaking, merely as the servant of the owner, nor was it either as to the whole or any part of the cottage, as his (the owner's) occupation, or for his use or business, or that of the colliery, but wholly for the use and benefit of Gent himself and his family, in like manner as if he had been paid the rent and taxes; and though the servant's occupation might in law, at the master's election, be considered as the occupation of the master and not of the servant, yet with regard to third persons it might be considered either as the occupation of the master or servant. The point was, however, reserved for the opinion of the judges, who held that the cottage might be

described as the dwelling house of Gent. R. v. Jobling, Russ. & Ry. 525. A toll-house was occupied by a person employed by the lessee of the tolls at weekly wages as collector, and as such he had the privilege of living in the toll-house. The judges were unanimously of opinion, that the toll-house was rightly described as his dwelling-house; for he had the exclusive possession of it, and it was unconnected with any premises of the lessee, who did not appear to have any interest in it. R. v. Camfield, 1 Moody, C. C. 43. So where a person who has been servant remains, on the tenant's quitting, upon the premises, not in the capacity of servant, they may be de-
[*343] scribed as his dwelling-house. Lord Spencer let a house to *Mr. Stephens, who underlet it. The sub-lessee failed, and quitted, and no one remained in the house but Ann Pemberton, who had been servant to the sub-lessee. Stephens paid her 15*s.* a week till he died, when she received no payment, but continued in the house. At Michaelmas it was given up to Lord Spencer, but Ann Pemberton was permitted by the steward to remain in it. Bayley, J., thought Ann Pemberton might be considered tenant at will, but reserved the point for the opinion of the judges, who held that the house was rightly laid in the indictment as the dwelling-house of Ann Pemberton, as she was there, not as a servant, but as a tenant at will. R. v. Collet, Russ. & Ry. 498. Where a gardener lived in a house of his master, quite separate from the dwelling-house of the latter, and had the entire control of the house he lived in and kept the key, it was held that it might be laid either as his or as his master's house. R. v. Rees, 7 C. & P. 568: 32 E. C. L. R.

Occupation, how to be described—by guests, &c.] If several persons dwell in one house, as guests or otherwise, having no fixed or certain interest in any part of the house, and a burglary be committed in any of their apartments, it seems clear that the indictment ought to lay the offence in the mansion-house of the proprietor. Hawk. P. C. b. 1, c. 38, s. 26. Therefore, where the chamber of a guest at an inn is broken open, it shall be laid to be the mansion-house of the innkeeper, because the guest has only the use of it, and not any certain interest. 1 Hale, P. C. 557. It has been said that if the host of an inn break the chamber of his guest in the night to rob, this is burglary. Dalton, c. 151, s. 4. But it has been observed that this may be justly questioned; for that there seems no distinction between that case and the case of an owner residing in the same house, breaking the chamber of an inmate having the same outer door as himself, which Kelynge says cannot be burglary. Kel. 84; 2 East, P. C. 582. It is said by Lord Hale, that if A. be a lodger in an inn, and in the night opens his chamber-door, steals goods in the house, and goes away, it may be a question whether this be burglary; "and," he continues, "it seems not, because he had a special interest in his chamber, and so the opening of his own door was no breaking of the innkeeper's house; but if he had opened the chamber of B., a lodger in the inn, to steal his goods, it had been burglary." 1 Hale, P. C. 554. It has been observed that the reasoning in the following case is opposed to the distinction taken by Lord Hale, and that the case of a guest at an inn breaking his own door to steal goods in the night, falls under the same consideration as a servant under like circumstances. 2 East, P. C. 503. The prosecutor, a Jew peddler, came to the house of one Lewis, a publican, to stay all night, and fastened the door of his chamber. The prisoner pretended to Lewis that the prosecutor had stolen his goods, and under this pretence, with the assistance of Lewis and others, forced the chamber-door open, and stole the prosecutor's goods; Adams, B., doubted whether the chamber could be properly called the dwelling-house of the prosecutor, being really a part of the dwelling house of the innkeeper. Upon a case reserved, the judges all thought

that though the prosecutor had for that night a special interest in the bedchamber, yet it was merely for a particular purpose, viz., to sleep there that night as travelling guest, and not as a regular lodger; that he had no certain and permanent interest in the room itself; but both the property and *possession of the room re- [*344] mained in the landlord, who would be answerable *civiliter* for any goods of his guest that were stolen in the room, even for the goods now in question, which he could not be, unless that room were deemed to be in his possession; and that the landlord might go into the room when he pleased and would not be a trespasser to his guest. R. v. Prosser, 2 East, P. C. 562.

Occupation, how to be described—partners.] Where one of several partners is the lessee of the premises where the business is carried on, and another partner occupies an apartment there, and pays for his board and lodging, the latter, as already stated, will be considered as a lodger only. R. v. Parmenter, 1 Leach, 537 (*n*); *ante*, p. 337. But where the house is the joint property of the firm, and one of the partners, and the persons employed in the trade, live there, it is properly described as the dwelling-house of the firm. R. v. Athea, 1 Moody, C. C. 329.

Proof of the parish—the local description.] If it be not expressly stated where the dwelling-house is situated, it is taken to be situated at the place named in the indictment by way of special venue. 14 & 15 Vict. c. 100, s. 25, *supra*, p. 227. And if two parishes having been named, the house is stated to be "at the parish aforesaid," the last parish shall be intended. R. v. Richards, 1 Moo. & R. 177. Where an indictment for burglary charged that the prisoners, "late of Norton juxta Kempsey in the county of Worcester," "at Norton juxta Kempsey aforesaid, the dwelling-house of T. Hooke, there situate," feloniously did break and enter, &c., and it appeared that Norton juxta Kempsey was a chapelry and perpetual curacy; it was objected that the indictment ought to have stated Norton juxta Kempsey to be a chapelry, or described it in some other manner. But Patteson, J., held, that R. v. Napper, 1 Moo. C. C. 44, was a sufficient authority to show that this indictment was good. There it was held, that an indictment alleging that the prisoner at "Liverpool," did break and enter a dwelling-house "there situate," was good; and there was no reason why an indictment alleging a burglary at "Norton juxta Kempsey" was not also good, it being proved that there was such a district. R. v. Brookes, and others, 1 Russ. by Grea., Addenda, xvi; S. C. Car. & M. 544: 41 E. C. L. R. A variance between the description in the indictment and the evidence is amendable, under 14 & 15 Vict. c. 100, s. 1, *ante*, p. 192.

Proof of the offence having been committed in the night-time.] With regard to what shall be esteemed *night*, it is said by Lord Hale to have been anciently held, that after sunset, though daylight be not quite gone, or before sun-rising, is *noctanter*, to make a burglary (Dalt. c. 99; Cromp. 22, b.); but he adds, that the better opinion has been, that if the sun be set, yet if the countenance of a party can be reasonably discerned by the light of the sun, or *crepusculum*, it is not night. 1 Hale, P. C. 550; 3 Inst. 63. This rule, however, does not apply to moonlight, otherwise many burglaries might pass unpunished (1) 1 Hale, 551; 4 Bl. Com. 224. Now

(1) The night-time consists of the period from the termination of daylight in the evening to the earliest dawn of the next morning. State v. Bancroft, 10 N. Hamp. 105.
An indictment for burglary may be supported by circumstantial evidence, and it is not necessary

by the 24 & 25 Vict. c. 96, s. 1, "for the purposes of this act, the night shall be deemed to commence at nine of the clock in the evening of each day, and to conclude at six of the clock in the morning of the succeeding day."

[*345] *The prosecutor must prove that both the breaking and entering took place in the night-time, but it is not necessary that both should have taken place on the same night. It is said by Lord Hale, that if thieves break a hole in the house one night, to the intent to enter another night and commit a felony through the hole they so made the night before, this seems to be burglary; for the breaking and entering were both *noctanter*, though not the same night, and it shall be supposed they broke and entered the night they entered, for the breaking makes not the burglary till the entry. 1 Hale, P. C. 551. This point was decided in the following case: During the night of Friday, the side-door of the prosecutor's house, which opened into a public passage, had all the glass taken out by the prisoner, with intent to enter, and on the Sunday night the prisoner entered through the hole thus made. On a case reserved, the judges were of opinion, that the offence amounted to a burglary, the breaking and entry being both by night. And although a day elapsed between the breaking and entering, yet the breaking was originally with intent to enter. R. v. Smith, Russ. & Ry. 417. See also R. v. Jordan, *ante*, p. 328.

"If the breaking of the house," says Lord Hale, "were done in the daytime, and the entering in the night, or the breaking in the night and the entering in the day, that will not be burglary; for both make the offence, and both must be *noctanter*. 1 Hale, P. C. 551, citing Cromp. 33 a. ex. 8 ed. 2." Upon this, the annotator of Lord Hale observes, that "the case cited does not fully prove the point it is brought for, the resolution being only, that if thieves enter in the night at a hole in the wall which was there before, it is no burglary; but it does not appear who made the hole." 1 Hale, P. C 551 (*n*). It is observed by Mr. Serjeant Russell, that it is elsewhere given as a reason by Lord Hale, why the breaking and entering, if both in the night, need not be both in the same night, that it shall be supposed that the thieves broke and entered in the night when they entered; for that the breaking makes not the burglary till the entry; and the learned writer adds, that "this reasoning, if applied to a breaking in the daytime, and an entering in the night, would seem to refer the whole transaction to the entry, and make such breaking and entry a burglary." 1 Russ. by Grea. 821; and see 2 East, P. C. 509. It would seem, however, to be carrying the presumption much further than in the case put by Lord Hale; and it may well be doubted whether, in such a case, the offence would be held to amount to burglary.

Proof of intent—to commit felony—felony at common law, or by statute.] The prosecutor must prove that the dwelling-house was broken and entered with intent to commit a felony therein. Evidence that a felony was actually committed, is evidence that the house was broken and entered with intent to commit that offence. 1 Hale, P. C. 560; 2 East, P. C. 513. It was at one time doubted, whether it was not essential that the felony intended to be committed should be a felony at common law. 1 Hale, P. C. 562; Crompton, 32; Dalt. s. 151, c. 5. But it appears to be now settled, according to the modern authorities, that it makes no difference whether the offence

to show that the entry could not have been made in the daytime. State v. Bancroft, 10 N. Hamp. 105.

It having been proved that the prisoner was seen on the day after the burglary, for which he was indicted, under very suspicious circumstances, near the place where it was committed, it was competent to prove that the implements used came from his home. The People v. Larned, 3 Selden, 445.

intended be felony at common law or by statute; and the reason given is, that whenever a statute makes an offence felony, it incidentally gives it all the properties of a felony at common law. *Hawk. P. C. b. 1, c. 38, s. 38; R. v. Gray, Str. [*346] 481; 4 Bl. Com. 228; 2 East, P. C. 511; 1 Russ. by Grea. 824. If it appear that the intent of the party in breaking and entering was merely to commit a trespass, it is no burglary, as where the prisoner enters with intent to beat some person in the house, even though killing or murder may be the consequence, yet, if the primary intention was not to kill, it is still not burglary. 1 Hale, P. C. 561; 2 East, P. C. 509. Where a servant embezzled money intrusted to his care, ten guineas of which he deposited in his trunk, and quitted his master's service, but afterwards returned, broke and entered the house in the night, and took away the ten guineas, this was adjudged no burglary, for he did not enter to commit a felony, but a trespass only. Although it was the master's money *in right*, it was the servant's *in possession*, and the original act was no felony. R. v. Bingley, Hawk. P. C. b. 1, c. 38, s. 37, cited 2 Leach, 843, as R. v. Dingley; 2 East, P. C. 510, S. C. as Anon. Where goods had been seized as contraband by an excise officer, and his house was entered in the night, and the goods taken away, upon an indictment for entering his house with intent to steal his goods, the jury found that the prisoners broke and entered the house with intent to take the goods on behalf of the person who had smuggled them; and upon a case reserved, all the judges were of opinion, that the indictment was not supported, there being no intent to steal, however outrageous the conduct of the prisoners was in thus endeavoring to get back the goods. R. v. Knight & Roffey, 2 East, P. C. 510. If the indictment had been for breaking and entering the house, with intent feloniously to rescue goods seized, that being made a felony by statute 19 Geo. 2, c. 34, the chief baron and some of the other judges held it would have been burglary. But even in that case some evidence must be given, on the part of the prosecutor, to show that the goods were uncustomed, in order to throw the proof upon the prisoners that the duty was paid; but their being found in oil-cases, or in great quantities in an unentered place, would have been sufficient for this purpose. 2 East, P. C. 510. The prisoner was indicted for breaking, &c., with intent to kill and destroy a gelding there being. It appeared that the prisoner, in order to prevent the horse from running a race, cut the sinews of his fore legs, from which he died. Pratt, C. J., directed an acquittal, the intent being not to commit felony by killing and destroying the horse, but a trespass only to prevent his running, and therefore it was no burglary. But the prisoner was afterwards indicted for killing the horse, and capitally convicted. R. v. Dobb, 2 East, P. C. 513. Two poachers went to the house of a gamekeeper, who had taken a dog from them, and believing him to be out of the way, broke the door and entered. Being indicted for this as a burglary, and it appearing that their intention was to rescue the dog, and not to commit a felony, Vaughan, B., directed an acquittal. Anon. Matth. Dig. C. L. 48. See R. v. Holloway, 5 C. & P. 524: 24 E. C. L. R.

Proof of the intent—variance in the statement of.] The intent must be proved as laid. If it were laid with intent to commit one sort of felony, and it were proved that it was with intent to commit another, it was formerly a fatal variance. 2 East, P. C. 514. But see now 14 & 15 Vict. c. 100, s. 1, *ante*, p. 192. Where the prisoner was indicted for burglary and stealing goods, and it appeared that *there were no [*347] goods stolen, but only an intent to steal, it was held by Holt, C. J., that this ought to have been so laid, and he directed an acquittal. R. v. Vandercomb, 2 East, P. C. 514. The property in the goods, which it is alleged were intended to be stolen, must

be correctly laid. 1 Russ. by Grea. 825 (*n*). An indictment for burglary charged the prisoner with breaking, in the night-time, into the dwelling-house of E. B., with intent the goods and chattels in the same dwelling-house then and there being feloniously and burglariously to steal, and stealing the goods of E. B. It was proved that it was the house of E. B., but that the goods the prisoner stole were the joint property of E. B. and two others. It was held, that if it was proved that the prisoner broke into the house of E. B. with intent to steal the goods there generally, that would be sufficient to sustain the charge of burglary contained in the indictment, without proof of an intent to steal the goods of the particular person whose goods the indictment charged that he did steal. R. v. Clarke, 1 C. & K. 421: 47 E. C. L. R. A. was charged with breaking into the house of K. and stealing the goods of M. It was proved by M. that K., his brother-in-law, had taken the house, and that M. (who lived on his property) carried on the trade of a silversmith for the benefit of K. and his family, having himself neither a share in the profits nor a salary. M. stated that he had authority to sell any part of the stock, and might take money from the till, but that he should tell K. of it; and that he sometimes bought goods for the shop, and sometimes K. did it; it was held that M. was a bailee, and that the goods in the shop might properly be laid as his property. R. v. Bird, 9 C. & P. 44: 38 E. C. L. R.

It seems sufficient in all cases where a felony has been actually committed, to allege the commission without any intent: 1 Hale, P. C. 560; 2 East, P. C. 514; and in such case no evidence, except that of the committing of the offence, will be required to show the intention. It is a general rule, that a man who commits one sort of felony in attempting to commit another, cannot excuse himself on the ground that he did not intend the commission of that particular offence. Yet this, it seems, must be confined to cases where the offence intended is in itself a felony.(1) 2 East, P. C. 514, 515.

The intention of the parties will be gathered from all the circumstances of the case. Three persons attacked a house. They broke a window in front and at the back. They put a crowbar and knife through a window, but the owner resisting them, they went away. Being indicted for burglary, with intent to commit a larceny, it was contended that there was no evidence of the intent; but Park, J., said, that it was for the jury to say whether the prisoner went with the intent alleged or not; that persons do not in general go to houses to commit trespasses in the middle of the night; that it was matter of observation that they had the opportunity, but did not commit the larceny, and he left it to the jury to say whether, from all the circumstances, they could infer that or any other intent. Anon. 1 Lewin, C. C. 37.

Minor offence—larceny.] If the prosecutor fail in his attempt to prove the breaking and entry of the dwelling-house, but the indictment charges the prisoner with a larceny committed there, he may be convicted of the larceny, simple or compound, according to the circumstances of the case. Thus, where the prisoner was charged [*348] with *breaking and entering the house of the prosecutor, and stealing 60*l.* therein, and the jury found that he was not guilty of breaking and entering the house in the night, but that he was guilty of stealing the money in the dwelling-house; upon a case reserved, it was resolved by the judges, after some doubt, that by this finding the prisoner was ousted of his clergy, for the indictment contained every charge necessary upon the 12 Ann. c. 7, viz., a stealing in the dwelling-house

(1) The Commonwealth v. Chilson, 2 Cushing, 15.

to the amount of 40s., and the jury had found him guilty upon that charge. R. v. Withal, 2 East, P. C. 517; 1 Leach, 88. In a similar case the verdict given by the jury was, "Not guilty of burglary, but guilty of stealing above the value of 40s. in the dwelling-house," and the entry made by the officer was in the same words. On a case reserved, the judges held the finding sufficient to warrant a capital judgment. They agreed, that if the officer were to draw up the verdict in form, he must do so according to the plain sense and meaning of the jury, which admitted of no doubt; and that the minute was only for the future direction of the officer, and to show that the jury found the prisoner guilty of the larceny only. But many of the judges said, that when it occurred to them they should direct the verdict to be entered, "Not guilty of the breaking and entering in the night, but guilty of the stealing," &c., as that was more distinct and correct. It appeared, upon inquiry, to be the constant course on every circuit in England, upon an indictment for murder, where the party was only convicted of manslaughter, to enter the verdict, "Not guilty of murder, but guilty of manslaughter," or, "Not guilty of murder, but guilty of feloniously killing and slaying," and yet murder includes the killing. The judges added, that the whole verdict must be taken together, and that the jury must not be made to say that the prisoner is not guilty generally, where they find him expressly guilty of part of the charge, or to appear to speak contradictory by means of the officer's using a technical term, when the verdict is sensible and intelligent in itself. R. v. Hungerford, 2 East, P. C. 518.

It was formerly thought, that if several were jointly indicted for burglary and larceny, and no breaking and entering were proved against one, he could not be convicted of larceny and the others of burglary. R. v. Turner, 1 Sid. 171; 2 East, P. C. 519. But in a later case, where one prisoner pleaded guilty and the other two were found guilty of the larceny only, the judges, on a case reserved, differed in opinion. Seven of them resolved that judgment should be entered against all the three prisoners,—against him who had pleaded guilty for the burglary and capital larceny, and against the other two for the capital larceny. Burrough, J., and Hullock, B., were of a different opinion, but Hullock thought that if a *nolle prosequi* were entered as to the burglary, judgment might be given against all the three for the capital larceny. The seven judges thought that there might be cases in which, upon a joint larceny by several, the offence of one might be aggravated by burglary in him alone, because he might have broken the house in the night, in the absence and without the knowledge of the others, in order to come afterwards and effect the larceny, and the others might have joined in the larceny, without knowing of the previous breaking. R. v. Butterworth, Russ. & Ry. 520.

Although a prisoner may be convicted of the larceny only, yet if the larceny was committed on a previous day, and not on the day of *the supposed burglary, [*349] he cannot be convicted of such larceny. This point having been reserved for the opinion of the judges, they said: "The indictment charges the prisoner with burglariously breaking and entering the house *and* stealing the goods, and most unquestionably that charge may be modified by showing that they stole the goods without breaking open the house; but the charge now proposed to be introduced goes to connect the prisoners with an antecedent felony, committed before *three* o'clock, at which time, it is clear, they had not entered the house. Having tried, without effect, to convict them of breaking and entering the house, and stealing the goods, you must admit that they neither broke the house nor stole the goods on the day mentioned in the indictment; but to introduce the proposed charge, it is said that they stole the goods on a former day, and that their being found in the house is evidence of it.

But this is surely a distinct transaction, and it might as well be proposed to prove any felony which these prisoners committed in this house seven years ago, as the present." R. v. Vandercomb, 2 Leach, 708.

Proof of breaking out of a dwelling-house.] It was formerly doubted whether, where a man entered a dwelling-house in the night (without breaking) with intent to commit felony, and afterwards broke out of the same, or being there in the night committed a felony, and broke out, this amounted to burglary or not.(1) 1 Hale, P. C. 554; R. v. Clarke, 2 East, P. C. 490; Lord Bac. Elem. 65; 1 Russ. by Grea. 792. It was, however, declared to be such by 12 Anne, c. 7, and the provision has been repeated in the subsequent acts. See *supra*, p. 322.

An indictment which stated in one count that the prisoner "did break *to* get out," and in another that he "did break *and* get out," was held by Vaughan and Patteson, JJ., insufficient since the last-mentioned statute, which uses the words "break out." R. v. Crompton, 7 C. & P. 139: 32 E. C. L. R.

Where a lodger, in the prosecutor's house, got up in the night and unbolted the back-door, and went away with a jacket of the prosecutor's which he had stolen; he was convicted of burglary. In this case it was also held to be not the less a burglary because the defendant was *lawfully* in the house as a lodger or as a guest at an inn. R. v. Wheeldon, 8 C. & P. 747: 34 E. C. L R.

Proof upon plea of autrefois acquit.] In considering the evidence upon the plea of *autrefois acquit* in burglary, some difficulty occurs from the complex nature of that offence, and from some contrariety in the decisions. The correct rule appears to be, that an acquittal upon an indictment for burglary in breaking and entering and *stealing goods*, cannot be pleaded in bar to an indictment for burglary in the same dwelling-house, and on the same night, *with intent to steal*, on the ground that the several offences described in the two indictments cannot be said to be the same. This rule was established in R. v. Vandercomb, where Buller, J., delivered the resolution of the judges, and after referring to 2 Hawk. P. C. c. 35, s. 3; Fost. 361, 362; R. v. Pedley, 1 Leach, 242, concluded in these words: "These cases establish the principle, that unless the first indictment were such as the prisoner might have been convicted upon by proof of the facts contained in the second indictment, an acquittal on the first indictment can be no bar to the second. Now to apply these [*350] principles *to the present case. The first indictment was for burglariously breaking and entering the house of Miss Neville, and *stealing* the goods mentioned; but it appeared that the prisoners broke and entered the house *with intent to steal*, for in fact no larceny was committed, and therefore they could not be convicted on that indictment. But they have not been tried for burglariously breaking and entering the house of Miss Neville *with intent to steal*, which is the charge in the present indictment, and therefore they have never been in jeopardy for this offence. For this reason the judges are all of opinion that the plea is bad, and that the prisoners must take their trials upon the present indictment." R. v. Vandercomb, 2 Leach, 716; 2 East, P. C. 519; overruling R. v. Turner, Kel. 30, and R. v. Jones and Bever, Id. 52. See also the learned dissertation on the subject of *autrefois acquit* in 1 Russ. by Grea. 832. Where a prisoner was indicted for a simple burglary in the house of a person, for whose murder he had been acquitted, Parke, B., said, "The charge in the indictment did not affect the life of the prisoner, as there was

(1) That it does, see case of Sands et al., 6 Rogers's Rec. 1.

not an allegation that the burglary was accompanied by violence, and that if he had been indicted for burglary with violence, as he might have been convicted of manslaughter, or even assault, on the indictment for murder, on which he had been acquitted altogether, in my opinion that acquittal would have been an answer to the allegation of violence, if it had been inserted in the present indictment." R. v. Gould, 9 C. & P. 364: 38 E. C. L. R.

Nature of offence of having possession of implements of housebreaking.] This offence consists in the possession merely without lawful excuse of the implements mentioned. It is not necessary to allege or to prove at the trial an intent to commit a felony. R. v. Bailey, 1 Dears. C. C. R. 244; S. C. 23 L. J. M. C. 13.

What are implements of housebreaking.] Keys are implements of housebreaking; for though commonly used for lawful purposes, they are capable of being employed for purposes of housebreaking, and it is a question for the jury whether the person found in possession of them by night had them without lawful excuse, and with the intention of using them as implements of housebreaking. R. v. Oldham, 2 Den. C. C. R. 472; S. C. 21 L. J. M. C. 134.

The error suggested by Maule, J., in this case, as occurring in the 14 & 15 Vict. c. 19, s. 1, namely, the omission of a comma between the words "picklock" and "key" is not corrected in the present act, 24 & 25 Vict. c. 97, s. 58, *supra*, p. 323. If this was intentional, then there are no special words which make ordinary keys implements of housebreaking.

*CATTLE AND OTHER ANIMALS. [*351]

Stealing horses, cows, sheep, &c., ... 351
Killing animals with intent to steal carcase, &c., ... 351
Killing or maiming cattle, ... 351
Malice against owner unnecessary, ... 351
Injury by person having animals in his possession, ... 351
Proof of the animal being within the statute, . . . 351
Proof of the injury, ... 352
Proof of the malice and intent, ... 352

Stealing horses, cows, sheep, &c.] By the 24 & 25 Vict. c. 96, s. 10 (replacing s. 25 of the 7 & 8 Geo. 4, c. 29), "Whosoever shall steal any horse, mare, gelding, colt or filly, or any bull, cow, ox, heifer or calf, or any ram, ewe, sheep or lamb, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Killing animals with intent to steal the carcase, &c.] By s. 11, "Whosoever shall wilfully kill any animal with intent to steal the carcase, skin, or any part of the animal so killed, shall be guilty of felony, and being convicted thereof, shall be liable to the same punishment as if he had been convicted of feloniously stealing the same, provided the offence of stealing the animal so killed, would have amounted to felony."

Killing or maiming cattle.] By the 24 & 25 Vict. c. 97, s. 40, "Whosoever shall unlawfully and maliciously kill, maim, or wound any cattle, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Malice against owner unnecessary.] See 24 & 25 Vict. c. 97, s. 58, *supra*, p. 264.

Injury by person having animals in his possession.] See s. 59, *supra*, p. 264.

Proof of the animal being within the statute.] The word *cattle*, in the 24 & 25 Vict. c. 97, s. 40, would, doubtless, receive the same interpretation as it bore in the [*352] 9 Geo. 1, c. 22, upon which it was *held that an indictment for killing a "mare" was good. R. v. Paty, 1 Leach, 72; 2 W. Bl. 721; 2 East, P. C. 1074. And see R. v. Tivey, *post*, p. 353. And so an indictment for wounding a "gelding" has been held good. R. v. Mogg, 1 Leach, 73 (*n*). Pigs were held to be within the 9 Geo. 1, c. 22; R. v. Chapple, Russ. & Ry. 77. So also asses. R. v. Whitney, 1 Moody, C. C. 3. It is not sufficient in the indictment to charge the prisoner with maiming, &c., "cattle" generally, without specifying the description. R. v. Chalkley, Russ. & Ry. 258. Where the prisoner was indicted under the 7 & 8 Geo. 4, c. 29, s 25, for stealing a sheep, and the jury found that it was a lamb, the majority of the judges present, on a case reserved (six to five), held the conviction to be right. R. v. Spicer, 1 Den. C. C. 82; 1 C. & K. 669: 47 E. C. L. R.

And now upon any similar objection being taken the indictment would be amended under 14 & 15 Vict. c. 100, s. 1, *ante*, p. 192.

Proof of the injury.] Upon an indictment for maliciously *wounding*, it need not appear either that the animal was killed, or that the wound inflicted a permanent injury. Upon an indictment for this offence, it was proved that the prisoner had maliciously driven a nail into a horse's foot. The horse was thereby rendered useless to the owner, and continued so to the time of trial; but the prosecutor stated that it was likely to be perfectly sound again in a short time. The prisoner being convicted, the judges, on a case reserved, held the conviction right, being of the opinion that the word "wounding" did not imply a permanent injury. R. v. Haywood, Russ. & Ry. 16; 2 East, P. C. 1076. But by *maiming* is to be understood a permanent injury. Id. 2 East, P. C. 1077; R. v. Jeans, 1 C. & K. 539. Where the prisoner was indicted under the 4 Geo. 4, c. 54. for wounding a sheep, and it appeared that he had set a dog at the animal, and that the dog, by biting it, inflicted several severe wounds, Parke, J., is stated to have said, "This is not an offence at common law, and is only made so by a statute; and I am of opinion, that injuring a sheep, by setting a dog to worry it, is not a maiming or wounding within the meaning of that statute." R. v. Hughes, 2 C. & P. 420: 12 E. C. L. R. As to the construction of the word "wound," see *infra*, "*Attempt to commit murder.*" Where the prisoner poured a quantity of nitrous acid into the ear of a mare, some of which getting into the eye, produced immediate blindness, being convicted of maliciously maiming the mare, the conviction was held by the judges to be right. R. v. Owen, 1 Moody, C. C. 205. The administering of poison to cattle, however malicious the act may be, is not a felony within the statute, unless the animal die; but the party may be indicted as for a misdemeanor. Where a man was thus indicted, for administering

sulphuric acid to eight horses, with intent feloniously to kill them, and it appeared that he had mixed sulphuric acid with the corn, and having done so gave each horse his feed, Park, J., held, that this evidence supported the allegation in the indictment, of a joint administering to all the horses. R. v. Mogg. 4 C. & P. 364 : 19 E. C. L. R. Where the prisoner set fire to a cowhouse, and a cow in it was burned to death, Taunton, J., ruled that this was a killing of the cow within the 7 & 8 Geo. 4, c. 30, s. 16. R. v. Houghton, 5 C. & P. 559 : 24 E. C. L. R.

Proof of malice and intent.] Under the repealed statute of 9 *Geo. 1, c. [*353] 22, it was necessary to show that the act was done out of malice to the owner ; but the 7 & 8 Geo. 4, c. 30, s. 25, renders it an offence, whether the act be done from malice conceived against the owner or otherwise, and the same provision is contained in the 24 & 25 Vict. c. 97, s. 58, *supra*, p. 264. See 2 Russ. by Grea. p. 572 (*n*).

On an indictment under the 7 & 8 Geo. 4, c. 30, s. 16, for maliciously wounding a mare, where no malice was shown towards any one, and it did not appear that the prisoner knew to whom the mare belonged, or had any knowledge of the prosecutor, it was contended, that since the 7 W. 4 and 1 Vict. c. 90, s. 2, no punishment could be enforced under the 7 & 8 Geo. 4, c. 30, s. 16, and consequently that the twenty-fifth section of that act had no operation, and therefore that proof of malice was necessary. Patteson, J., held that it was not; and the prisoner being convicted, the judges were of opinion that the conviction was right. R. v. Tivey, 1 Denison, C. C. 63 ; 1 C. & K. 704, S. C.: 47 E. C. L. R.

Although it is thus rendered unnecessary to give evidence of malice against any particular person, yet an evil intent in the prisoner must appear. Thus, in R. v. Mogg, *supra*, Park, J., left it to the jury to say whether the prisoner had administered the sulphuric acid (there being some evidence of a practice of that kind by grooms) with the intent imputed in the indictment, or whether he had done it under the impression that it would improve the appearance of his horses; and that in the latter case they ought to acquit him. In the same case the learned judge allowed evidence to be given of other acts of administering, to show the intent.

*CHALLENGING TO FIGHT. [*354]

What amounts to, ... 354
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What amounts to.] It is a very high offence to challenge another, either by word or letter, to fight a duel, or to be the messenger of such a challenge, or even barely to provoke another to send such a challenge, or to fight, as by dispersing letters to that purpose, containing reflections and insinuating a desire to fight. Hawk. P. C. b. 1, c. 63, s. 3. Thus a letter containing these words, "You have behaved to me like a blackguard. I shall expect to hear from you on this subject, and will punctually attend to any appointment you may think proper to make," was held indictable. R. v. Phillips, 6 East, 464; R. v. Rice, 3 East, 581. No provocation, however great, is a justification on the part of the defendant, although it may weigh with the court in awarding the punishment. Id.

On an indictment for challenging, or provoking to challenge, the prosecutor must

prove,—1st, the letter or words conveying the challenge; and 2d, where it does no appear from the writing or words themselves, he must prove the intent of the part to challenge or to provoke to a challenge.(1)

Proof of the intent.] In general, the intent of the party will appear from th writing or words themselves; but where that is not the case, as where the words ar ambiguous, the prosecutor must show the circumstances under which they wer uttered, for the purpose of proving the unlawful intent of the speaker. Thus, word of provocation, as "liar," or "knave," though a *mediate* provocation to a breach o the peace, do not tend to it *immediately*, like a challenge to fight or a threatening t beat another. R. v. King, 3 Inst. 181. Yet these, or any other words, would be in dictable, if proved to have been spoken with an intent to urge the party to send challenge. 1 Russ. by Grea. 298.

Venue.] Where a letter, challenging to fight, is put into the post-office in on county, and delivered to the party in another, the venue may be laid in the forme county. If the letter is never delivered, the defendant's offence is the same. R. v Williams, 2 Camp. 506.

[*355] *CHEATING.

Nature of cheats indictable at common law, ... 355
Cheats affecting public justice, ... 355
Selling unwholesome provisions, ... 355
False accounting, &c., by public officers, ... 356
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Nature of cheats indictable at common law.] THE question, whether or no fraudulent transaction is indictable, as a cheat at common law, has become of les importance than it formerly was, because several cheats are now indictable by variou statutes, especially by the 24 & 25 Vict. c. 96, ss. 88, et seq. (replacing the 7 & Geo. 4, c. 29, s. 53), which include all that class of offences known as obtainin money and goods by *false pretences.*

The subject of cheats at common law is very fully considered in the second volum of Russ. Cr. by Greaves, b. 4, c. 39, s. 1. The line is there very carefully draw between such cheats and frauds as are of a public nature, and such as do not affec the public; and it is also strongly insisted on that the definition of a cheat indictabl

(1) A challenge to fight a duel out of the State is indictable, for its tendency is to produce a breac of the peace. State v. Farrier, 1 Hawks, 487; State v. Taylor, 1 Const. Rep. 107. The declaratio of the second are admissible against the principal. State v. Dupont, 2 McCord, 334.

It is a question for the jury whether the party intended the challenge or not. Gibbon's Case, Southard, 40; Commonwealth v. Levy, 3 Wheeler's C. C. 245; Wood's Case, 3 Rogers's Rec. 13 Parol testimony is admissible in explanation of the note. Commonwealth v. Hart, 6 J. J. Marsl 120. Expressing a readiness to accept a challenge does not amount to one. Commonwealth v. Tibb 1 Dana, 524.

Words insinuating a desire to fight with deadly weapons, as they tend to provoke such a comba may amount to a misdemeanor at common law. Id. 524.

Threats of great bodily harm, accompanied by acts showing a formed intention to put them in ex cution, if intended to put the person threatened in fear of their execution, and if they have th effect, and are calculated to produce that effect upon a person of ordinary firmness, constitute breach of the public peace, which is punishable by indictment. State v. Benedict, 11 Verm. 236.

at common law must include the term, that it is one *which affects or may affect, the public.*(1) The following are the more important frauds at common law.

Cheats affecting public justice.] All cheats which are levelled against the public justice of the kingdom are indictable at common law. 2 East, P. C. 821. Many such cheats, however, come under the head of the offence of *False Personation*, which will be separately considered. As to using false county court process, see 9 & 10 Vict. c. 95, s. 57, *infra*, tit. "Forgery."

Selling unwholesome provisions.] The selling unwholesome provisions, 4 Bl. Com. 162, or the giving any person unwholesome victuals, not fit for man to eat, *lucri causâ*, 2 East, P. C. 822, is an indictable offence. Where the defendant was indicted for deceitfully providing certain French prisoners with unwholesome bread, to the injury of their health, it was objected, in arrest of judgment, that the indictment could not be sustained, for it did not appear that what was done was in breach of any contract with the public, or of any civil or moral duty; but the judges on a reference to them, held the conviction right. R. v. Treeves, 2 East, P. C. 821. The defendant was indicted for supplying the royal military asylum at Chelsea with loaves not fit for the food of man, which he well knew, *&c. It appeared that many [*356] of the loaves were strongly impregnated with alum (prohibited to be used by 37 Geo. 3, c. 98, s. 21), and pieces as large as horsebeans were found; the defence was, that it was merely used to assist the operation of the yeast, and had been carefully employed. But Lord Ellenborough said, "Whoever introduces a substance into bread, which may be injurious to the health of those who consume it, is indictable if the substance be found in the bread in that injurious form, although, if equally spread over the mass, it would have done no harm." R. v. Dixon, 4 Campb. 12; 3 M. & S. 11.

False accounting, &c., by public officers.] Fraudulent malversations or cheats in public officers, are also the subject of an indictment at common law, as against overseers of the poor for refusing to account:(2) R. v. Comming, 5 Mod. 179; 1 Bott. 232; 2 Russ. by Grea. 278; or for rendering false accounts. R. v. Martin, 2 Campb. 269; 3 Chitty, C. L. 701; 2 Russ. by Grea. 278. Upon an application to the Court of King's Bench, against the minister and churchwardens of a parish, for misapplying moneys collected by a brief, and returning a smaller sum only as collected, the court, refusing the information, referred the prosecutors to the ordinary remedy by indictment. R. v. Ministers, &c., of St. Botolph, 1 W. Bl. 443. *Vide post*, tit. Officers.

Again, where two persons were indicted for enabling persons to pass their accounts with the pay-office, in such way as to defraud the government, and it was objected that it was only a private matter of account, and not indictable, the court decided otherwise, as it related to the public revenue. R. v. Bembridge, cited 6 East, 136.

False weights and measures.] Another class of frauds affecting the public, is cheating by false weights and measures, which carry with them the semblance of public authenticity.

It has never been doubted that selling by false weights and measures is at com-

(1) Resp. v. Teischer, 1 Dall. 338; Commonwealth v. Eckert, 2 Browne, 251; Resp. v. Powell, 1 Dall. 47.

(2) Resp. v. Powell, 1 Dall. 47; The Commonwealth v. Wade, 1 Whart. Dig. 347.

mon law an indictable offence, though selling a less quantity than is pretended is no so. Per Buller, J.; R. v. Young, 3 T. R. 304; 2 Russ. Cr. 280. Thus, if defend ant has measured corn in a bushel, and put something in the bushel to fill it up, o has measured it in a bushel short of the stated measure, he is indictable. R. v Pinkney, 2 East, P. C. 820. See R. v. Wheatley, *infra*, p. 358.

Cheating with cards, dice, &c.] This was considered an indictable offence a common law, but it is now regulated by the 8 & 9 Vict. c. 109, s. 17, which pro vides that "every person, who shall by any fraud or unlawful device, or ill practic in playing at or with cards, dice, tables, or other game, or in bearing a part in th stakes, wagers, or adventures, or in betting on the sides or hands of them that d play, or in wagering on the event of any game, sport, pastime, or exercise, win fron any person to himself, or any other or others, any sum of money or valuable thing shall be deemed guilty of obtaining such money or valuable thing from such othe person by a false pretence with intent to cheat or defraud such person of the same and, being convict thereof, shall be punished accordingly."

When it was stated in the indictment that the defendant *won* certain moneys, fron one H. F. B., but did not say to whom the money belonged, the indictment wa [*357] held good, because it followed the words *of the statute. R v. Moss, Dear & B. C. C. 104. A doubt was also raised in that case, whether the offence was no completed by *winning*, whether the money was *obtained* or not.

Using false tokens.] The using of false tokens is a cheat at common law. Th question was much considered in R. v. Cross, Dear. & B. C. C. 460; S. C. 27 L. J M. C. 541. There the prisoner was indicted for keeping and exposing for sale, an for selling to one H. A. F. a picture, upon which he had unlawfully painted the sig nature of J. L., intending thereby to denote that the picture was an original pictur by J. L. This was held, on a motion in arrest of judgment, to be a fraud at commor law. Cockburn, C. J., said, in delivering the judgment of the Court of Crimina Appeal, "We have carefully examined the authorities, and the result is, that w think if a person, in the course of his trade, openly and publicly carried on, puts false mark or token upon an article so as to pass it off as a genuine one, when in fac it was only a spurious one, and the article is sold, and money obtained by means o that false mark or token, that is a cheat at common law." But the indictment wa held bad for not alleging with sufficient clearness that it was *by means* of such fals tokens that the defendant was able to pass off the picture as genuine and obtain th money.

What cheats are not indictable.] The following cheats have been held not to b indictable at common law, though many of them would now be so by statute. Mos of these decisions are considered as resting on the ground that the cheats to whicl they relate are not of a public nature.

Where an imposition upon an individual is effected by a false affirmation or bar lie, in a matter not affecting the public, an indictment is not sustainable.(1) Thus where an indictment charged the defendants with selling to a person eight hundrec weight of gum, at the price of seven pounds per hundred weight, falsely affirmin that the gum was gum *seneca*, and that it was worth seven pounds per hundrec

(1) Commonwealth v. Warren, 6 Mass. 72. But when a man induces another, by false represen tations and false reading, to sign his name to a note for a different amount than that agreed upon, i has been held to be a cheat, for which he may be indicted. Hill v. The State, 1 Yerger, 76.

weight, whereas it was not gum *seneca*, and was not worth more than three pounds, &c., the indictment was quashed. R. v. Lewis, Sayer, 205.

So where the party accompanies his assertion with an apparent token *of no more value than his own assertion*. Thus, where an indictment at common law charged that Lara, deceitfully intending, by crafty means and devices, to obtain possession of divers lottery tickets, the property of A., pretended that he wanted to purchase them for a valuable consideration, and delivered to A. a fictitious order for payment of money subscribed by him (Lara), &c., purporting to be a draft upon his banker for the amount, which he knew he had no authority to do, and that it would not be paid; but which he falsely pretended to be a good order, and that he had money in the banker's hands, and that it would be paid, by virtue of which he obtained the tickets, and defrauded the prosecutor of the value; judgment was arrested, on the ground that the defendant was not charged with having used any false token to accomplish the deceit, for the banker's check, drawn by himself, entitled him to no more credit than his bare assertion that the money would be paid. R. v. Lara, 2 East, P. C. 819; 6 T. R. 565; 2 Leach, 652. But such an offence is punishable, as a *false pretence* under the statute. *Vide post*, title, "False Pretences." *So [*358] where the defendant, a brewer, was indicted for sending to a publican so many vessels of ale, marked as containing such a measure, and writing a letter, assuring him that they did contain such a measure, when in fact they did not contain such a measure, but so much less, &c., the indictment was quashed on motion, as containing no criminal charge. R. v. Wilder, cited 2 Burr, 1128; 2 East, P. C. 819. Upon the same principle, where a miller was indicted for detaining corn sent to him to be ground, the indictment was quashed, it being merely a private injury, for which an action would lie. R. v. Channell, 2 Str. 793; 1 Sess. Ca. 366; 2 East, P. C. 118. So selling sixteen gallons of ale as eighteen: Lord Mansfield said, "It amounts only to an unfair dealing and an imposition upon this particular man, for which he could not have suffered but from his own carelessness in not measuring the liquor when he received it; whereas fraud, to be the object of a criminal prosecution, must be of that kind which in its nature is calculated to defraud numbers, as false weights and measures, false tokens, or where there is a conspiracy." R. v. Wheatley, 2 Burr, 1125; 1 W. Bl. 273; 2 East, P. C. 818. Where a miller was charged with receiving good barley and delivering meal in return different from the produce of the barley, and musty, &c., this was held not to be an indictable offence. Lord Ellenborough said, that if the case had been that the miller had been owner of a soke mill, to which the inhabitants of the vicinage were bound to resort, in order to get their corn ground, and that he, abusing the confidence of his situation, had made it a color for practising a fraud, this might have presented a different aspect; but as it then stood, it seemed to be no more than the case of a common tradesman, who was guilty of a fraud in a matter of trade or dealing, such as was adverted to in R. v. Wheatley (*supra*), and the other cases, as not being indictable.(1) R. v. Hayne, 4 M. & S. 214; *vide*, R. v. Wood, 1 Sess. Ca. 217; 2 Russ. by Grea. 285. A baker had contracted with the guardians of a parish to deliver loaves of a certain weight to the poor people. The relieving officer gave the poor people tickets, which they were to take to the baker. He was to give them loaves on their presenting their tickets to him, and afterwards to return the tickets, as his vouchers, once a week, with a statement of the amount of the loaves, to the relieving officer, who would

(1) People v. Babcock, 7 Johns. 201; Commonwealth v. Warren, 6 Mass. 72; People v. Stone, 9 Wind. 182; State v. Stroll, 1 Richardson, 244.

give him credit in his account for the amount. The baker was to be paid by the guardians some months later; and by a clause in the contract, the guardians had the power, in case of a breach of contract by the baker, of deducting any damages caused by such breach from the amount to be ultimately paid. The baker supplied the poor people, who presented tickets, with loaves short of the contract weight. It was held, that this was not a fraud indictable at common law. R. v. Eagleton, 24 L. J. M. C. 858. The prisoner was, however, convicted of attempting to obtain money by false pretences. See that title, *post*.

The indictment stated that the defendant came to M. in the name of J., to borrow 5*l*., on which M. lent her the 5*l*., *ubi re verâ* she never had any authority from J. to borrow the money. The defendant being convicted, on motion in arrest of judgment the whole court thought this not an indictable offence. Holt, C. J., put the following case: A young man, seemingly of age, came to a tradesman to buy some commodities, who asked him if he was of age, and he told him he was, upon which he let [*359] him have the goods, and upon an action, *he pleaded *infra ætatem*, and was found to be under age half a year; and afterwards the tradesman brought an action upon the case against him for a cheat; but, after a verdict for the plaintiff, judgment was arrested. Powell, J., said, "If a woman, pretending herself to be with child, does with others conspire to get money, and for that purpose goes to several young men, and says to each that she is with child by him, and that, if he will not give her so much money, she will lay the bastard to him, and by these means gets money of them, this is indictable." Holt, C. J., added, "I agree it is so when she goes to several, but not to one particular person." R. v. Glanvill, Holt, 354. From the last observation of Holt, C. J., it appears that Powell, J., was speaking of an indictment for *cheating*, and not, as might be supposed, from using the words, "does with others conspire," of an indictment for conspiracy.

[*360] *CONCEALING BIRTH OF CHILD.

Statute, ... 360
Secret disposition of the body, ... 360

Statute.] THE offence of concealing the birth of a child was first provided against by the 21 Jac. 1, c. 27, which was repealed by the 43 Geo. 3, c. 58. The latter statute was also repealed and the offence provided for by the 9 Geo. 4, c. 31, s. 14. This is also repealed; and now, by the 24 & 25 Vict. c. 100, s. 60, "if any woman shall be delivered of a child, every person who shall, by any secret disposition of the dead body of the said child, whether such child died before, at, or after its birth, endeavor to conceal the birth thereof, shall be guilty of a misdemeanor, and, being convicted thereof, shall be liable at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labor: provided, that if any person tried for the murder of any child shall be acquitted thereof, it shall be lawful for the jury by whose verdict such person shall be acquitted, to find, in case it shall so appear in evidence, that the child had recently been born, and that such person did, by some secret disposition of the dead body of such child, endeavor to conceal the birth thereof; and thereupon the court may pass such sentence, as if such person had been convicted upon an indictment for the concealment of the birth."(1)

(1) See Pennsylvania v. McKee, Addison, 1; Boyles v. The Commonwealth, 2 Serg. & Rawle, 50

Upon a prosecution for this offence, the prosecutor, after establishing the birth of the child, must prove the secret burying or other disposal of the dead body, and the endeavor to conceal the birth. In general, the evidence to prove the first points will also tend to establish the last.

Secret disposition of the body.] What has been a sufficient disposal of the body has hitherto been a matter of doubt. Where the evidence was, that the prisoner had been delivered of a child, and had placed it in a drawer, where it was found locked up, the drawer being opened by a key taken from the prisoner's pocket, Maule, J., directed an acquittal, being of opinion that the former statute by the words, "buried or otherwise disposed of," contemplated a final disposing of the body. R. v. Ash, 2 Moo. & R. 294. So where the prisoner had placed the child in a box in her bedroom, Rolfe, B., held, that the disposing of the body must be in some place intended for its final deposit. R. v. Bell, MS. 2 Moo. & R. 294. These authorities have since been overruled. R. v. Goldthorpe, 2 Moo. C. C. R. 244. There the prisoner had been suspected of being with child, but always denied it, and after her delivery persisted in denying that she had been delivered, but on being pressed by the surgeon who examined her, she confessed that the child was between the bed and mattress, *where it was discovered. The case having been reserved, was considered [*361] at a meeting of the judges in Michaelmas Term, 1841, at which all the judges, except Alderson, B., Patteson, Erskine, and Bosanquet, JJ., were present, when Lord Abinger, C. B., Maule, J., and Rolfe, B., thought the conviction bad; the other judges held it good, and the conviction was affirmed. The point was again reserved in R. v. Perry, Dears. C. C. R. 473; S. C. 24 L. J. M. C. 137. There the prisoner placed the dead body of the child under the holster, with the intention of endeavoring, as far as she could, to conceal the body from the surgeon, but with the intention of removing it elsewhere when an opportunity offered. This was held by the Court of Criminal Appeal (Pollock, C. B., *dissentiente*) to be disposing of a dead body within the statute. And it appears from the case of R. v. Opie, 8 Cox, C. C. 332, that Martin, B., took the same view as the Lord Chief Baron.

Where a prisoner was stopped going across a yard, in the direction of a privy, with a bundle, which on examination was found to be a cloth sewed up, containing the body of a child; it was held by Gurney, B., that the prisoner could not be convicted, the offence not having been completed. R. v. Snell, 2 Moo. & R. 44. Evidence was given that the prisoner denied her pregnancy, and also, after the birth of the child, denied that also; but she afterward confessed to a surgeon that she had borne a child. The body of the child was, on the same day, found among the soil in the privy. Patteson, J., held it to be essential to the commission of the offence, that the prisoner should have done some act of disposal of the body after the child was dead; therefore if she had gone to the privy for another purpose, and the child came from her unawares, and fell into the soil and was suffocated, she must be acquitted of the charge, notwithstanding her denial of the birth of the child. The prisoner was acquitted. R. v. Turner, 8 C. & P. 755: 34 E. C. L. R. See, also R. v. Coxhead, 1 C. & K. 623: 47 E. C. L. R.

Frances Douglas and one Robert Hall were indicted for the murder of a female child, of which they were acquitted; whereupon the jury were desired to inquire whether the female was guilty of endeavoring to conceal the birth. The prisoners had been living together for some time, and in the night, or rather about four in the morning, she was delivered of the child, in the presence of the male prisoner, who was the father of it, and who, with his two sons, aged fourteen and ten, all slept on

the same pallet with her, up four pair of stairs. The male prisoner very soon afterwards put the child (which had not been separated from the after-birth) into a pan, carried it down stairs into the cellar, and threw the whole into the privy, the female prisoner remaining in bed up stairs. She was proved to have said she knew it was to be done. The fact of her being with child was, some time before her delivery, known by her mother, who lived at some distance, and was apparent to other women. No female was present at the delivery; one had been sent for at the commencement of the labor, about twelve at night, but was so ill she could not attend. There were no clothes prepared, or other provision made, but the parties were in a state of the most abject poverty and destitution. The jury found her guilty of endeavoring to conceal the birth, and two points were reserved for the opinion of the judges: 1st, Whether there was evidence to convict the prisoner as a principal? 2dly, whether [*362] in point of law the conviction was good? The case was argued before *all the judges (except Park, J.), who were of opinion that the communication made to other persons was only evidence, but no bar, and that the conviction was good; but they recommended a pardon. R. v. Douglas, 1 Moo. C. C. 480. So in R. v. Skelton, 3 C. & K. 119, V. Williams, J., directed the jury, that if a woman be delivered of a child which is dead, and a man take the body and secretly bury it, she was indictable for the concealment by secret burying under s. 14 of the former statute, and he for aiding and abetting under s. 31, if there was a common purpose in both in thus endeavoring to conceal the birth of the child; but that the jury must be satisfied, not only that she wished to conceal the birth, but was a party to the carrying that wish into effect by the secret burial by the hand of the man, in pursuance of a common design between them. Platt, B., had ruled in a similar way in R. v. Bird, 2 C. & K. 817: 61 E. C. L. R.

An indictment for endeavoring to conceal the birth of a child need not state whether the child died before, at, or after the birth. R. v. Coxhead, 1 C. & K. 623: 47 E. C. L. R.

Upon an indictment for the murder of a child, any person, on failure of the proof as to the murder, may be now convicted by the statute of endeavoring to conceal the birth. Formerly no person but the mother could be so convicted. R. v. Wright, 9 C. & P. 154: 38 E. C. L. R. Where the bill for murder was not found by the grand jury, and the prisoner was tried for murder on the coroner's inquisition; it was held, that she might be found guilty of the concealment, the words of the stat. 43 Geo. 3, being, that "it shall be lawful for the jury, by whose verdict any person *charged* with such murder shall be acquitted, to find," and the judges holding that the coroner's inquisition was a *charge*, so as to justify the finding of the concealment. R. v. Maynard, Russ. & R. 240; R. v. Cole, 2 Leach, 1095; 3 Camb. 371. It may be observed, that the word *charge*, does not occur in the statute 9 Geo. 4, c. 31; yet there seems no doubt that the prisoner might be so convicted under the new statute, for she is "tried for the murder of her child," as much on the inquisition as the indictment. 1 Russ. by Gr. 514, *n*.

[*363] *CHILDREN—OFFENCES RELATING TO.

Child-stealing, ... 363
Abandoning or exposing children, ... 363
Carnal knowledge of children, ... 363

Child-stealing.] THE offence of child-stealing is provided for by the 24 & 25 Vict. c. 100, s. 56, *supra*, 244.

Abandoning or exposing children.] The ill-treatment of children by persons who are their parents or guardians has frequently been the subject of criminal prosecution, and in many cases without success.

In some cases it has been attempted to make the abandonment itself the ground of a criminal prosecution, but it is now definitely settled that abandonment alone, without proof that the child's health was thereby injured, is not sufficient. R. v. Frend, Russ. & Ry. 20; R. v. Cooper, 1 Den. C. C. 454; R. v. Hogan, 2 Den. C. C. 277; R. v. Phillpot, Dears. C. C. 179. From what was said by Jervis, C. J., in delivering judgment in the last case, it appears also that the injury must be such as permanently to affect the health of the child, in analogy to the provision of the 14 & 15 Vict. c. 11, s. 1 (24 & 25 Vict. c. 100, s. 26).

These cases, however, assume that if the child's health were permanently injured the parent or guardian would be guilty of a misdemeanor.

The law on the subject is now contained in the 24 & 25 Vict. c. 100, s. 27, which provides that, "Whosoever shall unlawfully abandon or expose any child being under the age of two years, whereby the life of such child shall be endangered, or the health of such child shall have been or shall be likely to be permanently injured, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labor."

Carnal knowledge of children.] See tit. "Rape."

As to prosecution by guardians and overseers for offences relating to children, see *supra*, p. 277.

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*COIN, OFFENCES RELATING TO. [*364]

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THE laws against coining and other similar offences were consolidated by the 2 Wm. 4, c. 34, by which the former statutes were repealed. This statute has been now repealed, and the provisions against these offences are now contained in the 24 & 25 Vict. c. 99.

[*365] **Interpretation of terms.*] By s. 1, "In the interpretation of and for the purposes of this act, the expression 'the queen's current gold or silver coin,' shall include any gold or silver coined in any of her majesty's mints, or lawfully current by virtue of any proclamation or otherwise in any part of her majesty's dominions, whether within the United Kingdom or otherwise; and the expression 'the queen's copper coin,' shall include any copper coin and any coin of bronze or mixed metal coined in any of her majesty's mints, or lawfully current by virtue of any proclamation or otherwise, in any part of her majesty's said dominions; and the expression 'false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin,' shall include any of the queen's current coin which shall have been gilt, silvered, washed, colored, or cased over, or in any manner altered, so as to resemble, or be apparently intended to resemble or pass for any of the queen's current coin of a higher denomination; and the expression 'the queen's current coin,' shall include any coin coined in any of her majesty's mints, or lawfully current by virtue of any proclamation or otherwise in any part of her majesty's said dominions, and whether made of gold, silver, copper, bronze, or mixed metal; and where the having any matter in the custody or possession of any person is mentioned in this act, it shall include not only the having of it by himself in his personal custody or possession, but also the knowingly and wilfully having it in the actual custody or possession of any other person, and also the knowingly and wilfully having it in any dwelling-house or other building, lodging, apartment, field or other place, open or inclosed, whether belonging to or occupied by himself or not, and whether such matter shall be so had for his own use or benefit, or for that of any other person."

Counterfeiting the gold and silver coin.] By s. 2, "Whosoever shall falsely make or counterfeit any coin, resembling, or apparently intended to resemble or pass for any of the queen's current gold or silver coin shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Coloring coin or metal with intent to make it pass as gold or silver coin.] By s. 3, "Whosoever shall gild or silver, or shall, with any wash or materials capable of producing the color or appearance of gold or of silver, or by any means whatsoever wash, case over, or color any coin, whatsoever, resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin, or shall gild or silver, or shall, with any wash or materials capable of producing the color or appear-

ance of gold or of silver, or by any means whatsoever wash, case over, or color any piece of silver or copper, or of coarse gold or coarse silver, or of any metal or mixture of metals respectively, being of a fit size and figure to be coined, and with intent that the same shall be coined into false and counterfeit coin, resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin; or shall gild, or shall, with any wash or materials capable of producing the color *or [*366] appearance of gold, or by any means whatsoever wash, case over, or color any of the queen's current silver coin, or file, or in any manner alter such coin, with intent to make the same resemble or pass for any of the queen's current gold coin; or shall gild or silver, or shall, with any wash or materials capable of producing the color or appearance of gold or of silver, or by any means whatsoever wash, case over, or color any of the queen's current copper coin, or file, or in any manner alter such coin, with intent to make the same resemble or pass for any of the queen's current gold or silver coin, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Impairing or diminishing gold or silver coin.] By s. 4, "Whosoever shall impair, diminish, or lighten any of the queen's current gold or silver coin, with intent that the coin so impaired, diminished, or lightened, may pass for the queen's current gold or silver coin, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Possession of filings or clippings of gold or silver coin.] By s. 5, "Whosoever shall unlawfully have in his custody or possession any filings or clippings, or any gold or silver bullion, or any gold or silver in dust, solution, or otherwise, which shall have been produced or obtained by impairing, diminishing, or lightening any of the queen's current gold or silver coin, knowing the same to have been so produced or obtained, shall in England and Ireland be guilty of felony, and in Scotland, of a high crime and offence, and being convicted thereof, shall be liable at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Buying or selling counterfeit gold or silver coin.] By s. 6, "Whosoever without lawful authority or excuse (the proof whereof shall lie on the party accused) shall buy, sell, receive, pay, or put off, or offer to buy, sell, receive, pay, or put off any false or counterfeit coin resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin, at or for a lower rate or value than the same imports, or was apparently intended to import, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement. And in any indictment for any *such offence as in this section aforesaid, it [*367]

shall be sufficient to allege that the party accused did buy, sell, receive, pay, or put off, or did offer to buy, sell, receive, pay, or put off the false or counterfeit coin at or for a lower rate or value than the same imports, or was apparently intended to import, without alleging at or for what rate, price, or value the same was bought, sold, received, paid, or put off, or offered to be bought, sold, received, paid, or put off."

Importing counterfeit gold or silver coin.] By s. 7, "Whosoever without lawful authority or excuse (the proof whereof shall lie on the party accused) shall import or receive into the United Kingdom from beyond the seas, any false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin, knowing the same to be false or counterfeit, shall in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any time not exceeding two years, with or without hard labor, and with or without solitary confinement."

Exporting counterfeit coin.] By section 8, "Whosoever without lawful authority or excuse (the proof whereof shall lie on the party accused) shall export, or put on board any ship, vessel, or boat, for the purpose of being exported from the United Kingdom, any false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the queen's current coin, knowing the same to be false or counterfeit, shall in England and Ireland be guilty of a misdemeanor, and in Scotland of a crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Uttering counterfeit gold or silver coin.] By s. 9, "Whosoever shall tender, utter, or put off any false or counterfeit coin resembling, or apparently intended to resemble or pass for any of the queen's current gold or silver coin, knowing the same to be false or counterfeit, shall in England and Ireland be guilty of a misdemeanor, and in Scotland of a crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding one year, with or without hard labor, and with or without solitary confinement."

Uttering counterfeit gold or silver coin, having possession of other counterfeit coin.] By s. 10, "Whosoever shall tender, utter, or put off any false or counterfeit coin, resembling, or apparently intended to resemble or pass for any of the queen's current gold or silver coin, knowing the same to be false or counterfeit, and shall, at the time of such tendering, uttering, or putting off, have in his custody or possession, besides the false or counterfeit coin so tendered, uttered, or put off, any other piece of false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the queen's current gold or silver coin," is liable to the same punishment as for the next offence.

[*368] *Uttering twice within ten days.*] By the same section, "Whosoever *shall, either on the day of such tendering, uttering, or putting off, or within the space of ten days then next ensuing, tender, utter, or put off any false or counterfeit coin, resembling, or apparently intended to resemble or pass for any of the queen's current

gold or silver coin, knowing the same to be false or counterfeit, shall in England and Ireland be guilty of a misdemeanor, and in Scotland of a crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Having possession of counterfeit gold or silver coin.] By s. 11, "Whosoever shall have in his custody or possession three or more pieces of false or counterfeit coin, resembling, or apparently intended to resemble or pass for any of the queen's current gold or silver coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same or any of them, shall in England and Ireland be guilty of a misdemeanor, and in Scotland of a crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Uttering or having possession of counterfeit gold or silver coin after a previous conviction.] By s. 12, "Whosoever, having been convicted, either before or after the passing of this act, of any such misdemeanor or crime and offence, as in any of the last three preceding sections mentioned, or of any felony or high crime and offence against this or any former act relating to the coin, shall afterwards commit any of the misdemeanors or crimes and offences in any of the said sections mentioned, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Uttering foreign coin, medals, &c., as current gold and silver coin.] By s. 13, "Whosoever shall, with intent to defraud, tender, utter, or put off as or for any of the queen's current gold or silver coin any coin not being such current gold or silver coin, or any medal or piece of metal, or mixed metal, resembling in size, figure, and color the current coin as or for which the same shall be so tendered, uttered, or put off, such coin, medal, or piece of metal, or mixed metal so tendered, uttered, or put off, being of less value than the current coin as or for which the same shall be so tendered, uttered, or put off, shall in England and Ireland be guilty of a misdemeanor, and in Scotland of a crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding one year, with or without hard labor, and with or without solitary confinement."

Counterfeiting, &c., copper or bronze coin.] By s. 14, the various offences relating to the copper coin are consolidated into one clause, *and it is enacted, [*369] that, "Whosoever shall falsely make or counterfeit any coin resembling, or apparently intended to resemble or pass for any of the queen's current copper coin, and whosoever without lawful authority or excuse (the proof of which authority shall lie on the party accused) shall knowingly make or mend, or begin or proceed to make or mend, or buy or sell, or have in his custody or possession any instrument, tool, or engine adapted and intended for the counterfeiting any of the queen's current copper coin; or shall buy, sell, receive, pay, or put off, or offer to buy, sell, receive, pay, or put off any false or counterfeit coin resembling or apparently intended to resemble or

pass for any of the queen's current copper coin, at or for a lower rate or value than the same imports, or was apparently intended to import, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

By s. 1 the words "copper coin" include coin of bronze or mixed metal.

Uttering base copper or bronze coin.] By s. 15, "Whosoever shall tender, utter, or put off any false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the queen's current copper coin, knowing the same to be false or counterfeit, or shall have in his custody or possession three or more pieces of false or counterfeit coin, resembling or apparently intended to resemble or pass for any of the queen's current copper coin, knowing the same to be false or counterfeit, and with intent to utter or put off the same or any of them, shall in England and Ireland be guilty of a misdemeanor, and in Scotland of a crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding one year, with or without hard labor, and with or without solitary confinement."

Defacing coin.] By s. 16, "Whosoever shall deface any of the queen's current gold, silver, or copper coin, by stamping thereon any names or words, whether such coin shall or shall not be thereby diminished or lightened, shall in England and Ireland be guilty of a misdemeanor, and in Scotland of a crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding one year, with or without hard labor."

Counterfeiting foreign gold and silver coin.] By s. 18, "Whosoever shall make or counterfeit any kind of coin not being the queen's current gold or silver coin, but resembling or apparently intended to resemble or pass for any gold or silver coin of any foreign prince, state, or country, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

[*370] **Importing foreign counterfeit gold and silver coin.*] By s. 19, "Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall bring or receive into the United Kingdom any such false or counterfeit coin, resembling or apparently intended to resemble or pass for any gold or silver coin of any foreign prince, state, or country, knowing the same to be false or counterfeit, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Uttering foreign counterfeit gold and silver coin.] By s. 20, "Whosoever shall

tender, utter, or put off any such false or counterfeit coin, resembling or apparently intended to resemble or pass for any gold or silver coin of any foreign prince, state, or country, knowing the same to be false or counterfeit, shall in England and Ireland be guilty of a misdemeanor, and in Scotland of a crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding six months, with or without hard labor."

Second offence of uttering foreign counterfeit gold and silver coin.] By s. 21, "Whosoever, having been so convicted as in the last preceding section mentioned, shall afterwards commit the like offence of tendering, uttering, or putting off any such false or counterfeit coin as aforesaid, knowing the same to be false or counterfeit, shall in England and Ireland be guilty of a misdemeanor, and in Scotland of a crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Third offence of uttering foreign counterfeit gold and silver coin.] By the same section, "Whosoever, having been so convicted of a second offence, shall afterwards commit the like offence of tendering, uttering, or putting off any such false or counterfeit coin as aforesaid, knowing the same to be false or counterfeit, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Counterfeit foreign coin other than gold or silver coin.] By s. 22, "Whosoever shall falsely make or counterfeit any kind of coin not being the queen's current coin, but resembling or apparently intended to resemble or pass for any copper coin, or any other coin made of any metal or mixed metals of less value than the silver coin of any foreign prince, state, or country, shall in England and Ireland be guilty of a misdemeanor, and in Scotland of a crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, for the first offence to be imprisoned for any term not exceeding *one year, and for the second offence to be kept in [*371] penal servitude for any term not exceeding seven years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Making, mending, or having possession of coining-tools.] By s. 24, "Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall knowingly make or mend, or begin or proceed to make or mend, or buy or sell, or have in his custody or possession any puncheon, counter-puncheon, matrix, stamp, die, pattern or mould, in or upon which there shall be made or impressed, or which will make or impress, or which shall be adapted and intended to make or impress the figure, stamp, or apparent resemblance of both or either of the sides of any of the queen's current gold or silver coin, or of any coin of any foreign prince, state, or country, or any part or parts of both or either of such sides; or shall make or mend, or begin or proceed to make or mend, or shall buy or sell, or have in his custody or possession any edger, edging, or other tool, collar, instrument, or engine adapted and intended for the marking of coin round the edges, with letters, grainings, or other

marks or figures apparently resembling those on the edges of any such coin as in this section aforesaid, knowing the same to be so adapted and intended as aforesaid; or shall make or mend, or begin or proceed to make or mend, or shall buy or sell, or have in his custody or possession any press for coinage, or any cutting engine for cutting by force of a screw, or of any other contrivance, round blanks out of gold, silver, or other metal, or mixture of metals, or any other machine, knowing such press to be a press for coinage, or knowing such engine or machine to have been used, or to be intended to be used for, or in order to the false making or counterfeiting any such coin as in this section aforesaid, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Conveying coining-tools, &c., out of the mint.] By s. 25, "Whosoever, without lawful authority or excuse (the proof whereof shall lie upon the party accused) shall knowingly convey out of any of her majesty's mints, any puncheon, counter-puncheon, matrix, stamp, die, pattern, mould, edger, edging, or other tool, collar, instrument, press, or engine used or employed in or about the coining of coin, or any useful part of any of the several matters aforesaid, or any coin, bullion, metal or mixture of metals, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Venue.] By s. 28, "Where any person shall tender, utter, or put off any false or counterfeit coin in one county or jurisdiction, and shall also tender, utter, or put off any other false or counterfeit coin in any other county or jurisdiction, either on the [*372] day of such first-mentioned *tendering, uttering, or putting off, or within the space of ten days next ensuing, or where two or more persons, acting in concert in different counties or jurisdiction, shall commit any offence against this act, every such offender may be dealt with, indicted, tried, and punished, and the offence laid and charged to have been committed in any one of the said counties or jurisdictions, in the same manner in all respects as if the offence had been actually and wholly committed within such one county or jurisdiction."

As to offences committed within the jurisdiction of the Admiralty, see s. 36, *supra*, tit. "Venue," p. 235.

Proof of coin being counterfeit.] By s. 29, "Where, upon the trial of any person charged with any offence against this act, it shall be necessary to prove that any coin produced in evidence against such person is false or counterfeit, it shall not be necessary to prove the same to be false and counterfeit by the evidence of any moneyer or other officer of her majesty's mint, but it shall be sufficient to prove the same to be false or counterfeit by the evidence of any other credible witness."

When the offence of counterfeiting is complete.] By s. 30, "Every offence of falsely making or counterfeiting any coin, or of buying, selling, receiving, paying, tendering, uttering, or putting off, or of offering to buy, sell, receive, pay, utter, or put off any false or counterfeit coin against the provisions of this act, shall be deemed to be

complete, although the coin so made or counterfeited, or bought, sold, received, paid, tendered, uttered, or put off, or offered to be bought, sold, received, paid, uttered, or put off, shall not be in a fit state to be uttered, or the counterfeiting thereof shall not be finished or perfected."

Punishment of principals in the second degree, and accessories.] By s. 35, "In the case of every felony punishable under the act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act shall be liable to be imprisoned for any term not exceeding two years, with or without hard labor.

Coin of mixed metal.] The provisions of the 2 & 3 Will. 4, c. 34, which apply to copper coin, were applied to coin of mixed metal by the 22 & 23 Vict. c. 30. Now that the 2 & 3 Will. 4, c. 34, is repealed, the 22 & 23 Vict. c. 30, though unrepealed, becomes inoperative. But by the interpretation clause of the present statute the term "copper coin" is to include all current coin, whether copper or not, which is not gold and silver; so that the sections which apparently only apply to copper coin really include offences relating to any of the bronze coins now in circulation.

Proof of counterfeiting.] It is apprehended that, notwithstanding the provision in s. 30, *supra*, there must still be a substantial making or counterfeiting proved, and that it will not be sufficient merely to show that steps have been taken towards a counterfeiting. The clause appears to have been intended to provide against such cases as that of R. v. Harris, 1 Lea. 135, where the metal requiring a process of *beating, filing, and immersing in *aqua fortis*, to render the coin passable, [*373] the judges held, that the prisoner could not be convicted of counterfeiting. See also R. v. Varley, 1 Leach, 76; Wm. Black. 682; 1 East, P. C. 164.

The question whether the coin alleged to be counterfeit does, in fact, resemble or is apparently intended to resemble or pass for the king's current gold or silver coin, is one of fact for the jury; in deciding which they must be governed by the state of the coinage at the time.(1) Thus where the genuine coin is worn smooth, a counterfeit bearing no impression is within the law; for it may deceive the more readily for bearing no impression, and in the deception the offence consists. R. v. Welsh, 1 East, P. C. 164; 1 Leach, 293; R. v. Wilson, 1 Leach, 285. Nor will a variation, not sufficient to prevent the deception, render the coin less a counterfeit. Thus it is said by Lord Hale, that counterfeiting the lawful coin of the kingdom, yet with some small variation in the inscription, effigies, or arms, is a counterfeiting of the king's money. 1 Hale, P. C. 215.

What is current coin may be proved by evidence of common usage or reputation. 1 Hale, P. C. 215.

Proof of uttering.] Upon an indictment for the simple offence of uttering, the prosecutor must prove the act of uttering, &c., as charged, that the money was counterfeit, and that the prisoner knew it to be such. The practice of "ringing the changes" was held to be an offence under the repealed statute, 15 Geo. 2, c. 28. R. v. Frank, 1 Leach, 644; and it is so likewise under the present act. The coin must be proved to be counterfeit in the usual way.

The mode of proving guilty knowledge has been already considered at length, *ante*, p. 89.

(1) Case of Quinn et al., 6 Rogers's Rec. 63.

Where several persons are charged with an uttering, it must appear either that they were all present, or so near to the party actually uttering as to be able to afford him aid and assistance. Three persons were indicted for uttering a forged note, and it appeared that one of them uttered the note in Gosport while the other two were waiting at Portsmouth till his return, it having been previously concerted that the prisoner who uttered the note should go over the water for the purpose of passing the note, and should rejoin the other two. All the prisoners having been convicted, it was held, that the two prisoners who had remained in Portsmouth, not being present at the time of uttering, or so near as to be able to afford any aid or assistance to the accomplice who actually uttered the note, were not principals in the felony. R. v. Soares, Russ. & Ry. 25; 2 East, P. C. 974. The two prisoners were charged with uttering a forged note. It appeared that they came together to Nottingham, and left the inn there together, and that on the same day, between two and three hours from their leaving the inn, one of the prisoners passed the note; both the prisoners being convicted, the judges held the conviction wrong as to the prisoner who was not present, not considering him as present aiding and abetting. R. v. Davis, Russ. & Ry. 113.

If two utterers of counterfeit coin, with a general community of purpose go different ways and utter coin apart from each other, and not near enough to assist each other, their respective utterings are not joint utterings by both. R. v. Manners, 7 C. [*374] & P. 801: 32 E. C. L. R. But it *was held by Erskine, J., that if two persons having jointly prepared counterfeit coin, plan the uttering, and go on a joint expedition, and utter in concert and by previous arrangement the different pieces of coin, then the act of one would be the act of both, though they might not be proved to be actually together at each uttering. R. v. Hurse, 2 Moo. & R. 360; *Acc.* R. v. Greenwood, 2 Den. C. C. R. 453; S. C. 21 L. J. M. C. 127.

The giving of a piece of counterfeit coin in charity was held not an uttering within the statute, although the person might know it to be counterfeit, for there must be some intention to defraud. R. v. Page, 8 C. & P. 122: 34 E. C. L. R. See 1 Russ. by Grea. (*n*), where the correctness of this decision is doubted. The ruling in R. v. Page has also been thought questionable by Denman, C. J., and Coltman, J., in a recent trial at the Central Criminal Court, in which it was held, that if a person gave a counterfeit coin to a woman with whom he had shortly before had intercourse, it was an uttering within the 2 Wm. 4, c. 34, s. 7; Anon. 1 Cox, C. C. 250.

"To utter and put off" a thing is to "offer it, whether taken or not." Per Jervis, C. J., in R. v. Welch, 20 L. J. M. C. 161.

As to a joint uttering by a husband and wife, see *post*, tit. "Coercion by Husband."

Proof of possession of counterfeit coin.] It is a very frequent question, what amounts to the possession of counterfeit coin, both as aggravating the uttering and as itself a substantive offence. The following cases have been decided on this point. Having a large quantity of counterfeit coin in possession, many of each sort being of the same date, and made in the same mould, and each piece being wrapped in a separate piece of paper, and the whole distributed in different pockets of the dress, is some evidence that the possessor knew that the coin was counterfeit and intended to utter it. R. v. Jarvis, 25 L. J. M. C. 30. In the following case, two persons were convicted of a joint uttering, having another counterfeit shilling in their possession, although the latter coin was found upon the person of one of them only. It appeared that one of the prisoners went into a shop and there purchased a loaf, for

which she tendered a counterfeit shilling in payment. She was secured, but no more counterfeit money was upon her. The other prisoner who had come with her, and was waiting at the shop-door, then ran away, but was immediately secured, and fourteen bad shillings were found upon her, wrapped in gauze paper. It was objected that the complete offence stated in the indictment was not proved against either of the prisoners; Garrow, B., was of opinion, that the prisoners coming together to the shop, and the one staying outside, they must both be taken to be jointly guilty of the uttering, and that it was for the jury to say whether the possession of the remaining pieces of bad money was not joint. The jury found both the prisoners guilty. R. v. Skerritt, 2 C. & P. 427: 12 E. C. L. R. The prisoner was indicted for having in his possession three or more pieces of counterfeit coin. The prisoner was taken in company with a man named Large. On their being searched, only two bad shillings were found on the former, but upon Large were found sixteen bad shillings. The jury found, that the prisoner knew that Large had the sixteen bad shillings in his possession: that he knew that all the shillings found on Large and himself were counterfeit, and that both parties had the common purpose of *uttering them. [*375] Alderson, B., thereupon directed the jury, that the possession of Large was the possession of the prisoner; and if so, that the latter had three or more counterfeit pieces in his possession, although only two were found upon him. The prisoner being convicted, the learned judge reserved the point for the consideration of the judges, thinking that a difficulty arose out of the interpretation clause, which seemed to confine the possession to the personal custody or possession of the party accused. On the case being argued before the judges, they were divided in opinion; but a majority held, that the possession of Large was the possession of the prisoner, and that the latter was properly convicted. R. v. Rogers, 2 M. C. C. 85; S. C. 2 Lewin, C. C. 119, 297.

So where one of two persons in company utters counterfeit coin, and other counterfeit coin is found on the other person, they are jointly guilty of the aggravated offence, if acting in concert and both knowing of the possession. R. v. Gerrish & Brown, 2 Moo. & R. 219; see also R. v. Williams, Carr. & M. 259: 41 E. C. L. R.(1)

The guilty knowledge will be proved in the same manner as under an indictment for uttering false coin, *ante*, p. 89.

Proceedings for second offence.] If it is intended to punish the prisoner as for a second offence, under s. 21, he must be specially indicted; for upon the corresponding clause of the 2 & 3 Wm. 4, c. 34, s. 7, where a prisoner was convicted under the first part of the above section of two separate utterings contained in two counts of the same indictment, the judges held, that one judgment for two years' imprisonment was bad, and that there should have been two consecutive judgments of one year's imprisonment each. R. v. Robinson, 1 Moo. C. C. 413.

Offences relating to coining-tools.] The prisoner employed a diesinker to make, for a pretended innocent purpose, a die, calculated to make shillings; the diesinker

(1) Having in possession instruments for coining, with an intent to counterfeit money, is a misdemeanor at common law. Murphy's Case, 4 Rogers's Rec. 42; Dorsett's Case, 5 Id. 77.

An averment that the defendant *secretly* kept instruments for counterfeiting, sufficiently avers *a scienter*. Sutton v. The State, 9 Ohio, 133.

On an indictment for counterfeiting coin, the criminal participation of the defendant may be inferred by the jury from the fact that a large quantity of spurious coin, and various instruments and appliances for coining, were found in his possession, unless such possession be satisfactorily explained by him. United States v. Bums, 5 McLean, 23; United States v. King, Ibid. 208.

suspecting fraud, informs the commissioners of the mint, and under their directions made the die, for the purpose of detecting the prisoner. On a case reserved it was held, that the diesinker was an innocent agent, and that the prisoner was rightly convicted as a principal, under the 2 Wm. 4, c. 34, s. 10. R. v. Bannen, 2 Moody, C. C. R. 309; S. C. 1 C. & K. 295: 47 E. C. L. R. The particular tool specified must then be proved.(1) With regard to all the tools mentioned in the new statute, it should be observed, that they are described to be such as will impress "any *part* or *parts* of both or either of the sides" of any of the king's current gold or silver coin; a description of tool not included in the former acts. The new statute, like the former, divides the coining instruments into those upon which there shall be "made or impressed" and those which will "make and impress" the figure, &c., of both or either of the sides of the lawful coin. The following case, therefore, is still applicable: The prisoner was indicted for having in his custody a mould, upon which there was made and impressed, &c., the figure of a shilling. The mould bore the resemblance of a shilling inverted, viz., the *convex* parts being *concave* in the mould; and it was objected, that it should have been described as an instrument which *would make* or *impress*, &c., and not as one on which *was made and impressed*, &c.; but a great majority of the judges were of opinion that the evidence maintained the in- [*376] dictment, because the stamp of the current coin was *impressed upon the mould. They agreed, however, that it would have been more accurate had the instrument been described as one "which would make or impress." R. v. Lennard, 1 Leach, 92; 1 East, P. C. 170.

To convict a prisoner upon an indictment under the 2 Wm. 4, c. 34, s. 10, charging him with having in his possession "one mould, upon which was impressed the figure and apparent resemblance" of the obverse side of a shilling, Patteson, J., held, that the jury must be satisfied that, at the time the prisoner had it in his possession, the *whole* of the obverse side of a shilling was impressed on the mould. R. v. Foster, 7 C. & P. 494: 32 E. C. L. R. But on a second indictment against the same prisoner, under the above section, for making a mould "intended to make and impress the figure and apparent resemblance" of the obverse side of a shilling, the same learned judge ruled, that it was sufficient to prove that the prisoner made the mould and a part of the impression, though he had not completed the entire impression. Id. 495. An indictment alleging that the prisoner had in his possession a mould "upon which said mould was made and impressed the figure and apparent resemblance" of the obverse side of a sixpence, was held had on demurrer, as not sufficiently showing that the impression was on the mould *at the time* it was in the prisoner's possession. A fresh indictment, with the words "then and there" before the words "made and impressed," was held good. R. v. Richmond, 1 C. & K. 240: 47 E. C. L. R.

Upon the repealed statute of 8 & 9 Wm. 3, c. 26, it was held, that it was not confined to such instruments as used by the hand, unconnected with any other power, will produce the effect. A collar marking the edge, by having the coin forced through it by machinery, is an instrument within the act, though this mode of marking the edge is of modern invention. R. v. Moore, 1 Moody, C. C. 122.

The words "figure, stamp, or apparent resemblance," do not mean an exact resemblance; but if the instrument will impress a resemblance in point of fact such as will impose upon the world, it is sufficient. R. v. Ridgeley, 1 East, P. C. 171; 1 Leach,

(1) If one pass counterfeit money, and another in any way aids and abets its passage, knowing it to be counterfeit, an intent to defraud may be inferred, and both are guilty. The State v. Mix, 15 Missouri, 153.

189. See R. v. Richmond, as to how the indictment should be framed, where a coining mould is made and impressed to resemble the obverse of a coin which is partly defaced by wear. 1 C. & K. 240.

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*COMPOUNDING OFFENCES, &c. [*377]

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Compounding felonies.] THOUGH the bare taking again of a man's own goods which have been stolen (without favor shown to the thief) is no offence: Hawk. P. C. b. 1, c. 59, s. 7; yet where a man either takes back the goods, or receives other amends, on condition of not prosecuting, this is a misdemeanor punishable by fine and imprisonment. Id. s. 5. And so in any other felony an agreement not to prosecute an indictment for reward is punishable as a misdemeanor; though nearly all the precedents of indictments for this species of offence seem to be confined to *theftbote*, or that kind of composition of felony which has reference to the recovery of property of which the owner has been deprived. Where in an indictment for compounding a felony, it was averred that the defendant did desist, and from that time hitherto had desisted from all further prosecution, and it appeared that after the alleged compounding he prosecuted the offender to conviction, Bosanquet, J., directed an acquittal. R. v. Stone, 4 C. & P. 379: 19 E. C. L. R.; see 1 Russ. by Grea. 132 (*n*).

Compounding misdemeanors.] Whether at common law, the compounding of misdemeanor is in any case a misdemeanor, is perhaps doubtful. Such agreements, when not made under the permission of a court of justice, are clearly, in many cases, illegal.(1) Collins v. Blantern, 2 Wils. 341; 4 Bl. Comm. 363; Beeley v. Wingfield, 11 East, 46.

Compounding informations on penal statutes.] By 18 Eliz. c. 5, s. 4, if any informer, by color or pretence of process, or without process, upon color or pretence of any manner of offence against any penal law, make any composition, or take any money, reward, or promise of reward, without the order or consent of the court, he shall stand two hours in the pillory, be forever disabled to sue on any popular or penal statute, and shall forfeit ten pounds. This statute does not extend to penalties only recoverable by information before justices. R. v. Crisp, 1 B. & Ald. 282. But it is not necessary, to bring the case within the statute, that there should be an action or other proceeding pending. R. v. Gotley, Russ. & Ry. 84. A mere threat to prosecute for the recovery of penalties, not amounting to an indictable offence at common law, is yet, it seems, within the above statute. R. v. Southerton, 6 East, 126. A person may be convicted, under this statute, of taking money, though no offence liable to a *penalty has been committed by the person from whom the money [*378] is taken. R. v. Best, 2 Moo. C. C. 124; S. C. 9 C. & P. 868: 38 E. C. L. R.

(1) Taking a promissory note as a consideration for not prosecuting a larceny, is sufficient to constitute the offence. Commonwealth v. Pease, 16 Mass. 91. See Commonwealth v. Corry, 2 Mass. 524.

Misprision of felony.] Somewhat analogous to the offence of compounding felony, is that of misprision of felony. Misprision of felony is the concealment or procuring the concealment of felony, whether such felonies be at common law or by statute. Hawk. P. C. b. 1, c. 59, s. 2. Silently to observe the commission of a felony, without using any endeavor to apprehend the offender, is a misprision. Ibid. (*n*); 1 Hale, P. C. 431, 448, 533. If to the knowledge there be added assent, the party will become an accessory. 4 Bl. Com. 121. The punishment for this offence is fine and imprisonment, and provisions against the commission of it by sheriffs, coroners, and other officers, are contained in the 3 Edw. 1, c. 9.

Taking rewards for helping to recover stolen goods—advertising rewards, &c.] Similar to the offence of compounding a felony is that of taking a reward for the return of stolen property, and advertising a reward for the same purpose. These offences were formerly provided against by the statute 7 & 8 Geo. 4, c. 29, ss. 58, 59 (E.), and the 9 Geo. 4, c. 55, ss. 51, 52 (I.), which are repealed, and now by 24 & 25 Vict. c. 96, s. 151, "Whosoever shall corruptly take any money or reward, directly or indirectly, under pretence or upon account of helping any person to any chattel, money, valuable security, or other property whatsoever, which shall by any felony or misdemeanor have been stolen, taken, obtained, extorted, embezzled, converted, or disposed of as in this act before mentioned, shall, unless he shall have used all due diligence to cause the offender to be brought to trial for the same, be guilty of felony; and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement; and, if a male under the age of eighteen years, with or without whipping." Upon an indictment under this statute it is not necessary to show that the prisoner had any connection with the commission of the previous felony; it is sufficient if the evidence satisfies the jury that the prisoner had some corrupt and improper design when he received the money, and did not *bonâ fide* intend to use such means as he could for the detection and punishment of the offender. R. v. King, 1 Cox, C. C. 36. Where A. was charged under s. 58, with corruptly and feloniously receiving from B. money under pretence of helping B. to recover goods before then stolen from B., and with not causing the thieves to be apprehended, three questions were left to the jury: 1. Did A. mean to screen the guilty parties, or to share the money with them? 2. Did A. know the thieves, and intend to assist them in getting rid of the property by promising B. to buy it? 3. Did A. know the thieves, and assist B. as her agent, and at her request, in endeavoring to purchase the stolen property from them, not meaning to bring the thieves to justice? The jury answered the two first questions in the negative, and the third in the affirmative. It was held that the receipt of the money under the above circumstances was a corrupt receiving of the money by A. within the statute. R. v. Pascoe, 1 Den. C. C. R. 456; S. C. 18 L. J. M. C. 186.

[*379] *By s. 50, any person advertising a reward for the return of property stolen or lost, and using any words purporting that no questions will be asked, or that a reward will be given for property stolen or lost, without seizing or making any inquiry after the person producing such property, or promising to return to any pawnbroker or other person who may have bought or advanced money upon any property stolen or lost, the money so paid or advanced, or any other sum of money or reward for the return of such property; or any person printing or publishing such advertisement, shall forfeit fifty pounds, to be recovered by action of debt.

*CONCEALMENT OF DEEDS AND INCUMBRANCES.

By the 22 & 23 Vict. c. 35, s. 24, "Any seller or mortgagor of land or of any chattels, real or personal, or choses in action conveyed or assigned to a purchaser, or the solicitor or agent of any such seller or mortgagor, who shall, after the passing of this act, conceal any settlement, deed, will, or other instrument material to the title, or any incumbrance, from the purchaser, or falsify any pedigree upon which the title does or may depend, in order to induce him to accept the title offered or produced to him, with intent in any of such cases to defraud, shall be guilty of a misdemeanor, and, being found guilty, shall be liable, at the discretion of the court, to suffer such punishment by fine or imprisonment for any time not exceeding two years, with or without hard labor, or by both, as the court shall award."

*CONSPIRACY. [*381]

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Preferring indictments for conspiracy.] By the 22 & 23 Vict. c. 17, s. 1, no bill of indictment for conspiracy is to be presented to or found by any grand jury, except under the circumstances there mentioned (1) See *ante*, p. 178.

(1) 1 Wheeler's C. C. 149, 222; Commonwealth v. Hunt, 4 Metcalf, 111; People v. Mather, 4 Wend. 229. All who accede to a conspiracy after its formation are equally guilty with the original conspirators. Ibid. It may be between principal and clerk. Case of Robbins et al., 4 Rogers's Rec. 1; Commonwealth v. Judd, 2 Mass. 329; Commonwealth v. Davis, 9 Id. 415; State v. Richie, 4 Halst. 223; State v. Buchanan, 5 Har. & Johns. 317; State v. Cawood, 2 Stewart, 360; Collins v. The Commonwealth, 3 Serg. & Rawle, 220; Commonwealth v. McKisson, 8 Id. 420. A conspiracy to commit a felony, if the felony be actually committed, is merged. Commonwealth v. Kingsbury et al., 5 Mass. 106. *Aliter*, in a misdemeanor. People v. Mather, *supra*; The Commonwealth v. Delany, 1 Grant's Cases, 224. See The Commonwealth v. O'Brien, 12 Cushing, 84.

The offence of conspiracy to impede an officer in the discharge of his official duty will not merge in the offence of impeding the officer. The State v. Noyes, 25 Vermont, 415.

The offence of conspiring is of common law origin, and not restricted or abridged by the statute 33 Edw. 1.

An indictment will lie at common law for a conspiracy:

1. To do an act not illegal or punishable if done by an individual, but immoral only.

2. To do an act neither illegal nor immoral in an individual, but to effect a purpose which has a tendency to prejudice the public.

3. To extort money from another or to injure his reputation, by means not indictable, as verbal defamation, and whether it be to charge him with an indictable offence or not.

4. To cheat a person, accomplished by means of an act which would not in law amount to an indictable cheat in an individual.

5. To impoverish or ruin a third person in his trade or profession.

6. To defraud a third person by means of an act not *per se* unlawful, and though no person be thereby injured.

7. To defraud, though the means be not determined on at the time. The State v. Buchanan et al., 5 Har & Johns. 317.

Nature of the crime of conspiracy.] There are numerous definitions of conspiracy given in R. v. Vincent, 9 C. & P. 91: 38 E. C. L. R.; R. v. Seward, 1 A. & E. 713: 28 E. C. L. R.; R. v. Peek, 9 A. & E. 686: 36 E. C. L. R.; R. v. Jones, 4 B. & Ad. 345: 24 E. C. L. R.; 2 Russ. by Gr. 675 (*n*); they all, in effect, amount to this, that a conspiracy is an agreement between two or more persons to do that which is unlawful. Of course it makes no difference whether the final object be unlawful, or the means be unlawful: in either case the conspiracy is equally indictable.

Notwithstanding the high authority on which this definition is founded, it may be doubted whether it is complete. The act to be done must certainly be unlawful to the knowledge of the persons who are about to commit it; that is, it must be malicious. This is, however, perhaps a mere verbal criticism on the above definition. There is, however, another point upon which this definition is silent, and which is certainly one involved in great obscurity: namely, whether any one of the parties must have proceeded to the commission of some act in furtherance of the conspiracy, or, as it is usually called, some overt act.

The authorities seem to stand thus. In the Poulterer's Case, 9 Co. 55 b, Lord Coke says that, "A man shall have a writ of conspiracy, *although they do nothing but conspire together*, and he shall recover damages, and they may also be indicted thereof." (p. 56 b.) In the next page he mentions, as the first incident of the crime of conspiracy (or, as he calls it, *confederacy*), that, "it ought to be declared *by some manner of prosecution*, as in this case it was, either by making of bonds, or of promises one to the other." In R. v. Best, 2 Ld. Raym. 1167, it is said in the mar- [*382] ginal note that "an illegal *conspiracy is indictable, though nothing is done in pursuance of it." This was so contended by counsel in that case, but from the indictment it does not appear that any such contention was necessary, and the judgment is silent on the point.

In R. v. Kinnersley, Str. 193, which is frequently referred to as an authority that no overt act need be proved, no such point arose. All that was there decided was that no overt act need be laid in the indictment, as is now well settled. So also in the case of R. v. Spragg, 2 Burr. 993, Lord Mansfield expressly reserves his opinion on the subject now under consideration, pointing out that it was not necessary for the decision of that case.

The practical importance of this difficulty is lessened by the fact that the existence of the conspiracy until revealed by some overt act is rarely known, and it therefore seldom becomes, under such circumstances, the subject of indictment.

Of course an overt act committed by any one of the conspirators would be sufficient, for, on the general principles of agency as applied to criminal law, such an act would be the act of all.

It was said by Lord Ellenborough that a mere agreement to commit a civil trespass would not be the subject of indictment. R. v. Turner, 13 East, 228. But this decision is not at all borne out by the definitions above referred to. In the case referred to the agreement was to go and take hares by night in a preserve, armed with offensive weapons; which was rather a strong one to hold to be a mere civil trespass.

The same learned judge held that a conspiracy to hiss an actor or damn a play would be indictable. Clifford v. Brandon, 2 Camp. 369; 6 T. R. 628. So a conspir-

A conspiracy may be criminal, although for the purpose only of getting possession of land, by means of an extorted deed, in favor of the legal owner. The State v. Shooter, 8 Richardson, 72.

A conspiracy to commit an assault and battery is an indictable offence. Commonwealth v. Putnam, 5 Casey, 296. See generally, United States v. Cole, 5 McLean, 513; Hazon v. The Commonwealth, 11 Harris, 366; Alderman v. The People, 4 Michigan, 414; Smith v. The People, 25 Illinois, 17; The People v. Clark, 10 Michigan, 310.

acy to impoverish A. B., a tailor, and to prevent him carrying on his trade, has been held to be indictable. R. v. Eccles, 1 Lea. 274; 3 Dougl. 337: 26 E. C. L. R. In R. v. Carlisle, Dears, C. C. 337; S. C. 23 L. J. M. C. 109, S. sold a mare to B. for 39*l.*, and before the price was paid, B. & C. conspired together falsely and fraudulently to represent to S. that the mare was unsound, in order to induce S. to accept 27*l.* instead of the agreed price of 39*l.*; and it was held that this was indictable as a conspiracy. So it has been held to be indictable to conspire to raise the price of funds by spreading false reports: R. v. De Berenger, 3 M. & S. 67; to conspire to raise a false claim to property by contracting a marriage. R. v. Robinson, 1 Lea. 44.(1)

In R. v. Pywell, 1 Stark. N. P. C. 402: 2 E. C. L. R., it was held by Lord Ellenborough, that an agreement between two persons to give a false warranty to the purchaser of a horse was not the subject of an indictment for conspiracy; but in R. v. Kenrick, 5 Q. B. 49, where the conspiracy proved was to make a false representation that horses were the property of a private person, and not of a horse-dealer, and thereby induce F. to buy them, the conviction was affirmed. This case apparently overrules R. v. Pywell.

A conspiracy to charge an innocent person with an offence is indictable: R. v. Best, 2 Ld. Raym. 1167; 1 Salk. 174; 2 Russ. by Gr. 657; and it is immaterial whether the charge be true or false, successful or unsuccessful, if any of the means resorted to be unlawful. Hawk. P. C. b. 1, c. 72, ss. 3 & 4; R. v. Hollingberry, 4 B. & C. 329: 10 E. C. L. R. But several persons may combine together to carry on a prosecution in a legal manner. Hawk. P. C. b. 1, c. 72, s. 7; 2 Russ. by Gr. 677; R. v. Murray, Matth. Dig. Cr. L. 90.

Any conspiracy to pervert the course of justice is, of course, indictable. Hawk. P. *C. b. 1, c. 21, s. 15; Bushell v. Barrett, Ry. & M. 434; 1 Saund. 300; R. [*383] v. Joliffe, 4 T. R. 285; R. v. Thompson, 16 Q. B. 832; S. C. 20 L. J. M. C. 183; R. v. Macdaniel, 1 Lea. 45; Fost. 130; R. v. Mabey, 6 T. R. 619; Claridge v. Hoare, 14 Ves. 65.

There are numerous instances in the books of conspiracies against morality and public decency held indictable; such as a conspiracy to seduce a young woman. R. v. Lord Grey, 3 St. Tr. 519; 1 East, P. C. 460; or to procure an infant female to have illicit carnal connection with a man. R. v. Mears, 2 Den. C. C. R. 79; S. C. 20 L. J. M. C. 59. So a conspiracy to take away a young woman, an heiress, from the custody of her friends, for the purpose of marrying her to one of the conspirators. R. v. Wakefield (Murray's ed.), 2 Deac. Abr. C. L. 4. A conspiracy to prevent the burial of a corpse, though for the purposes of dissection, has been held

(1) A conspiracy to manufacture a base material in the form and color of genuine indigo, with intent to sell it as genuine, is indictable. Commonwealth v. Judd et al., 2 Mass. 329; S. C. 2 Wheeler's C. C. 293. So a conspiracy between persons in falsely pretending they were about to enter in business, whereby they obtained goods on credit, when the intention was to procure the goods, sell them at an under price, and leave the Commonwealth, is indictable. Commonwealth v. Ward, 2 Mass. 473. But it has been held not an indictable offence for several persons to conspire to obtain money from a bank, by drawing their checks on the bank when they have no funds there. State v. Richie, 4 Halst. 223.

To constitute the offence of conspiracy, there must be a conspiracy to cheat and defraud some person of his property. Although there may have been an intention to defraud, yet if the means used could not possibly have that effect, the offence is not complete. March v. The People, 7 Barbour, 391.

The obtaining possession of goods under the pretence of paying cash for them, on delivery, the buyer knowing that he has no funds to pay with, and appropriating the goods to his own use, in fraud of the seller, is such a fraud or cheat as may be the subject of a conspiracy. Commonwealth v. Eastman, 1 Cushing, 189.

To constitute the crime of conspiracy, it is not necessary that the conspirators should succeed. The State v. Norton, 3 Zabriskie, 33; The People v. Chase, 16 Barbour, 495.

to be an indictable offence. R. v. Young, cited, 2 T. R, 734; 2 Chit. C. L. 36. *Vide post*, tit. "Dead Bodies."(1)

There has been some discussion about conspiracies to marry paupers. Of course these are indictable if any unlawful means be used. But it has been attempted to carry the matter further, and to hold that the conspiracy to persuade paupers to marry by their own consent was itself indictable, as being an injury to the inhabitants of the parish on whom the burden of supporting the woman was thereby thrown. But this notion is now completely exploded. In a case of this kind, Buller, J., directed an acquittal, holding it necessary in support of such an indictment, to show that the defendant had made use of some violence, threat, or contrivance, or used some sinister means to procure the marriage, without the voluntary consent or inclination of the parties themselves; that the act of marriage being in itself lawful, a conspiracy to procure it could only amount to a crime by the practice of some undue means; and this, he said, had been several times ruled by different judges: R. v. Fowler, 1 East, P. C. 461; and the same has been determined in a recent case. R. v. Seward, 1 Ad. & Ell. 706: 28 E. C. L. R.; 3 Nev. & M. 557. Where it is stated to have been by threats and menaces, it is not necessary to aver that the marriage was had against the consent of the parties, though that fact must be proved. R. v. Parkhouse, 1 East, P. C. 462.

The crime of conspiracy has been sometimes said to include combinations among workmen to regulate the price of wages. It is certainly, however, going beyond the definition of that crime as generally recognized, to say that an agreement between any number of persons not to work except at certain prices is indictable as a conspiracy. The principal authorities in favor of such a combination being indictable are R. v. Mawbey, 6 T. R. 338; R. v. Eccles, 1 Lea. 276; but in Hilton v. Eckersby, 19 Jur. 874, Lord Campbell expressed great doubt upon the point, and it has never been finally settled. The subject is now regulated by various statutes. See *post*, tit. "Workmen."(2)

Proof of the existence of conspiracy in general.] It is a question of some difficulty, how far it is competent for the prosecutor to show in the first instance the existence of a conspiracy amongst other persons than the defendants, without showing, at the same time, the knowledge or concurrence of the defendants, but leaving that [*384] part of *the case to be subsequently proved. The rule laid down by Mr. East is as follows: "The conspiracy or agreement among several to act in concert for a particular end, must be established by proof, before any evidence can be given of the acts of any person not in the presence of the prisoner; and this must, generally speaking, be done by evidence of the party's own act, and cannot be collected from the acts of others, independent of his own, as by express evidence of the fact of a previous conspiracy together, or of a concurrent knowledge and approbation of each other's acts." 1 East, P. C. 96. But it is observed by Mr. Starkie that in some peculiar instances in which it would be difficult to establish the defendant's privity, without first proving the existence of a conspiracy, a deviation has been made from the general rule, and evidence of the acts and conduct of others has been admitted to prove the existence of a conspiracy previous to the proof of the defendant's privity.

(1) Mifflin v. The Commonwealth, 5 Watts & Serg. 461.

(2) Every association is criminal whose object is to raise or depress the price of labor, beyond what it would bring were it left without artificial excitement. Commonwealth v. Carlisle, 1 Journal Jurisp. 225. See The Trials of the Journeymen Cordwainers, Philadelphia, 1806; New York, 1810; Pittsburgh, 1816; Pamphlets.

2 Stark. Ev. 234, 2d ed. So it seems to have been considered by Mr. Justice Buller, that evidence might be, in the first instance, given of a conspiracy, without proof of the defendant's participation in it. "In indictments of this kind," he says, "there are two things to be considered: first, whether any conspiracy exists; and next, what share the prisoner took in the conspiracy." He afterwards proceeds, "Before the evidence of the conspiracy can affect the prisoner materially, it is necessary to make out another point, viz, that he consented to the extent that the others did." R. v. Hardy, Gurney's ed. vol. i, p. 360, 369; 2 Stark. Ev. 234, 2d ed. So in the course of the same trial, it was said by Eyre, C J., that in the case of a conspiracy, general evidence of the thing conspired is received, and then the party before the court is to be affected for his share of it. Id. Upon a prosecution for a conspiracy to raise the rate of wages, proof was given of an association of persons for that purpose, of meetings, of rules being printed, and of mutual subscriptions, &c. It was objected that evidence could not be given of these facts without first bringing them home to the defendants, and making them parties to the combination; but Lord Kenyon permitted a person, who was a member of the society, to prove the printed regulations and rules, and that he and others acted under them in execution of the conspiracy charged upon the defendants, as evidence introductory to the proof that they were members of the society, and equally concerned; but added, that it would not be evidence to affect the defendants until they were made parties to the same conspiracy. R. v. Hammond, 2 Esp. N. P. C. 720. So in many important cases evidence has been given of a general conspiracy, before any proof of the particular part which the accused parties have taken. 2 Russ. by Grea. 699, citing R. v. Lord Stafford, 7 St. Tr. 1218; R. v. Lord W. Russell, 9 St. Tr. 578; R. v. Lord Lovat, 18 St. Tr. 530; R. v. Hardy, 24 St. Tr. 199; R. v. Horne Tooke, 25 St. Tr. 1. The point may be considered as settled ultimately in the Queen's Case, 2 Brod. & Bing. 310: 6 E. C. L. R., where the following rules were laid down by the judges: "We are of opinion, that on the prosecution of a crime to be proved by conspiracy, general evidence of an existing conspiracy may, in the first instance, be received as a preliminary step to that more particular evidence, by which it is to be shown that the individual defendants were guilty participators in such conspiracy. This is often necessary to render the particular evidence intelligible, and to show the true meaning and character of the acts of the individual defendants, and on that account, we presume, it is permitted. But *it is to be observed, that, in such cases, the [*385] general nature of the whole evidence intended to be adduced, is previously opened to the court, whereby the judge is enabled to form an opinion as to the probability of affecting the individual defendants by particular proof applicable to them, and connecting them with the general evidence of the alleged conspiracy; and if upon such opening it should appear manifest, that no particular proof sufficient to affect the defendants is intended to be adduced, it would become the duty of the judge to stop the case *in limine*, and not to allow the general evidence to be received, which, even if attended with no other bad effect, such as exciting an unreasonable prejudice, would certainly be a useless waste of time."

The rule, says Mr. Starkie, that one man is not to be affected by the acts and declarations of a stranger, rests on the principles of the purest justice; and although the courts, in cases of conspiracy, have, out of convenience and on account of the difficulty in otherwise proving the guilt of the parties, admitted the acts and declarations of strangers to be given in evidence, in order to establish the fact of a conspiracy, it is to be remembered that this is an inversion of the usual order, for the sake of con-

venience, and that such evidence is, in the result, material so far only as the assent of the accused to what has been done by others is proved. 2 Stark. Ev. 235, 2d ed.

It has since been held, that the prosecutor may either prove the conspiracy which renders the acts of the conspirators admissible in evidence, or he may prove the acts of the different persons, and thus prove the conspiracy. Where, therefore, a party met, which was joined by the prisoner the next day, it was held, that directions given by one of the party on the day of their meeting, as to where they were to go, and for what purpose, were admissible, and the case was said to fall within R. v. Hunt, 3 B. & Ald. 566: 5 E. C. L. R., where evidence of drilling at a different place two days before, and hissing an obnoxious person, was held receivable. R. v. Frost, 9 C. & P. 129; 38 E. C. L. R.; 2 Russ. by Grea. 700.

Upon an indictment for a conspiracy, the evidence is either direct of a meeting and consultation for the illegal purpose charged, or more usually, from the very nature of the case, circumstantial. 2 Stark. Ev. 232, 2d ed.; R. v. Cope, 1 Str. 144. Thus, upon a trial of an information for a conspiracy to take away a man's character, by means of a pretended communication with a ghost in Cock Lane, Lord Mansfield directed the jury that it was not necessary to prove the actual fact of conspiracy, but that it might be collected from collateral circumstances. R. v. Parson, 1 W. Bl. 392. Upon an information for a conspiracy to ruin Macklin, the actor, in his profession, it was objected for the defendants that, in support of the prosecution, evidence should be given of a *previous* meeting of the parties accused, for the purpose of confederating to carry their object into execution. But Lord Mansfield overruled the objection. He said, that if a number of persons met together for different purposes, and afterwards joined to execute one common purpose, to the injury of the person, property, profession, or character of a third party, it was a conspiracy, and it was not necessary to prove any previous consult or plan among the defendants against the person intended to be injured. R. v. Lee, 2 McNally on Evid. 634. A husband, his wife, and their servants, were indicted for a conspiracy to ruin a card-maker, and [*386] it appeared that each had given money to the apprentices *of the prosecutor to put grease into the paste, which spoiled the cards, but no evidence was given of more than one of the defendants being present at the same time; it was objected, that this was not a conspiracy, there being no evidence of communication; but Pratt, C. J., ruled that the defendants, being all of one family, and concerned in making cards, this was evidence of a conspiracy to go to a jury. R. v. Cope, 1 Str. 144; 2 Russ. by Grea. 693; 2 Stark. Ev. 232, 2d ed.

If, on a charge of conspiracy, it appear that two persons by their acts are pursuing the same object, and often by the same means, the one performing part of an act and the other completing it for the attainment of the object, the jury may draw the conclusion that there is a conspiracy. If a conspiracy be formed, and a person join it afterwards, he is equally guilty with the original conspirators. Also, if on a charge of conspiracy to annoy a broker, who distrained for church-rates, it be proved that one of the defendants (the other being present) excited the persons assembled at a public meeting to go in a body to the broker's house, evidence that they did so go is receivable, although neither of the defendants went with them; but evidence of what a person who was at the meeting said, some days after, when he himself was distrained on for church-rates, is not admissible. Per Coleridge, J., R. v. Murphy, 8 C. & P. 297: 34 E. C. L. R.; see also R. v. Blake, 6 Q. B. 126: 51 E. C. L. R.; S. C. 13 L. J. M. C. 131.

The *existence* of the conspiracy may be established either as above stated, by evidence of the acts of third persons, or by evidence of the acts of the prisoner and of

any other with whom he is attempted to be connected, concurring together at the same time and for the same object. And here, says Mr. East, the evidence of a conspiracy is more or less strong, according to the publicity or privacy of the objects of such concurrence, and the greater or less degree of similarity in the means employed to effect it. The more secret the one and the greater coincidence in the other, the stronger is the evidence of conspiracy. 1 East, P. C. 97.(1)

Proof of the existence of conspiracy—declarations of other conspirators.] Supposing that the existence of a conspiracy may in the first instance be proved, without showing the participation or knowledge of the defendants, it is still a question whether the declarations of some of the persons engaged in the conspiracy may be given in evidence against others, in order to prove its existence; and upon principle such evidence appears to be inadmissible. The opinions of the judges upon this question have been at variance. In R. v. Hardy, which was an indictment for high treason, in conspiring the death of the king, it was proposed to read a letter written by Martin, in London, and addressed, but not sent, to Margarot, in Edinburgh (both being members of the Corresponding Society), on political subjects, calculated to inflame the minds of the people in the North. Eyre, C. J., was of opinion that this letter was not admissible in evidence against any but the party confessing. Two of the judges agreed that a bare relation of facts by a conspirator to a stranger, was merely an admission which might affect himself, but which could not affect a co-conspirator, since it was not an *act* done in the prosecution of that conspiracy; but that in the present instance the writing of a letter by one conspirator, having a relation to the subject of the conspiracy, was admissible, as *an act* to show the nature and tendency *of the conspiracy alleged, and which therefore might be proved as the foun- [*387] dation for affecting the prisoner with a share of the conspiracy. Buller, J., was of opinion that the evidence of the conversations and declarations by parties to a conspiracy, was in general and of necessity evidence to prove the existence of the combination Grose, J., was of the same opinion, but added, that he considered the writing *as an act* which showed the extent of the plan. R. v. Hardy, 25 St. Tr. 1. Mr. Starkie remarks, that upon the last point it is observable that of the five learned judges who gave their opinions, three of them considered the writing of the letter to be an act done; and that three of them declared their opinion that a mere declaration or confession, unconnected with any act, would not have been admissible. 2 Stark. Ev. 236, 2d ed. In the same case it was proposed to read a letter written by Thelwall, another conspirator, to a private friend. Three of the judges were of opinion that the evidence was inadmissible, since it was nothing more than a declaration or mere recital of a fact, and did not amount to any transaction done in the course of the plot for its furtherance; it was a sort of confession by Thelwall, and not like an act done by him, as in carrying papers and delivering them to a printer, which would be a part of the transaction. Two of the judges were of opinion that the evidence was admissible, on the ground that everything said and *a fortiori* everything done by the conspirators, was evidence to show what the design was.

The law on this subject is thus stated by Mr. Starkie: "It seems that mere detached declarations and confessions of persons not defendants, not made in the prosecution of the object of the conspiracy, are not evidence even to prove the existence of a conspiracy, though consultations for that purpose and letters written in prosecution of the design, even if not sent, are admissible. The existence of a conspiracy is a *fact*,

(1) The People v Mosher et al., 1 Wheeler's C. C. 246; The People v. Mather, 4 Wend. 229; The Commonwealth v. Clark, 6 Mass. 74.

and the declaration of a stranger is but hearsay, unsanctioned by either of the two great tests of truth. The mere assertion of a stranger that a conspiracy existed amongst others to which he was not a party, would clearly be inadmissible; and although the person making the assertion confessed that he was a party to it, this, on principle fully established, would not make the assertion evidence of the fact against strangers." 2 Stark. Ev. 235. And this doctrine has been recognized by Mr. Serjeant Russell. 2 Russ. by Grea. 697; see also R. v. Murphy, *ante*, p. 386.

Proof of acts, &c., done by other conspirators.] After the existence of a conspiracy is established, and the particular defendants have been proved to have been parties to it, the acts of other conspirators may, in all cases, be given in evidence against them, if done in furtherance of the common object of the conspiracy, as also may letters written and declarations made by other conspirators, if they are part of the *res gesta* of the conspiracy, and not mere admissions.(1) See Phill. Ev. 210, 8th ed.; R. v. Hardy, 24 How. St. Tr. 452, 475; R. v. Sidney, 9 How. St. Tr. 817. It seems to make no difference as to the admissibility of this evidence, whether the other conspirators be indicted or not, or tried or not, for the making of them co-defendants would give no additional strength to their declarations as against others. The principle upon which they are admissible at all is, that the acts and declarations are those of persons united in one common design: a principle wholly affected by the [*388] consideration of their being jointly indicted. 2 Stark. *Ev. 237, 2d ed., *supra*, p. 88. Where an indictment charged the defendant with conspiring with Jones, who had been previously convicted of treason, to raise insurrections and riots, and it was proved that the defendant had been a member of a chartist association, and that Jones was also a member, and that in the evening of the 3d of November the defendant had been at Jones's house, and was heard to direct the people there assembled to go to the racecourse, where Jones had gone on before with others; it was held, that a direction given by Jones, in the forenoon of the same day, to certain parties to meet on the racecourse, was admissible; it being further proved that Jones and the persons assembled on the racecoursewent thence to the New Inn; it was held, that what Jones said at the New Inn was admissible, as it was all part of the transaction. R. v. Shellard, 9 C. & P. 277: 38 E. C. L. R. The letters of one of the defendants to another have been, under certain circumstances, admitted as evidence for the former, with the view of showing that he was the dupe of the latter, and not a participator in the fraud. R. v. Whitehead, 1 Dow. & Ry. N. P. 61: 16 E. C. L. R.

Proof of the means used.] Where the act itself, which is the object of the conspiracy, is illegal, it is not necessary to state or prove the means agreed upon or pursued to effect it. 2 Russ. by Grea. 692; R. v. Eccles, 1 Leach, 274. But where the indictment charged the defendants with conspiring "to cheat and defraud the lawful creditors of W. F.," Lord Tenterden thought it too general, in not stating what was intended to be done or the persons to be defrauded. R. v. Fowle, 4 C. & P. 592: 19 E. C. L. R.; but see R. v. De Berenger, 3 M. & S. 67. So where the indictment

(1) Collios v. The Commonwealth, 3 Serg. & Rawle, 220.

If three combine and conspire to defraud another as a common object, the declarations and actions of one are evidence against all. Aldrich v. Warren, 16 Maine, 465.

When several persons are proved to have been associated together for the same illegal purpose, any act or declaration of one of the parties in reference to the common object, and forming a part of the *res gestæ*, may be given in evidence against the others. State v. Loper, 16 Maine, 293.

When partial proof of a combination has been given, what has been said or done by either in planning the plot, may be proved; but what was not in pursuance of the plot cannot be taken against the other conspirators. The State v. Simons, 266.

charged the defendants with a conspiracy "to cheat and defraud the said H. B. of the fruits and advantages" of a verdict, Lord Denman, C. J., held it bad, as being too general. R. v. Richardson, 1 Moo. & R. 402.

Where the indictment charged the defendants with conspiring, by divers false pretences and subtle means and devices, to obtain from A. divers large sums of money, and to cheat and defraud him thereof, it was held, that the *gist* of the offence being the conspiracy, it was quite sufficient only to state that fact and its object, and that it was not necessary to set out the specific pretences. Bayley, J., said that when parties had once agreed to cheat a particular person of his money, although they might not then have fixed on any means for the purpose, the offence of conspiracy was complete. R. v. Gill, 2 Barn. & Ald. 204. In R. v. Parker, 3 Q. B. 292: 43 E. C. L. R., Williams, J., said, "It has been always thought, that in R. v. Gill the extreme of laxity was allowed." But in Sydserff v. Reg., 11 Q. B. 245: 63 E. C. L. R., an indictment, charging that the defendants "unlawfully, fraudulently, and deceitfully, did conspire, combine, confederate, and agree together to cheat and defraud" the prosecutor of his goods and chattels, was held good on writ of error; and the court, in giving judgment, expressly upheld the decision in R. v. Gill. See, upon this point, King v. Reg. in error, 7 Q. B 782: 53 E. C. L. R.; S. C. 14 L. J. M. C. 172; and R v. Rowland, 2 Den. C. C. R. 364; S. C. 21 L. J. M. C. 81. When the combination becomes illegal from the means used, the illegality must be explained by proper statements, and established by proof, as in the cases already referred to of conspiracies to marry paupers.(1) 2 Russ. by Grea. 692; see *ante*, p. 383.

An indictment charged in the first count, that the defendants *unlawfully [*389] conspired to defraud divers persons who should bargain with them for the sale of merchandise, of great quantities of such merchandise, without paying for the same, with intent to obtain to themselves money and other profit. The second count charged that two of the defendants, being in partnership in trade, and being indebted to divers persons, unlawfully conspired to defraud the said creditors of payment of their debts, and that they and the other defendant, in pursuance of the said conspiracy, falsely and wickedly made a fraudulent deed of bargain and sale of the stock in trade of the partnership for fraudulent consideration, with intent thereby to obtain to themselves money and other emoluments, to the great damage of the said creditors. Held, 1. That the first count was not bad for omitting to state the names of the persons intended to be defrauded, as it could not be known who might fall into the snare; but that the count was bad for not showing by what means they were to be defrauded. 2. That the second count was bad for not alleging facts to show in what manner the deed of sale was fraudulent. Peck v. Reg., 9 A. & E. 686: 36 E. C. L. R.; see also Wright v. Reg., 14 Q. B. 148: 68 E. C. L. R.

An indictment charged that A. and B. conspired by false pretences and subtle means and devices, to obtain from F. divers large sums of money, of the moneys of F., and to cheat and defraud him thereof. The means of the conspiracy were not further stated. It was, however, held that this was sufficient, and that the indictment was sustained by proof that A. and B. conspired to make a representation, knowing it to be false, that certain horses were the property of a private person, and not of a horse dealer, thereby inducing F. to buy them. R. v. Kenrick, 5 Q. B. 49:

(1) Though usual to do so, it is not necessary to set forth the overt act. People v. Mather, 1 Wend. 229.

In a charge for a conspiracy, if the act to be done is in itself illegal, the indictment need not set forth the means by which it was to be accomplished. If the act to be done is not in itself unlawful, but becomes so from the purposes for which and the means by which it is to be done, the indictment must set out enough to show the illegality. State v. Bartlett, 30 Maine, 132.

48 E. C. L. R., overruling R. v. Pywell, 1 Stark. 402 : 2 E. C. L. R. See also R. v. Blake, 6 Q. B. 126, and R. v. Rowland, *supra*.

Where an indictment charged that the defendants conspired by false pretences to obtain from persons named divers goods and merchandise, and to cheat and defraud them of the said goods and merchandise, and, in pursuance of the conspiracy, did by false pretences (which were stated) obtain from them the goods, &c., aforesaid, and did cheat and defraud them thereof, to the damage of the persons named, it was held bad in arrest of judgment in not stating whose the goods, &c., were. R. v. Parker, 3 Q. B. 292 : 43 E. C. L R. The defendants A. and B. were indicted for conspiring to extort money from the prosecutor, by charging him with forging a certain check for 178*l*.; the indictment set forth a letter from one of the conspirators to the prosecutor, referring to the check, and conversations were proved, relating to it. Such a document was, in fact, in existence, but it was not produced by the prosecutor at the trial, and such production was held to be unnecessary; for it might have been that the existence of such a check was altogether a fabrication. R. v. Ford, 1 Nev. & M. 777 : 28 E. C. L. R.

Proof of the means used—cumulative instances.] Upon an indictment charging the defendants with conspiring to cause themselves to be believed persons of considerable property, for the purpose of defrauding tradesmen, evidence was given of their having hired a house in a fashionable street, and represented themselves to the tradesmen employed to furnish it, as persons of large fortune. A witness was then called to prove, that at a different time they had made a similar representation to another [*390] tradesman. This evidence *was objected to, on the ground that the prosecutor could not prove various acts of this kind, but was bound to select and confine himself to one. Lord Ellenborough, however, said, "This is an indictment for a conspiracy to carry on the business of common cheats, and cumulative instances are necessary to prove the offence." R. v. Roberts, 1 Campb. 399.

Proof of the object of the conspiracy.] The object of the conspiracy must be proved as laid in the indictment. An indictment against A. B. C. and D., charged that they conspired together to obtain "viz.: to the use of them the said A. B. and C. and certain other persons to the jurors unknown," a sum of money for procuring an appointment under government. It appeared that D., although the money was lodged in his hands to be paid to A. and B. when the appointment was procured, did not know that C. was to have any part of it, or was at all implicated in the transaction. Lord Ellenborough said, "The question is, whether the conspiracy, as actually laid, be proved by the evidence. I think it is not as to D. He is charged with conspiring to procure the appointment through the medium of C., of whose existence, for aught that appears, he was utterly ignorant. Where a conspiracy is charged, it must be charged truly." R. v. Pollman, 2 Campb. 233.

In an indictment for conspiring to defraud D. *and others*, which charged the obtaining of the goods of D. *and others*, the word *others* means partners of D., and evidence of attempts to defraud persons not the partners of D. is inadmissible. R. v. Steel, 2 Moo. C. C. 246; S. C. Carr. & M. 337 : 41 E. C. L. R.; R. v. Thompson, 16 Q. B. 832; S. C. 20 L. J. M. C. 183.

Where a count in an indictment charged several defendants with conspiring together, to do several illegal acts, and the jury found one of them guilty of conspiring with some of the defendants to do one of the acts, and guilty of conspiring with others of the defendants to do another of the acts, such finding was held bad, as

amounting to a finding that one defendant was guilty of two conspiracies, though the count charged only one. O'Connell v. Reg., 11 C. & F. 155.

Upon a count in an indictment against eight defendants, charging one conspiracy to effect certain objects, a finding that three of the defendants are guilty generally, that five of them are guilty of conspiring to effect some, and not guilty as to the residue of these objects, is bad in law and repugnant; inasmuch as the finding that the three were guilty was a finding that they were guilty of conspiring with the other five to effect all the objects of the conspiracy, whereas by the same finding it appears that the other five were guilty of conspiring to effect only some of the objects. Ib.

A count charging the defendants with conspiring to cause and procure divers subjects to meet together in large numbers for the unlawful and seditious purpose of obtaining, by means of the intimidation to be thereby caused, and by means of the exhibition and demonstration of great physical force at such meetings, changes in the government, laws, and constitutions of the realm, is bad; first, because "intimidation" is not a technical word, having a necessary meaning in a bad sense; and secondly, because it is not distinctly shown what species of intimidation is intended to be produced, or on whom it is intended to operate. Ib.

**Particulars of the conspiracy.*] Where the counts of an indictment for [*391] conspiracy were framed in a general form, Littledale, J. (after consulting several other judges), ordered the prosecutor to furnish the defendants with a particular of the charges, and that the particular should give the same information to the defendants that would be given by a special count. But the learned judge refused to compel the prosecutor to state in his particular the specific acts with which the defendants were charged, and the times and places at which those acts were alleged to have occurred. R. v. Hamilton, 7 C. & P. 448: 32 E. C. L R. See further as to particulars, *ante*, p. 178. If particulars have not been delivered as directed, the evidence will not thereby be excluded. See p. 178; R. v. Esdaile, 1 F. & F. 213, 228.

Form of indictment.] It is not uncommon to set out in the indictment the overt acts by which the object of the conspiracy was sought to be attained. But an indictment is good which charges a conspiracy to do an unlawful act without alleging any overt acts whatever. R. v. Kinnersley, Str. 193; R. v. Gill, 2 B. & Ald. 204; R. v. Kenrick, 5 Q. B. 62: 48 E. C. L R.

Venue] The *gist* of the offence in conspiracy being the act of conspiring together, and not the act done in pursuance of such combination, the venue in principle ought to be laid in the county in which the conspiring took place, and not where, in the result, the conspiracy was put into execution. R. v. Best, 1 Salk. 174; 2 Russ. by Grea. 696. But it has been said, by the Court of King's Bench, that there seems to be no reason why the crime of conspiracy, amounting only to a misdemeanor, ought not to be tried wherever one distinct overt act of conspiracy was in fact committed, as well as the crime of high treason, in compassing and imagining the death of the king, or in conspiring to levy war. R. v. Brisac, 4 East, 171. So where the conspiracy, as against all the defendants, having been proved, by showing a community of criminal purpose, and by the joint co-operation of the defendants in forwarding the objects of it in different counties and places, the locality required for the purpose of trial was held to be satisfied by overt acts done by some of the defendants in the county where the trial was had in prosecution of the conspiracy. R v. Bowes, cited in R. v. Brisac, *supra*.

Conspiracy to murder persons not her majesty's subjects.] By the 24 & 25 Vict. c. 100, s. 4, "All persons who shall conspire, confederate, and agree to murder any person, whether he be a subject of her majesty or not, and whether he be within the queen's dominions or not, and whosoever shall solicit, encourage, persuade, or endeavor to persuade, or shall propose to any person, to murder any other person, whether he be a subject of her majesty or not, and whether he be within the queen's dominions or not, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not more than ten and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor."

[*392] *DEAD BODIES.

OFFENCES RELATING TO.

ALTHOUGH larceny cannot be committed of a dead body, no one having any right of property therein, yet it is an offence to remove a body without lawful authority; and such offence is punishable with fine and imprisonment as a misdemeanor.(1) An indictment charged (*inter alia*) that the prisoner, a certain dead body of a person unknown, lately before deceased, wilfully, unlawfully, and indecently did take and carry away, with intent to sell and dispose of the same for gain and profit. It being evident that the prisoner had taken the body from some burial-ground, though from what particular place was uncertain, he was found guilty upon this count; and it was considered that this was so clearly an indictable offence, that no case was reserved. R. v. Gilles, 1 Russ. by Grea. 464; Russ. & Ry. 366 (*n*). So to take up a dead body even for the purpose of dissection, is an indictable offence. Where, upon an indictment for that offence, it was moved in arrest of judgment, that the act was only one of ecclesiastical cognizance, and that the silence of the older writers on crown law showed that there was no such offence cognizable in the criminal courts, the court said that common decency required that the practice should be put a stop to; that the offence was cognizable in a criminal court as being highly indecent, and *contra bonos mores;* that the purpose of taking up the body for dissection did not make it less an indictable offence, and that as it had been the regular practice at the Old Bailey in modern times to try charges of this nature, the circumstance of no writ of error having been brought to reverse any of those judgments, was a proof of the universal opinion of the profession upon this subject. R. v. Lynn, 2 T. R. 733; 1 Leach, 497; see also R. v. Cundick, Dowl. & Ry. N. P. C. 13. And it makes no difference what are the motives of the person who removes the body; the offence being the removal of the body without lawful authority. R. v. Sharpe, Dear. & B. 160; S. C. 26 L. J. M. C. 43; where the defendant, from motives of filial affection, had removed the corpse of his mother from its burying place. The defendant had in this case committed a trespass against the owner of the soil of the burying place; but *quære* whether, if no such trespass was committed, the offence might not be still complete.

The burial of the dead is the duty of every parochial priest and minister, and if he neglect or refuse to perform the office, he may, by the express words of canon 86,

(1) See The Commonwealth v. Loring, 8 Pick. 370.

be suspended by the ordinary for three months; and if any temporal inconvenience arise, as a nuisance, from the neglect of the interment of the dead corpse, he is punishable also by the temporal courts by indictment or information. Per Abney, J., Andrews v. Cawthorne, Willes, 357 (*n*).

To bury the dead body of a person who has died a violent death, before the coroner has sat upon it, is punishable as a misdemeanor, and the coroner ought to be sent for, since he is not bound *ex officio* to take the inquest without being sent for. R. v. Clerk, 1 Salk. 377; Anon, 7 Mod. 10. And if a dead body in a prison or other place, upon which an inquest ought to have been taken, is interred, *or [*393] is suffered to lie so long that it putrefies before the coroner has viewed it, the gaoler or township shall be amerced. Hawk. P. C. b. 2, c. 9, s. 23; see also Sewell's Law of Coroner, p. 29.

The preventing a dead body from being interred has likewise been considered an indictable offence. Thus the master of a workhouse, a servant, and another person, were indicted for a conspiracy to prevent the burial of a person who died in a workhouse. R. v. Young, cited 2 T. R. 734.

Provision is made for the interment of dead bodies which may happen to be cast on shore, by the 48 Geo. 3, c. 75.

By the 2 & 3 Wm. 4, c. 75, s. 7, it is provided that "it shall be lawful for any executor, or other party, having lawful possession of the body of any deceased person, and not being an undertaker, or other party intrusted with the body for the purpose only of interment, to permit the body of such deceased person to undergo anatomical examination, unless to the knowledge of such executor or other party, such person shall have expressed his desire, either in writing at any time during his life, or verbally in the presence of two or more witnesses during the illness whereof he died, that his body after death might not undergo such examination, or unless the surviving husband or wife, or any known relative of the deceased person, shall require the body to be interred without such examination." Section 8 provides for the party lawfully in the possession of a dead body directing and permitting anatomical examination, where the deceased shall, during his life, have directed it, "unless the deceased person's surviving husband or wife, or nearest known relative, or any one or more of such person's nearest known relatives, being of kin in the same degree, shall require the body to be interred without such examination." By section 10, professors of anatomy, and the other persons therein described, being duly licensed, are not liable to punishment for having in their possession human bodies according to the provision of the act. The 18th section of this statute makes offences against the act misdemeanors, and subjects offenders to be punished by imprisonment not exceeding three months, or by fine not exceeding fifty pounds.

In R. v. Feist, Dear. & B. C. C. 590; S. C. 27 L. J. M. C. 164, the defendant was master of a workhouse, and had lawful possession of the bodies of deceased paupers. He was in the habit of having the appearance of a funeral gone through with a view of preventing the relatives requiring that the bodies should be buried without being subject to anatomical examination; and the jury found that but for that deception the relatives would have required the bodies to be so buried. The bodies, instead of being buried, as was supposed by the relatives, were delivered to an hospital for the purpose of undergoing anatomical examination, and for this service the master received from the hospital a sum of money. The prisoner was found guilty of an offence at common law in disposing of a body for the purpose of dissection; but the question was reserved, whether the defendant was protected by s. 7 of the above act. The Court of Criminal Appeal held that he was, as the requirement mentioned in that section had

not been actually made. Willes, J., pointed out that this was an offence specially provided for by the 7 & 8 Vict. c. 101, s. 31.

So much of the 9 Geo. 4, c. 31, as relates to the dissection of dead bodies of persons condemned to death is repealed by the 2 & 3 Wm. 4, c. 75, s. 7.

[*394] *DEER.

OFFENCES RELATING TO.

Stealing deer, &c., ... 394
Power of deer-keepers, &c., to seize guns, . . 394
Assaulting deer-keepers or their assistants, . . 395

Stealing Deer.] THE former statutes with regard to the offence of stealing deer are repealed by the act of 7 & 8 Geo. 4, c. 27, and the law upon the subject comprised in the 7 & 8 Geo. 4, c. 29 (E.). The latter statute is now replaced by the 24 & 25 Vict. c. 96.

By s. 13, "Whosoever shall unlawfully and wilfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the inclosed part of any forest, chase, or purlieu, or in any inclosed land where deer shall be usually kept, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement; and if a male under the age of sixteen years, with or without whipping."

By s. 12, "Whosoever shall unlawfully and wilfully course, hunt, snare, or carry away, or kill or wound, or attempt to kill or wound, any deer kept or being in the uninclosed part of any forest, chase, or purlieu, shall for every such offence, on conviction thereof before a justice of the peace, forfeit and pay such sum, not exceeding fifty pounds, as to the justice shall seem meet; and whosoever having been previously convicted of any offence relating to deer for which a pecuniary penalty shall have been imposed, by this or by any former act of Parliament, shall afterwards commit any of the offences hereinbefore enumerated, whether such second offence be of the same description as the first or not, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement; and, if a male under the age of sixteen years, with or without whipping."

The word "deer," in this statute, includes all ages and both sexes; "a fawn," therefore. R. v. Strange, 1 Cox, C. C. 58.

By s. 14 of the above statute, suspected persons found in possession of venison, &c., and not satisfactorily accounting for the same, are rendered liable to a penalty not exceeding 20*l.*

By s. 15, persons setting snares or engines for the purpose of taking or killing deer, or destroying the fences of land where deer shall be kept, on conviction before a justice, shall forfeit a sum not exceeding 20*l.*

Power of deer-keepers, &c., to seize guns.] By s. 16 of the above statute, "If any person shall enter into any forest, chase, or purlieu, whether inclosed or not, or into

any inclosed land where deer shall be usually kept, *with intent unlawfully to hunt, course, wound, kill, snare, or carry away any deer, it shall be lawful for every person intrusted with the care of such deer, and for any of his assistants, whether in his presence or not, to demand from every such offender any gun, firearms, snare, or engine, in his possession, and any dog there brought for hunting, coursing, or killing deer; and in case such offender shall not immediately deliver up the same, may seize and take the same from him in any of those respective places, or, upon pursuit made, in any other place to which he may have escaped therefrom, for the use of the owner of the deer."

Assaulting deer-keepers or their assistants.] By the same section, "If any such offender (*vide suprà*) shall unlawfully beat or wound any person intrusted with the care of the deer, or any of his assistants, in the execution of any of the powers given by this act, every such offender shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement; and, if a male under the age of sixteen years, with or without whipping."

Pulling a deer-keeper to the ground, and holding him there while another person escapes, is not a beating of the deer-keeper within this section. There must be a beating in the popular sense of the word; proof of a bare legal battery only is insufficient. Per Maule, J., in R. v. Hale, 2 C. & K. 326: 61 E. C. L. R.

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*DISTURBING PUBLIC WORSHIP. [*396]

By the 52 Geo. 3, c. 155 (E.), s. 12, "If any person or persons, at any time after the passing of this act, do and shall wilfully and maliciously or contemptuously disquiet or disturb any meeting, assembly, or congregation of persons assembled for religious worship, permitted or authorized by this act, or any former act or acts of Parliament, or shall in any way disturb, molest, or misuse any preacher, teacher, or person officiating at such meeting, assembly, or congregation, or any person or persons there assembled, such person or persons so offending upon proof thereof, before any justice of the peace, by two or more credible witnesses, shall find two sureties to be bound by recognizances in the penal sum of fifty pounds, to answer such offence, and in default of such sureties shall be committed to prison, there to remain till the next general or quarter sessions; and upon conviction of the said offence at the said quarter sessions, shall suffer the pain and penalty of forty pounds."

For a similar provision with respect to Roman Catholic chapels, but imposing a penalty of twenty pounds for the offence, see 31 Geo. 3 (E.), c. 32, s. 10.

Upon an indictment found at the sessions under the toleration act, 1 W. & M. c. 18, for disturbing a dissenting congregation, it was held that, upon conviction, each defendant was liable to the penalty of twenty pounds imposed by that statute. R. v. Hube, 5 T. R. 542.

This offence may be tried at the sessions, 52 Geo. 3, c. 155, s. 12, *supra*, or in the king's bench, or at the assizes, if removed by *certiorari* from the sessions. R. v. Hube, *supra;* R. v. Wadley, 4 M. & S. 508.

With regard to Ireland the 6 Geo. 1, c. 5 (I.), s. 14, enacts, that if any person shall willingly and of purpose, maliciously or contemptuously, come into any cathedral

or parish church, chapel, or other congregation permitted by this act, and disquiet or disturb the same, or misuse any preacher or teacher, such person upon proof thereof before any justice of the peace by two or more witnesses, shall find two sureties, to be bound by recognizances, in the penal sum of fifty pounds, to appear at the next general or quarter sessions for the county wherein such offence shall be committed, or in default thereof be committed to prison till next quarter sessions, and upon conviction at the said sessions shall forfeit twenty pounds for the use of the king. See R. v. Hube, *supra*. No statute made for the relief of Roman Catholics contains any express clause for protecting the ministers or congregations of this persuasion.

Now, however, the 23 & 24 Vict. c. 32 (E. & I.), which abolishes the jurisdiction of the ecclesiastical courts in cases of brawling, provides for the recovery in a summary manner of a penalty of not more than five pounds for any disturbance in any recognized place of worship whatsoever, whether during the celebration of divine ser- [*397] vice or *not. And it seems that any disturbance of a congregation assembled according to law would be indictable at common law (1 Hawk. c. 28, s. 23; 1 Keb. 491), more particularly if arising out of any previous conspiracy for the purpose. See, moreover, 1 Gab., Crim. Law of Ireland, 294, 295.

As to assaults on clergymen, see 24 & 25 Vict. c. 100, s. 56, *supra*, p. 274.

[*398] *DOGS.

Stealing dogs.] By the 24 & 25 Vict. c. 96, s. 18, "Whosoever shall steal any dog shall, on conviction thereof before two justices of the peace, either be committed to the common gaol or house of correction, there to be imprisoned, or to be imprisoned and kept to hard labor, for any term not exceeding six months, or shall forfeit and pay, over and above the value of the said dog, such sum of money, not exceeding twenty pounds, as to the said justices shall seem meet; and whosoever, having been convicted of any such offence, either against this or any former act of Parliament, shall afterwards steal any dog, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding eighteen months, with or without hard labor."

Having possession of stolen dogs.] By s. 19, "Whosoever shall unlawfully have in his possession or on his premises any stolen dog, or the skin of any stolen dog, knowing such dog to have been stolen or such skin to be the skin of a stolen dog, shall, on conviction thereof before two justices of the peace, be liable to pay such sum of money, not exceeding twenty pounds, as to such justices shall seem meet; and whosoever, having been convicted of any such offence, either against this or any former act of Parliament, shall afterwards be guilty of any such offence as in this section before mentioned, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding eighteen months, with or without hard labor."

Taking money to restore dogs.] By s. 20, "Whosoever shall corruptly take any money or reward, directly or indirectly, under pretence or upon account of aiding any person to recover any dog which shall have been stolen, or which shall be in the possession of any person not being the owner thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to

be imprisoned for any term not exceeding eighteen months, with or without hard labor.

A dog is not a chattel within the meaning of the statute relating to obtaining property by false pretences. R. v. Robinson, 1 Bell, C. C. 34; S. C. 28 L. J. M. C. 58.

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*DWELLING-HOUSE—OFFENCES RELATING TO. [*399]

What building within the curtilage to be deemed part of a dwelling-house, . . 399
Breaking and entering building within the curtilage and committing a felony, . . 399
Breaking and entering a house, warehouse, &c., and committing felony, . . . 399
Breaking and entering a house, place of divine worship, &c., with intent to commit felony, ... 400
Stealing in a dwelling-house to the value of 5*l.*, ... 400
Stealing in a dwelling-house with menaces, ... 400
Riotously pulling down dwelling-house, ... 400
Proof of the breaking and entering, ... 400
of the premises being a dwelling-house, ... 400
of stealing in a dwelling-house, ... 400
of the value of the goods stolen, ... 401

BURGLARY or the offence of breaking a dwelling-house by night has already been treated of; so also has the setting fire to a dwelling-house, under the title Arson; the offence we are now to consider is breaking and entering a dwelling-house by day. The offence was formerly provided for by several statutes, which were repealed, and consolidated by the 7 & 8 Geo. 4, c. 29. This statute is also repealed, and the act which now applies is the 24 & 25 Vict. c. 96.

What building within the curtilage to be deemed part of a dwelling-house.] By s. 53, "No building although within the same curtilage with any dwelling-house, and occupied therewith, shall be deemed to be part of such dwelling-house for any of the purposes of this act, unless there shall be a communication between such building and dwelling-house, either immediate, or by means of a covered and inclosed passage leading from the one to the other."

Breaking and entering building within the curtilage and committing a felony.] By s. 55, "Whosoever shall break and enter any building, and commit any felony therein, such building being within the curtilage of a dwelling-house, and occupied therewith, but not being part thereof, according to the provision hereinbefore mentioned, or being in any such building shall commit any felony therein, and break out of the same, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Breaking and entering a house, warehouse, &c., and committing any felony.] *By s. 56, "Whosoever shall break and enter any dwelling-house, school- [*400] house, shop, warehouse, or counting-house, and commit any felony therein, or, being in any dwelling-house, schoolhouse, shop, warehouse, or counting-house, shall commit any felony therein, and break out of the same, shall be guilty of felony, and being

convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Breaking and entering a house, place of divine worship, &c., with intent to commit felony.] By s. 57, "Whosoever shall break and enter any dwelling-house, church, chapel, meeting-house, or other place of divine worship, or any building within the curtilage, schoolhouse, shop, warehouse, or counting-house, with intent to commit any felony therein, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Stealing in a dwelling-house to the value of 5l.] By s. 60, "Whosoever shall steal in any dwelling-house any chattel, money, or valuable security, to the value in the whole of 5*l.* or more shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Stealing in a dwelling-house with menaces.] "Whosoever shall steal any chattel, money, or valuable security in any dwelling-house, and shall by any menace or threat put any one being therein in bodily fear, shall be guilty of felony, and being convicted thereof shall be liable" to precisely the same punishment as in the last section.

Riotously pulling down dwelling-houses.] See tit. Riot.

Proof of the breaking and entering.] See tit. Burglary, *supra*, pp. 323, 328.

Proof of the premises being a dwelling-house.] See tit. Burglary, and tit. Arson, pp. 265, 330.

Proof of stealing in a dwelling-house.] The offence of stealing in a dwelling-house was held not to have been committed in R. v. Campbell, 2 Lea, 564; 2 East, P. C. 644, S. C.; where the occupier of the house gave the prisoner a bank-note to get changed, and which the prisoner stole. So when the prisoner obtained a sum of money from the prosecutor, in the dwelling-house of the latter, by *ring-dropping*, this also was held not to be within the statute. The judges were of opinion, that to [*401] bring a case within the statute, the property *must be under the protection of the house, deposited there for safe custody, as the furniture, money, plate, &c., kept in the house, and not things immediately under the eye or personal care of some one who happens to be in the house. R. v. Owen, 2 East, P. C. 645; 2 Leach, 572. The same point was ruled in subsequent cases.

On the other hand, it was held, on a case reserved, that stealing in a dwelling-house to the value of 5*l.* by the owner of the house was within the previous statute of the 7 & 8 Geo. 4, c. 29, s. 12. R. v. Bowden, 2 Moo. C. C. 285.

Where a lodger invited the prosecutor to take part of his bed, without the knowledge of his landlord, and stole his watch from the bed-head, it was held by the judges

that he was properly convicted of stealing in a dwelling-house. R v. Taylor, R. & R. 418. So where goods were left by mistake at a house in which the prisoner lodged, and were placed in his room, and carried away by him, they were held to be within the protection of the house. R. v. Carroll, 1 Moo. C. C. 89. So if a man, on going to bed, put his clothes and money by his bedside, these are under the protection of the dwelling-house, and not of the person. R. v. Thomas, Car Sup. 295. So where a man went to bed with a prostitute, having put his watch in his hat on a table, and the woman stole the watch while the man was asleep, Parke, B., and Patteson, J., after referring to R. v. Taylor, *supra*, were of opinion that the prosecutor having been asleep when the watch was taken by the prisoner, it was sufficiently under the protection of the house to bring it within the statute. R. v. Hamilton, C. & P. 49. It would appear that, had the prosecutor been awake instead of asleep, in Taylor's Case, the property was sufficiently within his personal control to render the stealing of it a stealing from the person, and that an indictment under the above enactment would not have been sustainable. See the note to R. v. Hamilton, *supra*, and 1 Russ. by Grea. 855 (*n*). But where a person put money under his pillow, and it was stolen whilst he was asleep, this was held not a stealing of money in the dwelling-house within the meaning of the 12 Anne, c. 12. 2 Stark. C. P. 467; R. v. Challoner, Dick. Quar. Sess. 235, 5th ed.; 1 Russ. by Grea. 855.

It is a question for the court, and not for the jury, whether goods are under the protection of the dwelling-house or in the personal care of the owner. R. v. Thomas, *supra*.

Proof of the value of the goods stolen.] It must appear not only that the goods stolen were of the value of 5*l*., but likewise that goods to that value were stolen upon one occasion, for a number of distinct larcenies cannot be added together to constitute a compound statutable larceny. Where it appeared that the prisoner had purloined his master's property to a very considerable amount, but it was not shown that he had ever taken to the amount of 40*s*. at any one particular time, upon an indictment under the 12 Anne, c. 7, the court held that the property stolen must not only be in the whole of such a value as the law requires to constitute a capital offence, but that it must be stolen to that amount at one and the same time; that a number of distinct petty larcenies could not be combined so as to constitute grand larceny, nor could any distinct number of grand larcenies be added together, so as to constitute a capital offence. R. v. Petrie, 1 Leach, 295. And the same was ruled by Ashurst, J., in a subsequent case. R. v. Farley, 2 East, P. C. 740. But it may vary the consideration, *if the property of several persons, lying together in one bundle [*402] or chest, or even in one house, be stolen together, at one time; for there the value of all may be put together, so as to make it grand larceny, or to bring it within a statute which aggravates the punishment, for it is one entire felony. 2 East, P. C. 740. And where, under the statute of Anne, the property was stolen at one time to the value of 40*s*., and a part of it only, not amounting to 40*s*., was found upon the prisoner, the court left it to the jury to say whether the prisoner had not stolen the remainder of the property, which the jury accordingly found. R. v. Hamilton, 1 Leach, 348; 1 Russ. by Grea. 857.

Where the prisoner, who was in the prosecutor's service, stole a quantity of lace in several pieces, which were not separately worth 5*l*., and brought them all out of his master's house at one time, Bolland, B., held that the offence was made out, although it was suggested that the prisoner might have stolen the lace a piece at a time R. v. Jones, 4 C. & P. 217: 19 E. C. L. R. The learned baron mentioned a case tried

before Garrow, B., where it appeared that the articles, which were separately under the value of 5*l.*, were in fact stolen at different times, but were carried out of the house all at once; and the latter learned judge held, after much consideration, that as the articles were brought out of the house all together, the offence (which was then capital) was committed.

[*403] *EMBEZZLEMENT.

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Embezzlement by clerks or servants.] By the 24 & 25 Vict. c. 96, s. 68, "Whosoever being a clerk or servant, or being employed for the purpose, or in the capacity of a clerk or servant, shall fraudulently embezzle any chattel, money, or valuable security, which shall be delivered to or received or taken into possession by him for or in the name or on the account of his master or employer, or any part thereof, shall be deemed to have feloniously stolen the same from his master or employer, although such chattel, money, or security was not received into the possession of such master or employer otherwise than by the actual possession of his clerk, servant, or other person so employed, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years, or to be imprisoned for any term not exceeding two [*404] years, with or without hard labor, and with or *without solitary confinement, and, if a male under the age of sixteen years, with or without whipping."

Embezzlement by persons in the queen's service, or by the police.] By s. 70, "Whosoever being employed in the public service of her majesty, or being a constable or other person employed in the police of any county, city, borough, district, or place whatsoever, and intrusted by virtue of such employment with the receipt, custody, management, or control of any chattel, money, or valuable security, shall em-

bezzle any chattel, money, or valuable security which shall be intrusted to, or received, or taken into possession by him by virtue of his employment, or any part thereof, or in any manner fraudulently apply or dispose of the same, or any part thereof, to his own use or benefit, or for any purpose whatsoever, except for the public service, shall be deemed to have feloniously stolen the same from her majesty, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years, or to be imprisoned for any term not exceeding two years."

Venue in embezzlement by persons in the queen's service, or by the police.] By the same section every offender against this provision "may be dealt with, indicted, tried, and punished, either in the county or place in which he shall be apprehended or be in custody, or in which he shall have committed the offence."

Form of warrant of commitment and indictment in the same cases.] By the same section, in every case of embezzlement under this section "it shall be lawful in the warrant of commitment by the justice of the peace before whom the offender shall be charged, and in the indictment to be preferred against such offender, to lay the property of any such chattel, money, or valuable security in her majesty."

Distinct acts of embezzlement may be charged in the same indictment.] By s. 71, "for preventing difficulties in the prosecution of offenders in any case of embezzlement, or fraudulent application or disposition hereinbefore mentioned, it shall be lawful to charge in the indictment and proceed against the offender for any number of distinct acts of embezzlement, or of fraudulent application or disposition, not exceeding three, which may have been committed by him against her majesty, or against the same master or employer, within the space of six months from the first to the last of such acts."

Description of property in the indictment.] By the same section, in every indictment for embezzlement "where the offence shall relate to any money or any valuable security, it shall be sufficient to allege the embezzlement, or fraudulent application or disposition to be of money, without specifying any particular coin or valuable security; and such allegation, so far as regards the description of the property, shall be sustained if the offender shall be proved to have embezzled, or fraudulently applied or disposed of any amount, although the particular species of coin or valuable security of which such amount was composed shall not be proved."

Where part of the property is to be returned.] By the same *section an [*405] indictment for embezzlement of "money" is declared to be sustained against the prisoner, "if he shall be proved to have embezzled, or fraudulently applied or disposed of, any piece of coin or any valuable security, or any portion of the value thereof, although such piece of coin or valuable security may have been delivered to him in order that some part of the value thereof should be returned to the party delivering the same, or to some other person, and such part shall have been returned accordingly."

Person indicted for embezzlement not to be acquitted if the offence turn out to be larceny, and vice versa] By s. 72, "If upon the trial of any person indicted for embezzlement, or fraudulent application or disposition, as aforesaid, it shall be proved

that he took the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person is not guilty of embezzlement, or fraudulent application or disposition, but is guilty of simple larceny, or of larceny as a clerk, servant, or person employed for the purpose, or in the capacity of a clerk or servant, or as a person employed in the public service, or in the police, as the case may be; and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such larceny; and if upon the trial of any person indicted for larceny it shall be proved that he took the property in question in any such manner as to amount in law to embezzlement, or fraudulent application, or disposition, as aforesaid, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person is not guilty of larceny, but is guilty of embezzlement, or fraudulent application, or disposition, as the case may be, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such embezzlement, fraudulent application, or disposition; and no person so tried for embezzlement, fraudulent application, or disposition, or larceny as aforesaid, shall be liable to be afterwards prosecuted for larceny, fraudulent application, or disposition, or embezzlement, upon the same facts."

Embezzlement by officers of the Bank of England or Ireland.] By s. 73, "Whosoever being an officer or servant of the governor and company of the Bank of England, or of the Bank of Ireland, and being intrusted with any bond, deed, note, bill, dividend warrant, or warrant for payment of any annuity or interest, or money, or with any security, money, or other effects of or belonging to the said governor and company, or having any bond, deed, note, bill, dividend warrant, or warrant for payment of any annuity or interest, or money, or any security, money, or other effects of any other person, body politic or corporate, lodged or deposited with the said governor and company, or with him as an officer or servant of the said governor and company, shall secrete, embezzle, or run away with, any such bond, deed, note, bill, dividend or other warrant, security, money, or other effects, as aforesaid, or any part thereof, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three [*406] years, or to be imprisoned *for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Embezzlement by officers and servants of South Sea Company.] The 24 Geo. 2, c. 11, s. 3, contains provisions with respect to officers and servants of the South Sea Company similar to those just stated.

Embezzling warehoused goods.] By the 3 & 4 Wm. 4, c. 57, s. 41, it is enacted, "that if it shall at any time happen that any embezzlement, waste, spoil, or destruction shall be made of or in any goods or merchandise, which shall be warehoused in warehouses under the authority of that act, by or through any wilful misconduct of any officer or officers of customs or excise, such officer or officers shall be guilty of a misdemeanor, and shall on conviction, suffer such punishment as may be inflicted by law in cases of misdemeanor." See also 16 & 17 Vict. c. 107, s. 95.

Embezzlement of naval and military stores.] See *post*, tit. Naval and Military Stores.

Embezzling woollen, flax, mohair, silk, and other manufactures.] By the 6 & 7 Vict. c. 40, various offences partaking of the nature of embezzlement, are provided for with respect to manufactures. See also 17 Geo. 3, c. 56, s. 10; R. v. Edmundson, 28 L. J. M. C. 213.

Interpretation.] As to the meaning of the term "valuable security," see 24 & 25 Vict. c. 96, s. 1, *infra*, tit. Larceny.

What persons are within the statute.] The question, whether or not the prisoner comes within the meaning of the statute, must be submitted to the jury, the judge directing them what facts are sufficient to determine this question in the negative or affirmative. Upon an indictment for embezzlement, it was proved in evidence, that the prisoner was storekeeper and clerk to a gaol, and that, though it was no part of his ordinary duty to receive money, he frequently did so, with the permission of the justices, in the absence of the governor. The judge directed the jury, that, if they believed the prisoner received the money, he did receive it by virtue of his employment, and was guilty of embezzlement. This was held to be a wrong direction by the Court of Criminal Appeal. R. v. Armau, Dears. C. C. 678.

The 24 & 25 Vict. c. 96, s. 68, comprises any person "being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant." The words of the 7 & 8 Geo. 4, c. 29, s. 47, were the same; and under that statute it was always considered that there must be something more than a mere casual temporary employment for the particular occasion when the offence is committed. Indeed, under that statute, something more than this was required, as will be seen presently, p. 412.

As to when the relation which is required by the statute is created, it has been held that a female servant is within the statute: R. v. Smith, Russ. & Ry. 267; so likewise is an apprentice: R. v. Mellish, Russ. & Ry. 80; so is the clerk or servant of a corporation, although *not appointed under the common seal. R. v. Bea- [*407] call, 1 C. & P. 457: 11 E. C. L. R.; 2 Russ. by Grea. 159 (*n*); Williams v. Stott, 1 Cromp. & M. 689. The clerk of a chapelry, who receives the sacrament money, is not the servant either of the curate, or of the chapel wardens, or of the poor of the township, within the meaning of the act. R. v. Burton, 1 Moo. C. C. 237. A person was chosen and sworn in at a court leet held by a corporation, as chamberlain of certain commonable lands. The duties of the chamberlain, who received no remuneration, were to collect moneys from the commoners and other persons using the commonable lands, to employ the moneys so received in keeping the common in order, and to account for the balance at the end of the year to two members of the corporation. The Court of Exchequer held that this person was not within the statute: Williams v. Stott, *ubi suprà*.

A person employed by overseers of the poor under the name of their accountant and treasurer is a clerk within the statute. Thus, where the prisoner had acted for many years for the overseers of the parish of Leeds, at a yearly salary, under the name of their accountant and treasurer, and as such had received and paid all the money receivable or payable on their account, rendering to them a weekly statement, purporting to be an account of moneys so received and paid: he was held to be rightly convicted of embezzlement. R. v. Squires, Russ. & Ry. 349; 2 Stark, 349. So, a person, who acted as clerk to parish officers at a yearly salary, voted by the vestry, was convicted of embezzlement. R. v. Tyers, Russ. & Ry. 402. And an extra collector of poor rates, paid out of the parish funds by a percentage, was held by Richardson, J., to be a clerk of the churchwardens and overseers, so as to support

an indictment for embezzlement. R. v. Ward, Gow. 168. The law on this subject is simplified by the 12 & 13 Vict. c. 103, s. 15, which, after reciting that difficulty had arisen in cases of larceny or embezzlement as to the proper description of the office of collectors of poor rates and assistant overseers, enacts that "In respect of any indictment or other criminal proceeding, every collector or assistant overseer appointed under the authority of any order of the poor-law commissioners or the poor-law board, shall be deemed and taken to be the servant of the inhabitants of the parish whose money or other property he shall be charged to have embezzled or stolen, and shall be so described; and it shall be sufficient to state any such money or property to belong to the inhabitants of such parish, without the names of any such inhabitants being specified." A similar provision is contained in some local acts.

The prisoner was a carrier whose *only* employment was to carry unsewed gloves from a glove-manufacturer at A. to glove-sewers who resided at B., to carry them back when sewed, and to receive the money for the work and pay it to the glove-sewers, deducting his charge. On several occasions he appropriated the money which he received on behalf of the sewers. It was held that he was not the servant of the sewers so as to be guilty of embezzlement; that his offence was a breach of trust, being a mere bailee of the money. R. v. Gibbs, Dears. C. C. 445; S. C. 24 L. J. M. C. 63. The prosecutors, who were manure manufacturers, engaged the prisoner, who kept a refreshment house at B., to get orders which they supplied from their stores. The prisoner was to collect the money, and pay it at once to them, and send a weekly [*408] account, and was called agent for the B. *district. Subsequently the prosecutors sent large quantities of manure to stores at B., which were under the control of the prisoner, who took them in his own name and paid the rent. The prisoner supplied orders from these stores, but the first-mentioned mode of supplying orders was not abandoned. The prisoner received a salary of 1*l.* per annum besides commission. It was held that the relation was one of principal and agent, and that the prisoner was not guilty of embezzlement. R. v. Walker, Dears. & B. C. C. 606. See as to a traveller paid by commission on the goods sold, *infra*, p. 410.

Where a society in consequence of administering to its members an unlawful oath was an unlawful combination and confederacy under the statutes 37 Geo. 3, c. 123; 39 Geo. 3, c. 79; 52 Geo. 3, c. 104; and 57 Geo. 3, c. 19; it was held by Mirehouse, C. S. (after consulting Bosanquet and Coleridge, JJ.), that a person charged with embezzlement as clerk and servant to such society could not be convicted. R. v. Hunt, 8 C. & P. 642. And see Milligan v. Wedge, *infra*.

In R. v. Atkinson, 2 Moo. C. C. 278, it was held that a clerk to a joint-stock banking company, established under 7 Geo. 4, c. 46, might be convicted of embezzling the money of the company, notwithstanding that he was a shareholder.

When a drover keeping cattle for a farmer at Smithfield was ordered to drive the cattle to a purchaser and receive the money, which he did, and appropriated it, the judges were unanimously of the opinion that he was a servant within the meaning of the act. R. v. Hughes, 1 Moo. C. C. 370. But in Milligan v. Wedge, 12 Ad. & El. 737, where the buyer of a bullock employed a licensed drover to drive it from Smithfield to his slaughter-house, and it appeared by the laws of the city of London that it was unlawful to employ any other than a licensed drover, Coleridge, J., on a question raised as to the liability of the owner of the bullock for negligence in driving it, held that no relation of master and servant was created between him and the drover. In the same case, it appeared that the drover had intrusted the bullock to the care of a boy, not a licensed drover, and it was held that he also was not the servant of the owner.

In R. v. May, 1 L. & C. C. C. 13; S. C. 30 L. J. M. C. 81, the prosecutors had told the prisoner that they would not appoint him as their agent, but that for all business he did for them they would pay him a commission. It does not appear that he transacted business on more than two occasions for the prosecutors, and the court held that the prisoner could not be convicted of embezzlement under the statute. There was here, it is true, the additional circumstance that even if the prisoner had been a clerk or servant, he was not employed to receive money, and Williams, J., said, in R. v. Tite, *infra*, p. 410, that this circumstance influenced his judgment, but without that circumstance the case seems a clear one.

In R. v. Tongue, 30 L. J. M. C. 49, the secretary of a money club, hired at a salary, was held to be within the old statute.

What persons are within the statute—persons employed by several.] In R. v. Goodbody, 8 C. & P. 665, 34 E. C. L. R., Parke, B., said, "I am of opinion that a man cannot be the servant of several persons at the same time, but is rather in the character of an agent. There is one case in which it has been held that a man may be the servant of *several at the same time, but I should like to have that [*409] question further considered." The question has been further considered, and the doubt here expressed no longer exists. See *infra*. In R. v. Leach, 3 Stark. 70: 3 E. C. L. R., the prisoner was in the employment of B. and R. as their bookkeeper; while in this situation he received into his possession certain bank-notes, which were the property of B. Being indicted for embezzling the notes as the servant of B., it was objected that he was the servant of the partners and not of individuals; but Bayley, J., held that he was the servant of each; and the learned judge referred to the case of R. v. Carr, Russ. & Ry. 198, where it was held that a traveller employed by several houses might be indicted for embezzlement as the servant of any one house. In R. v. Batty, 2 Moo. C. C. 257, it was held that a person employed by A. B. to sell goods for him at certain wages might be convicted of embezzlement as the servant of A. B., though at the same time he was employed by other persons for other purposes.

A., being one of the proprietors of a Hereford and Birmingham coach, horsed it from Hereford to Worcester, and employed the prisoner to drive it when he did not drive it himself, the prisoner taking all the gratuities. It was the prisoner's duty, on each day when he drove, to tell the bookkeeper at Malvern how much money he had taken, which the latter entered in a book, and then handed over to the prisoner the amount he had himself received. These two sums it was the duty of the prisoner to deliver to A., who was accountable to his co-proprietors. It was held by Patteson, J., that the prisoner, by appropriating the money, was guilty of embezzlement, that he was rightly described as the servant of A., and that the money was properly laid as the property of A. R. v. White, 8 C. & P. 742: 34 E. C. L. R.; S. C. 2 Moo. C. C. 91.

A railway station was maintained, at the joint expense of four companies, out of a fund contributed by them in certain proportions; it was under the general management of a committee of eight persons, selected from the directors of the four companies. This committee appointed and paid all the officers and servants of the station, and, amongst others, the prisoner, who was a delivery clerk, whose duty it was to receive parcels at the station brought by trains belonging to any of the four companies, to deliver them, and receive the payments for carriage and delivery. The money so received it was his duty to pay over to the cashier, who then paid it over to the respective companies entitled thereto. The prisoner appropriated a part of the amount paid to him for the carriage and delivery of a parcel brought to the station

by one of the four companies. It was held, that the prisoner might be indicted either as the servant of the four companies, or of the eight directors forming the committee. R. v. Bayley, Dear. & B. C. C. 121; S. C. 26 L. J. M. C. 4; see also R. v. Carr and R. v. Tite, *infra*, p. 410.

What persons are within the statute—wages or payment.] Several cases have occurred in which doubts have arisen whether the party offending could be considered a *servant* within the meaning of the statute, on account of the manner in which he was remunerated for his services. The allowance of part of the profit on the goods sold will not prevent the character of servant from arising. The prisoner was employed to take coals from a colliery and sell them, and bring the money to his em- [*410] ployer. The mode of paying him was by allowing *him two-third parts of the price for which he sold the coal, above the price charged at the colliery. It was objected that the money was the joint property of himself and his employer; and the point was reserved for the judges, who held that the prisoner was a servant within the act. They said that the mode of paying him for his labor did not vary the nature of his employment, nor make him less a servant than if he had been paid a certain price per chaldron or per diem; and as to the price at which the coals were charged at the colliery in this instance, that sum he received solely on his master's account as his servant, and by embezzling it he became guilty of larceny within the statute. R. v. Hartley, Russ. & Ry. 139; see also R. v. Wortley, *infra*. The prisoner was employed by the prosecutors, who were turners, and was paid according to what he did. It was part of his duty to receive orders for jobs, and to take the necessary materials from his masters' stock, to work them up, to deliver out the articles, and to receive the money for them; and then his business was to deliver the whole of the money to his masters, and to receive back, at the week's end, a proportion of it for working up the articles. Having executed an order, the prisoner received three shillings for which he did not account. Being convicted of embezzling the three shillings, a doubt arose whether this was not a fraudulent concealment of the order, and an embezzlement of the materials; but the judges held the conviction right. R. v. Higgins, Russ. & Ry. 145. A partner in a firm, with the consent of the other partners, contracted to give his clerk one-third of his own share of the profits; it was held by Chambre, J., that he might be convicted of embezzlement. R. v. Holmes, 2 Lew. C. C. 256. The learned judge quoted, on this occasion, a case on the northern circuit, before Wood, B., in which the prisoner had been sent by one F., the owner of a coal vessel, with a cargo of coals. According to the custom of the trade, F. was entitled to one-third of the freight and the prisoner to two-thirds. The prisoner took the whole, and was convicted of embezzlement. A large majority of the judges held the conviction right.

A person who acts as a traveller for various mercantile houses, takes orders and receives moneys for them, and is paid by a commission, is a *clerk* within the statute. The prisoner was indicted for embezzling the property of his employers, Stanley & Co. He was employed by them and other houses as a traveller, to take orders for goods and to collect money for them from their customers. He did not live in the house with them. He was paid by a commission of five per cent. on all goods sold, whether he received the price or not, provided they proved good debts. He had also a commission upon all orders that came by letter, whether from him or not. He was not employed as a clerk in the counting-house, nor in any other way than as above stated. Stanley & Co. did not allow him anything for the expenses of his journeys. Having been convicted of embezzling money, the property of Stanley & Co., the

judges, on a case reserved, held the conviction right. R. v. Carr, Russ. & Ry. 198. This decision is affirmed by R. v. Tite, 1 L. & C. C. C. 29; S. C. 30 L. J. M. C. 142.

The prisoner entered into the following agreement with the prosecutor: "S. W. agrees to take charge of the glebe land of J. B. C., his wife undertaking the dairy, poultry, &c., at 15*s.* a week, till Michaelmas, 1850; and afterwards at a salary of 25*l.* a year, and a third of the clear annual profit after all the expenses of rent, rates, labor, and interest on capital, &c., are paid, on a fair valuation made *from [*411] Michaelmas to Michaelmas. Three months' notice on either side to be given; at the expiration of which time, the cottage to be vacated by S. W., who occupies it as bailiff, in addition to his salary." It was held, that this agreement created the relation of master and servant, and that the prisoner (S. W.) might be convicted of embezzlement. R. v. Wortley, 2 Den. C. C. 333; S. C. 21 L. J. M. C. 44.

In whose employment.] Sometimes there is little doubt that the person indicted is a clerk or servant, or employed in that capacity, but it is difficult to say precisely who his employer is. This difficulty has frequently arisen with respect to the collectors of poor-rates and persons holding similar situations, and some cases on this subject will be found at p. 407; but the 12 & 13 Vict. c. 103, s. 15, *supra*, p. 407, simplifies the case so far as these persons are concerned. Before the passing of that act, a collector of poor and other rates in the parish of St. Paul, Covent Garden, was held by Vaughan and Patteson, JJ., to be rightly described under a local act (10 Geo. 4, c. lxviii), as in the employ of the committee of management of the affairs of the parish, though he was elected by the vestrymen of the parish. R. v. Callahan, 8 C. & P. 154: 34 E. C. L. R. But an assistant overseer, appointed and paid by the guardians of a union, was held not to be the servant of the overseers. R. v. Townsend, 1 Den. C. C. 167. On an indictment against the clerk of a savings bank, the judges held that he was properly described as clerk of the trustees, although elected by the managers. R. v. Jenson, 1 Moo. C. C. 434. So it was held that the secretary of a society appointed by the society *generally*, might be described as the servant of the trustees. R. v. Hall, 1 Moo. C. C. 474. And the clerk of a friendly society may be described as the servant of the trustees. R. v. Miller, 2 Moo. C. C. 249. See 18 & 19 Vict. c. 63, s. 18; *infra*.

In R. v. Beaumont, Dear. C. C. 270; S. C. 23 L. J. M. C. 54, it appeared that one W. had engaged with a railway company to find horses and carmen to deliver the company's coals, and that he or his carmen should deliver to the company's manager all the money received from the customers. The delivery notes were entered by W. in his book, and the receipted invoices given to the customers. The prisoner was one of W.'s carmen, whose duty it was to pay over directly to the manager the money which he received from the customers. No account of money so received and paid was kept between W. and the company. It was held by a majority of the Court of Criminal Appeal that the prisoner was the servant of the company and not of W., and that the money was received by him on their account and not on the account of W., and that, consequently, an indictment against the prisoner, as the servant of W. for embezzling money received in that capacity could not be supported. A somewhat similar case was that of R. v. Thorpe, Dears. & B. C. C. 562. There C. H. was agent for a railway company for delivering goods, under a contract very similar to the last, but the points of difference, though minute, were important; because here the court thought that an indictment against the prisoner, as servant of C. H., for embezzling money received from one of the persons to whom goods were

delivered under the contract, could be sustained. The chief point of difference between the two contracts appears to be that in the latter case the master was liable to [*412] account to the railway *company for the money received by his carmen; in the former not.

There is also a civil case which is frequently referred to on this subject. In Quarman v. Burnett, 6 M. & W., 499, the owners of a carriage were in the habit of hiring horses from the same person to draw it for a day or drive; the owners of the horses provided a driver, who was always the same person, he being a regular coachman in the employment of the owner of the horses; the coachman was paid by the owners of the carriage a fixed sum for each drive, and provided by them with a livery, which he left at the house at the end of each drive. It was held that this coachman was not the servant of the owners of the carriage so as to make them liable for an injury caused by his negligence.

Upon this part of the law compare also the cases in the last heading.

Money not received by virtue of employment.] Frequently there has been no doubt that the prisoner is a clerk or servant, but he has been held not liable to be convicted, because the money which he has appropriated was not received, in the words of the 7 & 8 Geo. 4, c. 29, s. 47, "by virtue of his employment." In the present statute (24 & 25 Vict. c. 96, s. 68) the words "by virtue of his employment" are omitted. Mr. Greaves says, that these words were advisedly omitted in order to enlarge the enactment and to get rid of some of the following decisions. Greaves' Crim. Stat. p 117. It is, however, thought desirable to insert the cases on the old statute.

In R. v. Thorley, 1 Moo. C. C. 343, it was held that the servant of a carrier, employed to look after the goods, but not intrusted with the receipt of money, could not be convicted of embezzling money paid him by one of his master's customers. So where the prisoner was an apprentice to a butcher, and his duty was to carry out the meat, but he had never been employed to receive money; having delivered a bill for meat to one of his master's customers, he received it, and applied the amount to his own use. The judges, however, held that he could not be convicted, as he did not receive the money by virtue of his employment. R. v. Mellish, Russ. & Ry. 80. Where the prisoner was employed to lead a stallion, with authority to charge and receive a fixed sum, but not less, and he received a less sum and kept it, this was holden to be no embezzlement, because the money was not received by the prisoner by virtue of his employment. R. v. Snowley, 4 C. & P. 390, per Parke, B. This seems rather a strong decision, but the learned Baron said in R. v. Harris, *infra*, that he adhered to it. In R. v. Ashton, 2 C. & K. 413: 61 E. C. L. R., a brewer sent his drayman out with porter, with authority to sell it at fixed prices only. The drayman sold some of it at an under price, but did not receive the money at the time. The master heard of this, and, without saying anything to the drayman, told the customer to pay the drayman the amount, if he asked for it. Patteson, J., held that the drayman might be convicted of embezzlement. In R. v. Harris, 1 Dears. C. C. 334: S. C. 23 L. J. M. C. 110, the prisoner was the miller of a mill in a county gaol, and it was his duty to direct persons bringing grain to be ground to obtain from the porter of the gaol a ticket stating the quantity of the grain, which ticket the miller was to receive with the grain. He also received the money for grinding, for which it was his duty to account to the governor. In some cases he omitted to direct [*413] customers *to obtain the ticket, as above mentioned, and in such cases appropriated the money to his own use. It was held by the judges that the prisoner could

not be convicted of embezzlement, as he had obtained the money not by virtue of his employment, but by a misuse of the power of the master's mill.

Where a servant, who was not authorized to receive money, was standing near a desk in his master's counting-house, and a person who owed money to the master paid it to the servant, who appropriated it, this was held to be no embezzlement. R. v. Crowley, cited by Alderson, B., in R. v. Hawker, 7 C. & P. 281 : 32 E. C. L. R., a precisely similar case, and in which that learned baron laid down the same law. So where a drover was employed by a grazier in the country to drive eight oxen to London, with instructions that if he could sell them on the road he might, and those he did not sell on the road he was to take to a particular salesman in Smithfield, who was to sell them for the grazier; and the drover sold two on the road, and instead of taking the remaining six to the salesman, drove them himself to Smithfield market and sold them there, and received the money, and applied it to his own use; it was held by Littledale, J , and Parke, B., that he could not be convicted of embezzlement. R. v. Goodbody, 8 C. & P. 665 : 34 E. C. L. R.

It has, however, been held not to be necessary that the servant should have been acting in the ordinary course of his employment when he received the money, provided that he was employed by his master to receive the money on that particular occasion. The prisoner was employed to collect the tolls at a particular gate, which was all that he was hired to do; but on one occasion his master ordered him to receive the tolls of another gate, which the prisoner did, and embezzled them. Being indicted (under the 39 Geo. 3, c. 85), for his embezzlement, a doubt arose whether it was by virtue of his employment, and the case was reserved for the opinion of the judges: Abbott, C. J., Holroyd, J., and Garrow, B., thought that the prisoner did not receive the money by virtue of his employment, because it was out of the course of his employment to receive it. But Park, Burrough, Best, and Bayley, JJ., and Hullock, B., thought otherwise; because, although out of the ordinary course of the prisoner's employment, yet as, in the character of servant, he had submitted to be employed to receive the money, the case was within the statute. R v. Smith, Russ. & Ry. 516.

So, although it may not have been part of the servant's duty to receive money, in the capacity in which he was originally hired, yet if he has been in the habit of receiving money for his master, he is within the statute. Thus, where a man was hired as a journeyman miller, and not as a clerk or accountant, or to collect money, but was in the habit of selling small quantities of meal on his master's account, and of receiving money for them, Richard, C. B., held him to be a servant within the 39 Geo. 3, c. 85, saying, that he had no doubt the statute was intended to comprehend masters and servants of all kinds, whether originally connected in any particular character and capacity or not. R. v. Barker, Dow. & Ry. N. P. C. 19 : 16 E. C. L. R.

If the servant be intrusted with the receipt of money from particular persons, in the ordinary course of his employment, and receives money from other persons, and embezzles it, the case seems to be within the act. The prisoner was employed by the prosecutors in the capacity of a clerk, as *evening collector*, in which character it *was his duty to receive every evening, from the porters employed in the [*414] business, such money as they had received from the customers in the course of the day; and it was the prisoner's duty to pay over these sums to another clerk the following morning. He was not expected, in the course of his employment, to receive money from the customers themselves. Having called on a customer for the payment of a bill, he received a check and embezzled it. Being convicted of this offence, the judges, on a case reserved, were of opinion, that as the prisoner was instructed to

receive from the porters such moneys as they had collected from the customers in the course of the day, the receiving immediately from the customers, instead of receiving through the medium of the porters, was such a receipt of money, "by virtue of his employment," as the act was meant to protect. R. v. Beechey, Russ. & Ry. 319. Upon the same principle, where a person employed by a carrier was directed by his employer to receive a sum of 2*l.*, which he did receive and embezzled, on a case reserved, the judges were of opinion that he was rightly convicted of embezzlement. R. v. Spencer, Russ. & Ry. 299. So where a drover, keeping cattle for a farmer at Smithfield, was ordered to drive the cattle to a purchaser and receive the money, which he did and embezzled it, the judges were unanimously of opinion that the prisoner was a servant within the meaning of the act, and that the conviction was right. R. v. Hughes, 1 Moo. C. C. 370.

In R. v. Tongue, 30 L. J. M. C. 49, the Court of Criminal Appeal held, affirming the above principle, that the employment to receive money was sufficient, though it was not the prisoner's usual duty to receive money.

Nature of the offence of embezzlement.] Embezzlement is only a species of larceny. It is in every respect a precisely similar crime to that which is committed by a servant who receives property from his master and appropriates it. This is larceny, because the possession of the master continues in law until the wrongful appropriation by the servant takes place. The case which was held not to be larceny was that of a banker's clerk, who received money from a customer and appropriated it; and the reason given was, that as the employer had never had possession of the money, he had never been wrongfully deprived of the possession of it, which was a necessary ingredient in the crime of larceny. R. v. Bazeley, 2 East, P. C. 576. The effect of the 39 Geo. 3, c. 85, which was passed in consequence of this decision, was to make the master's possession commence from the moment that his property came into the servant's hands.

Distinction between larceny and embezzlement.] It seems hardly necessary, after the passing of the last-mentioned statute, to keep up the distinction between larceny and embezzlement, especially as if the principle of the possession of the servant being the possession of the master had been interpreted with the same latitude in criminal and civil cases, for which there seems to be no reason to the contrary, that statute would have been altogether unnecessary. But the distinction has been preserved, and before the passing of the 14 & 15 Vict. c. 100, s. 13, many prisoners were acquitted on this distinction. By that provision (*supra*, p. 405), where a person is indicted for embezzlement, he is not to be acquitted altogether if the offence turns out [*415] to be larceny, but he may be found not guilty of embezzlement *and guilty of larceny. And *vice versâ* on an indictment for larceny. But this does not enable a jury to find a prisoner guilty of larceny on facts which amount to embezzlement: R. v. Garbutt, Dears. & B. C. C. 166; S. C. 26 L. J. M. C. 47; so that even now the distinction must still be observed. What the distinction is, is obvious enough from the account of the origin of embezzlement as a separate offence in the last section. In R. v. Masters, 1 Den. C. C. 332, it was held, that where money was received on account of his master by one servant, and by him handed to another in due course of business, and the latter appropriated it, that this was embezzlement, as the master had clearly never had possession by the first servant any more than by the second. So where the servant was sent by his master to get change for a 5*l.* note, which he did, and then appropriated the change to his own use, it was held, that as the master had

never had possession of the change, this was embezzlement, and not larceny. R. v. Sullen, 1 Moo. C. C. 129. The prosecutors suspecting the prisoner, desired a neighbor to go to their shop and purchase some articles, and pay for them with some marked money, which they supplied for the purpose. This was done, and the prisoner appropriated the money. It was contended that this was larceny, and not embezzlement, as the money was in law always in the master's possession. But the prisoner was convicted of embezzlement, and the conviction held right. R. v. Hedge, Russ. & Ry. 162; 2 Leach, 1033. And this case was followed in R. v. Gill, 1 Dear. C. C. 289; S. C. 23 L. J. M. C. 50; see also *infra*, tit. Larceny.

Proof of embezzlement.] The first possession being lawful, the act of embezzlement consists in a mere act of the mind without any outward and visible trespass as in many cases of larceny, and in all crimes of violence. That this mental act of fraudulent appropriation has taken place has to be inferred from the conduct of the prisoner, or from his own admissions. The case of R. v. Smith, Russ. & Ry. 467, in which the master had given his servant money to pay taxes which the collector had never received, was, if anything, larceny, though the remarks of the judges were applicable to embezzlement. It is clear that, as there stated, the bare non-application of money in the manner directed is not sufficient whereon to convict a person of embezzlement. For all that appeared in that case, the servant had never appropriated the money at all. The same remarks apply to the case of R. v. Hodgson, 3 C. & P. 423 : 14 E. C. L. R., where it was admitted that the prisoner had made no false entry, and that he had charged himself in the books with all the moneys which he had received, but it was imputed to him that he had not sent the amount of three items to his employers as he ought to have done. But, on the other hand, it is clearly settled that a prisoner, by making an admission in his account that he has received the money, does not thereby necessarily free himself from the charge of embezzlement, if there be other circumstances from which the jury may infer that the money was fraudulently appropriated. R. v. Lister, Dears. & B. C. C. 118. Any doubt on this point arises from not keeping clearly in view the distinction between the offence and the evidence of it. See the next heading, and R. v. Guelder, 30 L. J. M. C. 34.

At what time the offence is committed.] There is sometimes *difficulty in [*416] ascertaining the precise time when the embezzlement takes place, which is important upon the question of venue. In general the act of embezzlement cannot be said to take place until the party who has received the money refuses to account, or falsely accounts for it. Where the prisoner received the money in Shropshire, and told his master in Staffordshire that he had not received it, the question was, whether he was properly convicted for the embezzlement in the former county. On a case reserved, the conviction was held right. Lawrence, J., thought that embezzlement being the offence, there was no evidence of any offence in Shropshire, and that the prisoner was improperly indicted in that county. But the other judges were of opinion, that the indictment might be in Shropshire, where the prisoner received the money, as well as in Staffordshire, where he *embezzled it*, by *not accounting for it to his master;* that the statute having made receiving money and embezzling it a larceny, made the offence a felony where the property was first taken, and that the offender might, therefore, be indicted in that or in any other county into which he carried the property: R. v. Hobson, 1 East, P. C. Add. xxiv.; Russ. & Ry. 56. The doctrine, that the not accounting is the evidence of the embezzlement, was also laid down in the fol-

lowing case. The prisoner was indicted for embezzling money in Middlesex. It appeared that he received the money in Surrey, and, returning into Middlesex, denied to his master the receipt of the money. It was objected that he ought to have been indicted in Surrey, and the point was reserved. Lord Alvanley, delivering the opinion of the judges, after referring to the last case, said, "The receipt of the money was perfectly legal, and there was no evidence that he ever came to the determination of appropriating the money until he had returned into the county of Middlesex. In cases of this sort, the nature of the thing embezzled ought not to be laid out of the question. The receipt of money is not like the receipt of an individual thing, where the receipt may be attended with circumstances which plainly indicate an intention to steal, by showing an intention in the receiver to appropriate the thing to his own use. But with respect to money, it is not necessary that the servant should deliver over to his master the identical pieces of money which he receives, if he should have lawful occasion to pass them away. In such a case as this, therefore, even if there had been evidence of the prisoner having spent the money on the other side of Blackfriars Bridge, it would not necessarily confine the trial of the offence to the county of Surrey. But here there is no evidence of any act to bring the prisoner within the statute, *until he is called upon by the master to account.* When so called upon, he denied that he had ever received it. That was the first act from which the jury could with certainty say, that the prisoner intended to embezzle the money. There was no evidence of the prisoner having done any act to embezzle in the county of Surrey, nor could the offence be complete, nor the prisoner be guilty within the statute, *until he refused* to account to his master." R. v. Taylor, 3 Bos. & Pul. 596; 2 Leach, 974; Russ. & Ry. 63. The prisoner was a travelling salesman, whose duty it was to go into Derbyshire every Monday to sell goods and receive money for them there, and return with it to his master in Nottinghamshire every Saturday. He received two sums of money for his master in Derbyshire, but never returned to [*417] render any account of them. Two months afterwards he was *met by his master in Nottinghamshire, who asked him what he had done with the money, and the prisoner said he was sorry for what he had done; he had spent it. It was held, under these circumstances, that the prisoner was rightly indicted in Nottinghamshire, there being some evidence to go to the jury of an embezzlement in that county. R. v. Murdock, 2 Den. C. C. R. 298; S. C. 21 L. J. M. C. 22.

It is impossible to avoid seeing that these decisions are colored with the error, that a denial of the receipt or omission to account is necessary to constitute the crime of embezzlement, and that the distinction already adverted to between the offence and the evidence of it is not always kept in view. It is, however, only reasonable where there is no other indication of the time at which the money was appropriated, to conclude that this act took place at the same time as the first indication of it, viz.: the refusal to account, or the omission to do so at the proper time.

Where a claim is set up, though unfounded] Upon an indictment for embezzlement, it appeared that the prosecutors were owners of a vessel, and the prisoner was in their service as the master. The vessel carried culm from Swansea to Plymouth, which, when weighed at Plymouth, weighed 215 tons, and the prisoner received payment for the freight accordingly. When he was asked for his account by the owner, he delivered a statement acknowledging the delivery of 210 tons, and the receipt of freight for so much. Being asked whether this was all that he had received, he answered that there was a difference of five tons between the weighing at Swansea and Plymouth, and that he had retained the balance for his own use, according to a

recognized custom between owners and captains in the course of business. But there was no evidence of the alleged difference of weight, or of the custom. Cresswell, J., held that this did not amount to embezzlement. Embezzlement necessarily involved secrecy; the concealment, for instance, by the defendant of his having appropriated the money. If instead of his denying his appropriation, a defendant immediately owned it, alleging a right or an excuse for retaining the sum, no matter how frivolous the allegation, and although the fact itself on which the allegation rested were a mere falsification; as if, in the present case, it should turn out that there was no such difference as that asserted by the defendant between the tonnage at Swansea and at Plymouth, or that there was no such custom as that set up, it would not amount to embezzlement. Reg. v. Norman, Carr. & M. 501: 41 E. C. L. R. Perhaps this case may be explained on the ground that the claim set up, though it might be frivolous, was accepted by the master. The prisoner could then be indicted for obtaining money by false pretences.

Absconding evidence of embezzlement.] Where the prisoner was sent to receive money due to her master, and on receiving it went off to Ireland, Coleridge, J., held that the circumstance of the prisoner having quitted her place, and gone off to Ireland, was evidence from which the jury might infer that she intended to embezzle the money. The prisoner was convicted. R. v. Williams, 7 C. & P. 338: 32 E. C. L. R.

Particularity with which the crime must be laid and proved.] *Where the [*418] prisoner receives several sums of money, and his accounts do not fix him with the embezzlement of any specific sum at a specific time, the crime is very difficult of proof. In R. v. Hall, Russ. & Ry. 463; S. C. 3 Stark. 671: 3 E. C. L. R., the prisoner received on account of his masters 18*l.* in one pound notes; he immediately entered in the books of his employers 12*l.* only as received, and accounted to them only for that sum. In the course of the same day he received 104*l.* on their account, which he paid over to them that evening with the 12*l.* It was urged for the prisoner that this money might have included all the 18*l.* in one pound notes, and if so, he could not be said to have embezzled any of them. The prisoner being convicted, on a case reserved, nine of the judges held the conviction right, being of opinion that from the time of making the false entry, it was an embezzlement. Wood, B., doubted whether it could be considered an embezzlement, and Abbott, C. J., thought that the point should have been left to the jury, and that the conviction was wrong.

It was held upon the statute 39 Geo. 3, c. 85, that the indictment ought to set out specially some article of the property embezzled, and that the evidence should support that statement. Therefore, where the indictment charged that the prisoner embezzled the sum of *one pound eleven shillings*, and it did not appear whether the sum was paid by a one pound note and eleven shillings in silver, or by two notes of one pound each, or by a two pound note, and change given by the prisoner; on a case reserved, the judges were of opinion that the indictment ought to set out specifically, at least, some articles of the property embezzled, and that the evidence should support the statement, and they held the conviction wrong. R. v. Furneaux, Russ. & Ry. 335; R. v. Tyers, Id. 402. But by the 7 & 8 Geo. 4, c. 29, s. 48, and now by the 24 & 25 Vict. c. 96, s. 71, it is sufficient to allege the embezzlement to be of money, without specifying any particular coin, or valuable security, and such allegation, so far as it regards the description of property, shall be sustained, if the offender

shall be proved to have embezzled any amount, although the particular species of coin, or valuable security, of which such amount was composed, shall not be proved.

It was the duty of the prisoner, who was a banker's clerk, to receive money and to put it either into a box or a till, of each of which he kept the key, and to make entries of his receipts in a book; the balance of each evening before the first item with which he debited himself in the book the next morning. On the morning of the day in question he had thus debited himself with 1762*l.*, and at the close of business on the latter day he made the balance in the "money book" 1309*l.* On being called upon in the evening by one of his employers to produce his money, he threw himself upon his employers' mercy, saying he was about 900*l.* short. On examination it was found that the prisoner, instead of having 1309*l.* had only 345*l.*, making the actual deficiency 964*l.* The jury having found the prisoner guilty, upon an indictment of embezzling "money to a large amount, to wit, 500*l.*;" a majority of the judges (eight to seven), after very considerable doubts, were of opinion that there was sufficient evidence to go to the jury, of the prisoner having received certain moneys on a particular day, and for them to find he had embezzled the sum mentioned in the indictment. R. v. Grove, 7 C. & P. 635: 32 E. C. L. R.; 1 Moo. C. C. 447. [*419] But in a more recent case, Alderson, *B., after stating that the determination in the above case proceeded more upon the particular facts than upon the law, said, "It is not sufficient to prove at the trial a general deficiency in account. Some specific sum must be proved to be embezzled, in like manner as in larceny some particular article must be proved to have been stolen." R. v. Jones, 8 C. & P. 288: 34 E. C. L. R. It was the duty of a clerk to receive money for his employer, and pay wages out of it, to make entries of all moneys received and paid in a book, and to enter the weekly totals of receipts and payments in another book, upon which last book he, from time to time, paid over his balance to his employer. Having entries of weekly payments in his first book amounting to 25*l.* he entered them in the second as 35*l.*; and two months after, in accounting with his employer, by these means made his balance 10*l.* too little, and paid it over accordingly. Williams, J., held that the clerk could not, on these facts, be convicted of embezzlement, without its being shown that he had received some particular sum on account of his employer, and had converted either the whole or part of it to his own use. R. v. Chapman, C. & K. 119: 47 E. C. L. R.

There is still likely to be much difficulty on this point. Where a person is employed in the receipt and payment of money it is almost impossible to prove anything more than a deficiency in account, and if the words of Alderson, B., in R. v. Jones, *supra*, were to be taken in their strict sense, it would be impossible ever to procure a conviction for embezzlement where there were running accounts between the parties.

It is suggested that there is some misapprehension of the principles of law applicable to this question. As has already been said, the first statute of embezzlement, 39 Geo. 3, c. 85, was passed to meet a particular case which was held not to be larceny, namely, the appropriation of money by a clerk received by him from a customer on account of his master, *supra*, p. 414. Very strong arguments could be used to show that this was larceny at common law, the only difficulty that the judges had in the case referred to being about the trespass, and they seemed timid about extending the doctrine of constructive possession. But now that that difficulty has been removed by the legislature, embezzlement stands on precisely the same footing as larceny by a servant: if money be continually passing from the master to the servant, and the servant, instead of applying it to the purposes indicated, appropriates any part of it

to his own use, he is guilty of larceny; and in the numberless cases which must have occurred of this kind no one has ever thought of objecting that the servant could not be convicted of larceny, because he could not be shown to have received a particular sum, and to have appropriated a part of the whole of that particular sum. And what difference can it make now that the possession of the servant is made the possession of the master in all cases, that the money was received not from the master, but from third persons on account of the master?

There is a case of R. v. Monk, Dears. C. C. 626; S. C. 25 L. J. M. C. 66, which was decided on the statute 2 Wm. 4, c. 4, s. 1, which corresponds to the 24 & 25 Vict. c. 96, s. 70 (*supra*, p. 404). There the prisoner was an officer of receipt of inland revenue, and he was allowed to retain in his hands a balance of 300*l.* According to his accounts sent in to the Board, there stood a balance against him of more than 5000*l.* Upon inquiry being made, he said he was not prepared to hand over the balance, or any part of it. He was then *reminded that there was [*420] a sum of 300*l.* which he had received at a particular place on the previous Monday, and which was not included in his accounts. He then handed over 28*l.*, and a fraction, and said that was all the money he had in the world. It was held that a conviction might be sustained for embezzling the 300*l.*; but as to the 5000*l.*, the court thought it was a matter of doubt.

Particulars of the embezzlement.] Though it is not necessary to state in the indictment from whom the money, &c., was received, the judge before whom the indictment is found will order the prosecutor to furnish the prisoner with a particular of the charges, upon the prisoner making an affidavit that he is unacquainted with the charges, and that he has applied to the prosecutor for a particular which has been refused. R. v. Bootyman, 5 C. & P. 300: 24 E. C. L. R. Where three acts of embezzlement were stated in the indictments, the prisoner moved, upon affidavit, for an order directing the prosecutor to furnish a particular of the charges; notice of the motion had been given. Vaughan, B., to whom the application was made, said, "I think you ought to apply to the other side to furnish you with a particular, and, if they refuse, I will grant an order. The clause of 7 & 8 Geo. 4, c. 29, respecting the framing of indictments for embezzlement, causes great hardships to prisoners. What information does the indictment convey to such a man as this? As a clerk in a coach-office he must have received money from many hundred persons. I should, therefore, recommend the prisoner's attorney to apply to the prosecutor for a particular; and I think the prosecutor ought at least to give the names of the persons from whom the sums of money are alleged to have been received, and if the necessary information be refused, I will, on an affidavit of that fact, grant an order, and put off the trial." R. v. Hodgson, 3 C. & P. 422: 14 E. C. L. R. See also 1 Chit. Rep. 698; and *supra*, p. 178.

Proof of the thing embezzled.] The 24 & 25 Vict. c. 96, s. 71, *supra*, p. 404, allows great latitude in the description of money or valuable securities in indictments for embezzlement; and by the same section it is sufficient if any part of the money or valuable securities described in the indictment be proved to have been embezzled. The same rules of description will apply to chattels as in larceny; see that tit., *infra*. See also the general rules applicable to descriptive averments, *supra*, p. 81.

Proof of embezzlement by officers, &c., of the banks of England and Ireland.] It was held under the 15 Geo. 2, c. 13, s. 12, that it was not sufficient, in order to

bring a party within the statute, that he should be an officer of the bank, and as such *have access* to the document in question. It must appear also that he was *intrusted* with it. A bank-clerk, employed to post into the ledger, and read from the cash-book, bank-notes in value from 100*l.* to 1000*l.*, and who, in the course of that occupation, had, with other clerks, access to a file upon which *paid notes* of every description were filed, took from the file a paid bank-note for 50*l.* Being indicted for this, it was contended that he was not *intrusted* with this note within the statute, the only notes with which he could be said to be intrusted being those between 100*l.* and 1000*l.* Having been found guilty, the judges held the conviction wrong, on the [*421] ground that it did not appear that he *was *intrusted* with the cancelled note, though he had *access* to it. R. v. Bakewell, Russ. & Ry. 35.

Where the prisoner was charged with embezzling "certain bills, commonly called exchequer bills," and it appeared that the bills had been signed by a person not legally authorized to sign them, it was held that the prisoner could not be convicted. R. v. Aslett, 2 Leach, 954. The prisoner was again indicted, under the same statute, for embezzling "certain effects" of the bank, and being convicted, the judges on a case reserved, were of opinion that these bills or papers were *effects* within the statute: for they were issued under the authority of government as valid bills, and the holder had a claim on the justice of government for payment. R. v. Aslett, Russ. & Ry. 67; 2 Leach, 958; 1 N. R. 1. See now 24 & 25 Vict. c. 96, s. 1, *infra*, tit. Larceny.

[*422] *ESCAPE.

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An escape by a person in custody on a criminal charge may be either with or without force, or with or without the consent of the officer or other person who has him in custody.

Proof of escape by the party himself.] All persons are bound to submit themselves to the judgment of law, and therefore, if any one, being in custody, frees himself from it by any artifice, he is guilty of a high contempt, punishable by fine and imprisonment.(1) 2 Hawk. P. C. c. 17, s. 5. And if by the consent or negligence of the gaoler, the prison doors are opened, and the prisoner escapes, without making use of any force or violence, he is guilty of a misdemeanor. Id. c. 18, s. 9; 1 Hale, P. C. 611; 1 Russ. by Grea. 416.

(1) People v. Tompkins, 9 Johns. 70; People v. Washburn, 10 Johns. 160; People v. Rose, 12 Johns. 339; State v. Doud, 7 Conn. 384.

Proof of the criminal custody.] It is laid down that it must be proved that the party was in custody upon a criminal charge, otherwise the escape is not a criminal offence.(1) 1 Russ. by Grea. 416; but in R. v. Allan, Car. & M. 295 : 41 E. C. L. R., Erskine and Wightman, JJ., held that to aid a person confined under the warrant of the Commissioners for the Relief of Insolvent Debtors to escape from custody, was a common law misdemeanor. *Post*, tit. Rescue. Before the passing of the 4 Geo. 4, c. 64 (E.), it was decided that a certificate of the prisoner having been convicted, granted by the officer of the court, was not evidence. R. v. Smith, 1 Russ. by Grea. 417.

But now by the 44th section of the above statute, it is enacted, "that any offender escaping, breaking prison, or being rescued therefrom, may be tried either in the jurisdiction where the offence was committed, or in that where he or she shall be apprehended and retaken; and in case of any prosecution for any such escape, attempt to escape, breach of prison, or rescue, either against the offender escaping or attempting to escape, or having broken prison, or having been rescued, or against any other person or persons concerned therein, or aiding, abetting, or assisting the same, a certificate given by the clerk of assize, or other clerk of the court in which such offender shall have been convicted, shall, together with due proof of the identity of the person, be sufficient evidence to the court and jury *of the nature and [*423] fact of the conviction, and of the species and period of confinement to which such person was sentenced."

A certificate under this statute should set forth the effect and substance of the conviction, and not merely state it to have been for felony. R. v. Watson, R. & R. 468.

Proof of escape suffered by an officer.] In order to render a person suffering an escape liable, as an officer, it must appear that he was a known officer of the law. Thus, where the constable of the Tower committed a prisoner to the house of a warder of the Tower, the latter was held not to be such an officer as the law took notice of, and that he could not therefore be guilty of a negligent escape. 1 Chetw. Burn. Escape, 930. But whoever *de facto* occupies the office of gaoler is liable to answer for such an escape, and it is no way material whether his title to such an office be legal or not. Hawk. P. C. b. 2, c. 19, s. 28.

It is said by Hawkins to be the better opinion that the sheriff is as much liable to answer for an escape suffered by his bailiff as if he had actually suffered it himself; and that either the sheriff or the bailiff may be charged for that escape. Hawk. P. C. b. 2, c. 19, s. 28; 1 Hale, P. C. 597; 1 Russ. by Grea. 421. But this is opposed to the authority of Lord Holt, who says that the sheriff is not answerable criminally for the acts of his bailiff. R. v. Fell, 1 Salk. 272; 1 Lord Raym. 424.

Proof of escape suffered by an officer—proof of arrest.] In case of a prosecution against an officer, either for a voluntary or negligent escape of a prisoner in custody for a criminal offence, it must appear that there was an actual arrest of the offender. Therefore where an officer, having a warrant to arrest a man, sees him in a house and challenges him to be his prisoner, but never actually has him in his custody, and the party gets free, the officer cannot be charged with the escape. 2 Hawk. P. C. c. 19, s. 1. See Simpson v. Hill, 1 Esp. 431.

(1) The identity of the person who escaped with the one convicted must be proved. The State v. Murphy, 5 English, 74.

Proof of arrest—must be justifiable.] The arrest must be justifiable in order to render the escape criminal; and it is laid down as a good rule, that whenever an imprisonment is so far irregular as that it is no offence in the prisoner to break from it by force, it will be no offence in the officer to suffer him to escape. 2 Hawk. P. C. c. 29, s. 2. A lawful imprisonment must also be continuing at the time of the escape; and therefore, if an officer suffers a criminal, who was acquitted and detained for his fees, to escape, it is not punishable. Id. s. 3, 4. Yet, if a person convicted of a crime be condemned to imprisonment for a certain time, and *also till he pays his fees*, and he escape after such time is elapsed without paying them, perhaps such escape may be criminal, because it was part of the punishment that the imprisonment should continue till the fees were paid. But it seems that this is to be intended where the fees are due to others as well as to the gaoler. Id. s. 4.

Proof of voluntary escape.] It is not every act of releasing a prisoner that will render an officer subject to the penalties of voluntarily permitting an escape. The better opinion appears to be that the act must be done *malo animo*, with an intent to [*424] defeat the progress of *justice. Thus it is said by Hawkins, that it seems agreed that a person who has power to bail is guilty only of a negligent escape, by bailing one who is not bailable; neither, he adds, is there any authority to support the opinion that the bailing of one who is not bailable, by a person who has no power to bail, must necessarily be esteemed a voluntary escape. And there are cases in which the officer has knowingly given his prisoner more liberty than he ought, as to go out of prison on promise to return; and yet this seems to have been adjudged to be only a negligent escape. The judgment to be made, adds Hawkins, of all offences of this kind must depend on the circumstances of the case; as the heinousness of the crime with which the prisoner is charged, the notoriety of his guilt, the improbability of his returning, and the intention and motives of the officer. Hawk. P. C. b. 2, c. 19, s. 10; 1 Russ. by Grea. 419.

Proof of voluntary escape—retaking.] It is laid down in some books, that after a voluntary escape the officer cannot retake the prisoner by force of his former warrant, for it was by the officer's consent. But if the prisoner return, and put himself again under the custody of the officer, the latter may lawfully detain him, and bring him before a justice in pursuance of the warrant. 1 Burn, 930, tit. Escape, citing Dalt. c. 169; 2 Hawk. c. 13, s. 9; 1 Russ. by Grea. 421. But Hawkins observes, that the purport of the authorities seems to be no more than this, that a gaoler who has been fined for such an escape, shall not avoid the judgment by retaking the prisoner; and he adds, "I do not see how it can be collected from hence that he cannot justify the retaking him." Hawk. P. C. b. 2, c. 19, s. 12.

Proof of negligent escape.] A negligent escape is where the party arrested or imprisoned escapes against the will of him that arrested or imprisoned him, and is not freshly pursued and taken before he is lost sight of. Dalt. c. 159; 1 Chetw. Burn, 930, Escape. Thus, if a thief suddenly, and without the assent of the constable, hang or drown himself, this is a negligent escape. Id. It is said by Lord Hale, that if a prisoner for felony breaks the gaol, this seems to be a negligent escape, because there wanted either that due strength in the gaol that should have secured him, or that due vigilance in the gaoler or his officers that should have prevented it. 1 Hale, 600. But upon this passage it has been remarked, that it may be submitted that it would be competent to a person charged with a negligent escape under

such circumstances to show that all due vigilance was used, and that the gaol was so constructed as to have been considered by persons of competent judgment a place of perfect security. 1 Russ. by Grea. 420.

Proof of negligent escape—retaking.] Where a prisoner escapes through the negligence of the gaoler, but the latter makes such fresh pursuit as not to lose sight of him until he is retaken, this is said not to be an escape in law; but if he loses sight of him, and afterwards retakes him, the gaoler is liable to be punished criminally. It is scarcely necessary to add, that the sheriff or gaoler, though he had no other means of retaking his prisoner, would not be justified in killing him in such a pursuit. Hawk. P. C. b. 2, c. 19, ss. 12, 13; 1 Hale, P. C. 602.

**Proof of escape from the custody of a private person.*] The evidence upon [*425] an indictment against a private person, for the escape of a prisoner from his custody, will in general be the same as on an indictment against an officer. A private person may be guilty either of a voluntary or of a negligent escape, where he has another lawfully in his custody. Even where he arrests merely on suspicion of felony (in which case the arrest is only justifiable if a felony be proved), yet he is punishable if he suffer the prisoner to escape. Hawk. P. C. b. 2, c. 20, s. 2. And if, in such case, he deliver over the prisoner to another private person, who permits the escape, both, it is said, are answerable. Id. But if he deliver over his prisoner to the proper officer, as the sheriff or his bailiff, or a constable, from whose custody there is an escape, he is not liable. Id. s. 3; 1 Russ. by Grea. 425.

Punishment.] A negligent escape in an officer is punishable now by a fine imposed on the party, at the discretion of the court. 2 Hawk. c. 19, s. 31; 1 Hale, P. C. 600.

A voluntary escape in an officer amounts to the same kind of offence, and is punishable in the same degree, as the offence of which the prisoner is guilty, and for which he is in custody, whether treason, felony, or trespass. But the officer cannot be thus punished until after the original delinquent has been found guilty, or convicted; he may, however, before the conviction of the principal party, be fined and imprisoned for a misdemeanor. 2 Hawk. c. 19, s. 26; 1 Hale, 588, 589; 4 Comm. 130.

Where a private person is guilty of a negligent escape, the punishment is fine or imprisonment, or both. 2 Hawk. c. 20, s. 6.

As to escapes from Parkhurst prison, see the 1 & 2 Vict. c. 82, s. 53; from Pentonville prison, the 5 Vict. sess. 2, c. 29, ss. 24, 25; from Millbank prison, 6 & 7 Vict. c. 26, ss. 22, 23. For aiding escapes, see *post*, tits. Prison Breach and Rescue.

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*FALSE DECLARATIONS. [*426]

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At elections—parliamentary.] By the Reform Act, 2 & 3 Wm. 4, c. 45, s. 58, three questions were allowed to be put to the voter at the poll, to be answered by him

on oath; but by the 6 Vict. c. 18, ss. 81, 82, these were reduced to two. See Rogers on Elections, chap. Proceedings at the Election. Sec. 81 of the latter statute enacts, that "if any person shall wilfully make a false answer to either of the questions, he shall be deemed guilty of a misdemeanor, and shall and may be indicted and punished accordingly."

Upon an indictment under this statute the word "wilfully" should be construed in the same way as an indictment for perjury, and be supported by the same sort of evidence. Per Patteson, J., in R. v. Ellis, Car. & M. 564: 41 E. C. L. R. For other cases upon the 2 & 3 Wm. 4, c. 45, s. 58, see R. v. Bowler, Car. & M. 559; R. v. Spalding, Car. & M. 568; and R. v. Lacy, Car. & M. 511. See also R. v. Bent, 1 Den. C. C. R. 157, *infra.*

At elections—municipal.] The Municipal Corporation Act, 5 & 6 Wm. 4, c. 76, s. 34, provides likewise for questions being put to persons voting at municipal elections, and in the same words as those used in the 6 Vict. c. 18, makes it a misdemeanor for a burgess wilfully to make a false answer to any of these questions. It was held, that an indictment charging that "the defendant falsely and fraudulently answered" was bad for omitting the word "wilfully." R. v. Bent, 1 Den. C. C. R. 157. See now 22 Vict. c. 35.

Before magistrates.] The 5 & 6 Wm. 4, c. 62, s. 18, after reciting "Whereas, it may be necessary and proper in many cases not herein specified to require confirmation of written instruments or allegations, or proof of debts or of the execution of deeds or other matters," enacts, that "it shall and may be lawful for any justice of the peace, notary public, or other officer now by law authorized to administer an oath, to take and receive the declaration of any person voluntarily making the same before him in the form in the schedule to this act annexed; and if any declaration so made shall be false and untrue in any material particular, the person wilfully making such false declaration shall be deemed guilty of a misdemeanor."

Erskine, J., held, in R. v. Boynes, 1 C. & K. 65, 47 E. C. L. R., that the enact-[*427] ing *words of this section were not restrained by those in the preamble, so as to exclude from the operation of the statute a declaration by a member of a benefit society that he had sustained a loss by an accidental fire, it being a rule of such benefit society that any full free member thereof, who sustained a loss by an accidental fire, was to be indemnified to the extent of 15*l.*, on making a declaration before a magistrate verifying his loss.

On registration of births, deaths, and marriages.] The statute 6 & 7 Wm. 4, c. 86, s. 41, enacts that "every person who shall wilfully make, or cause to be made, for the purpose of being inserted in any register of birth, death, or marriage, any false statement touching any of the particulars herein required to be known and registered, shall be subject to the same pains and penalties as if he were guilty of perjury."

Sect. 43 enacts, that "every person who shall wilfully destroy or injure, or cause to be destroyed or injured, any such register book, or any part, or certified copy, or any part thereof, or shall falsely make or counterfeit, or cause to be falsely made or counterfeited, any part of any such register book or certified copy thereof, or shall wilfully insert or cause to be inserted in any register book or certified copy thereof, any false entry of any birth, death, or marriage, or shall wilfully give any false certificate, or shall certify any writing to be a copy or extract of any register book, know-

ing the same register to be false in any part thereof, or shall forge or counterfeit the seal of the register office, shall be guilty of felony."

To support an indictment on the 41st section, for making a false statement touching the particulars required to be registered, for the purpose of their being inserted in a register of marriages, it is essential that the false statement should have been made wilfully and intentionally, and not by mistake only. R. v. Lord Dunboyne, 3 C. & K. 1, per Campbell, C. J.

To constitute an offence under this section, it is not essential that the purpose for which the false declaration was made should have been effected. Per Cresswell, J., in R. v. Mason, 2 C. & K. 622. An indictment under this section charged that a clergyman had solemnized a marriage, and was about to register in duplicate the particulars relating to the marriage, and that the prisoner did wilfully make to the clergyman, for the purpose of being inserted in the register of marriage, certain false statements. The proof was, that the particulars were entered by the clerk of the church before the marriage; that after the marriage the clergyman asked the prisoner if they were correct, and that he answered in the affirmative, and the clergyman signed the register. It was held, that the prisoner had been rightly convicted. R. v. Brown, 1 Den. C. C. R. 291; S. C. 17 L. J. M. C. 145. Upon such an indictment it is not necessary to prove that the marriage register book is the identical book directed to be furnished by the registrar-general under 6 & 7 Wm. 4, c. 86, s. 30.

It is a felony, under sect. 43, to cause the registrar to make an entirely false entry of a birth, marriage, or death. Per Cresswell, J., in R. v. Mason, *supra*. Therefore, where a woman went to a registrar of births, and asked him to register the birth of a child, she stated to him the particulars necessary for the entry, and he made the entry accordingly, and she signed it as the person giving the *information; [*428] the same learned judge held, that this amounted to the felony of causing a false entry to be made within sect. 43, and was not merely the misdemeanor of making a false statement under sect. 41. R. v. Dewitt, 2 C. & K. 905: 61 E. C. L R.

Customs.] As to making false declarations in matters relating to the customs, see 16 & 17 Vict. c. 107, s. 198, and 18 & 19 Vict. c. 96, s. 38.

Bankruptcy.] By the 24 & 25 Vict. c. 134, s. 144, creditors are to make declarations of their debts for proof after adjudication, and by s. 145, "Any person who shall wilfully and corruptly make any declaration for proof of debt as aforesaid, knowing the same, or the statement of account to which the same shall be appended, to be untrue in any material particular, shall be deemed guilty of a misdemeanor, and shall be liable to undergo the pains and penalties imposed upon persons guilty of wilful and corrupt perjury."

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*FALSE PERSONATION. [*429]

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Offence at common law.] THE offence of falsely personating another, for the purpose of fraud, is a misdemeanor at common law, and punishable as such. 2 East, P.

C. 1010; 2 Russ. by Grea. 539. In most cases of this kind, however, it is usual, where more than one are concerned in the offence, to proceed as for a conspiracy; and very few cases are to be found of prosecutions at common law for false personation. In one case, where the indictment merely charged that the prisoner personated one A. B., clerk to H. H., justice of the peace, with intent to extort money from several persons, in order to procure their discharge from certain misdemeanors, for which they stood committed, the court refused to quash the indictment on motion, but put the defendant to demur. R. v. Dupee, 2 East, P. C. 1010. It is observed by Mr. East, that it might probably have occurred to the court that this was something more than a bare endeavor to commit a fraud by means of falsely personating another, for that it was an attempt to pollute public justice. Ibid.(1)

Offence by statute.] In a variety of statutes against forgery, provisions are likewise contained against false personation, which in general is made felony. Thus, personating the owner of stock, &c., is made felony by 1 Wm. 4, c. 66, s. 7. *Vide post*, tit. Forgery.

Personating bail—acknowledging recovery, &c.] By the 24 & 25 Vict. c. 98, s. 34, "Whosoever, without lawful authority or excuse, the proof whereof shall lie on the party accused, shall in the name of any other person acknowledge any recognizance or bail, or any *cognovit actionem*, or judgment, or any deed, or other instrument, before any court, judge, or other person lawfully authorized in that behalf, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

The Irish statute similar to this is the 7 Wm. 4, c. 18, the punishment therein enacted being modified by the 2 & 3 Wm. 4, c. 123, and the 1 Vict. c. 84, s. 2.

False personation of soldiers and seamen.] The false personation of soldiers and [*430] seamen was made felony by several statutes, the *provisions of which are now re-enacted in the 5 Geo. 4, c. 107. By the fifth section of which statute, reciting that, whereas it is expedient that the crime of personating and falsely assuming the name and character of any person entitled to prize-money or pension, for the purpose of fraudulently receiving the same, shall no longer be punished with death, it is enacted, that from and after the passing of that act, "Whoever shall willingly and knowingly personate or falsely assume the name or character of any officer, soldier, seaman, marine, or other person entitled, or supposed to be entitled, to any wages, pay, pension, prize-money, or other allowance of money for service done in his majesty's army or navy, or shall personate or falsely assume the name or character of the executor or administrator, wife, relation, or creditor of any such officer or soldier, seaman, marine, or other person, in order fraudulently to receive any wages, pay, pension, prize-money, or other allowances of money due, or supposed to be due, for or on account of the services of any such officer or soldier, seaman or marine, or other person, every such person, being thereof convicted, shall be liable, at the discretion of the court, to be transported beyond seas for life, or for any term of years not less than seven, or to be imprisoned only, or imprisoned and kept to hard labor in the common gaol or house of correction for any term not exceeding seven years." (See also the 10 Geo. 4, c.

(1) See Renoard v. Noble, 2 Johns. Cas. 293.

26 (U. K.), the 11 Geo. 4 and 1 Wm. 4, c. 20, s. 84 (U. K.), and the 2 Wm. 4, c. 53, s. 59.)

The statute 5 Geo. 4, c. 107, as well as the former statutes, makes use of the words "some officer," &c., "entitled, or supposed to be entitled," &c. Upon a prosecution, therefore, for such false personation, there must be some evidence to show that there was some person of the name and character assumed, who was either entitled or might, *primâ facie* at least, be supposed to be entitled to the wages attempted to be acquired. R. v. Brown, 2 East, P. C. 1007. Where the prisoner was indicted for personating and falsely assuming the character of Peter McCann, a seaman on board the Tremendous, and it appeared in evidence that there had been a seaman of the name of McCarn on board the vessel, but no one of the name of McCann; the prisoner being convicted, the judges held the conviction wrong. They were of opinion that "personating" must apply to some person who had belonged to the ship, and that the indictment must charge the personating of some such person. R. v. Tannet, Russ. & Ry. 351.

It has been held, that the offence is the same, though the seaman personated was dead at the time the offence was committed. R. v. Martin, Russ. & Ry. 324; R. v. Cramp, Id. 327.

Under the 57 Geo. 3, c. 127, it has been held, that all persons present, aiding and abetting a person in personating a seaman, are principals in the offence. R. v. Pott, Russ. & Ry. 353.

False personation of voters.] To falsely personate a burgess at an election of a town-councillor, is no offence at common law or under the 5 & 6 Wm. 4, c. 76. R. v. Thompson, 1 Den. C. C. R. 355. But the personation of a voter at an election for a member of Parliament, is now made a misdemeanor by the 6 Vict. c. 18, s. 73. As to voters under the Metropolis Local Management Act, see 18 & 19 Vict. c. 120, s. 21.

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Obtaining money, &c., by false pretences.] By 24 & 25 Vict. c. 96, s. 88, "Whosoever shall, by any false pretence, obtain from any other person any chattel, money, or

valuable security with intent to defraud shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

No acquittal because the offence amounts to larceny.] By the same section it is provided, "That if upon the trial of any person indicted for such misdemeanor, it shall be proved that he obtained the property in question in any such manner as to amount in law to larceny, he shall not, by reason thereof, be entitled to be acquitted of such misdemeanor; and no person tried for such misdemeanor shall be liable to be afterwards prosecuted for larceny upon the same facts."

Form of indictment and evidence.] By the same section, "Provided also that it [*432] shall be sufficient in any indictment for obtaining, *or attempting to obtain any such property by false pretences to allege, that the party accused did the act with intent to defraud, without alleging any intent to defraud any particular person, and without alleging any ownership of the chattel, money, or valuable security; and, on the trial of any such indictment, it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged with an intent to defraud."

Causing money, &c., to be delivered to another person.] By s. 89, "Whosoever shall by any false pretence cause or promise any money to be paid, or any chattel or valuable security to be delivered to any other person, for the use or benefit, or on account of the person making such false pretence, or of any other person, with intent to defraud, shall be deemed to have obtained such money, chattel, or valuable security within the meaning of the last preceding section."

Inducing persons by fraud to execute deeds and other instruments.] By s. 90, "Whosoever with intent to defraud or injure any other person, shall, by any false pretence, fraudulently cause or induce any other person to execute, make, accept, indorse, or destroy the whole or any part of any valuable security, or to write, impress, or affix his name, or the name of any other person, or of any company, firm, or copartnership, or the seal of any body corporate, company, or society, upon any paper or parchment, in order that the same may be afterwards made or converted into, or used, or dealt with as a valuable security, shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."(1)

Interpretation.] As to the meaning of the term "valuable security," see 24 & 25 Vict. c. 96, s. 1; *infra*, tit. Larceny.

Indictment for obtaining money, &c., by false pretences not to be preferred unless authorized.] By the 22 & 23 Vict. c. 17, *supra*, p. 178, no indictment for obtaining money or other property by false pretences is to be presented or found by the grand

(1) To sustain a criminal prosecution for obtaining the signature of one to a mortgage by false pretences, the mere fact of the instrument being signed is not enough; a delivery must also be shown. Fenton v. The People, 4 Hill, 126.

jury unless the party has been committed by a magistrate, or the indictment otherwise authorized, as there mentioned.

What constitutes a false pretence within the statute.] Great difficulty has been experienced in deciding where to draw the line between the frauds which may be punished criminally under this statute, and those which only give rise to civil remedies. On the one hand, the tendency of modern legislation and modern opinion has been, as far as possible, to bring all frauds within the penalties of the criminal law. On the other hand, the necessity has been felt that the line which separates the criminal law should be clearly drawn. The consequence is, that there is some conflict between the decisions, as will appear from a perusal of the following cases. These cases are arranged chronologically into two classes; those in which the false pretences alleged and proved have been held to be within the statute, and those where they have been held not to be so. This arrangement, though illogical, is the only one feasible in the *present state of the law; as, notwithstanding the great efforts [*433] that have been made, it must be owned that the principles upon which the distinction between criminal and non-criminal cases ought to proceed have not yet been clearly defined. In reading these cases, it should be borne in mind that there is a distinction between holding that a sufficient false pretence has not been alleged in the indictment, and that a sufficient false pretence has not been proved. Many expressions of the court in various cases, which are apparently contradictory, may be reconciled if this distinction be attended to.(1)

Cases which have been held to be within the statute.] The defendant, Count Villeneuve, applied to Sir T. Broughton, telling him that he was sent by the Duke de Lauzan to take some horses from Ireland to London, and that he had been detained so long by contrary winds, that all his money was spent; by which representations Sir T. B. was induced to advance money to him; after which it turned out that the defendant never had been employed by the duke, and that the whole story was a fiction. The defendant was convicted. R. v. Villeneuve, *coram* Moreton, C. J., at Chester, cited by Buller, J., in R. v. Young, *infra.*

Where the four prisoners came to the prosecutor representing that they had betted that a person named Lewis should walk a certain distance within a certain time, and that they should probably win, and thus obtained money from the prosecutor towards the bet; it was objected that, although the representation of a thing past or present, against which caution cannot guard, may be within the statute (30 Geo. 2, c. 24),

(1) A representation, though false, is not within the statute against obtaining property, &c., by false pretences, unless calculated to mislead persons of ordinary prudence and caution. The People v. Williams, 4 Hill, 9.

An indictment lies for obtaining goods by false pretences where a party represents himself to be the owner of property, which does not belong to him, and thus fraudulently induces the owner to sell the goods to him on credit. The People v. Kendall, 25 Wend. 339.

Where it was proved that the owner of a horse represented to another, that his horse, which he offered in exchange for the property of the other, was called the *Charley*, when he knew that it was not the horse called by that name, and that by such false representation he obtained the property of the other person in exchange; *it was held*, that the indictment was sustained, although the horse said to be the *Charley* was equal in value to the property received in exchange, and as good a horse as the *Charley*. State v. Mills, 17 Maine, 211.

It is a well-settled and rational rule that the false pretences, in order to sustain an indictment, must be such that, if true, they would naturally, and according to the usual operation of motives upon the minds of persons of ordinary prudence, produce the alleged results; or in other words, that the act done by the person defrauded, must be such as the apparent exigency of the case would directly induce an honest and ordinary prudent person to do, if the pretences were true. People v. Stetson, 4 Barbour, 151.

yet if it be the representation of some *future* transaction respecting which inquiries may be made, it is not an indictable offence, but the subject only of a civil remedy. The Court of King's Bench, however, were of opinion that false pretences, referring to future transactions, were equally within the statute. R. v. Young, 3 T. R. 98.

The prisoner was indicted under the 30 Geo. 2, for obtaining money under false pretences. The prosecutors were clothiers, and the prisoner a shearman in their service, and employed as superintendent to keep an account of the persons employed and the amount of their wages and earnings. At the end of each week he was supplied with money to pay the different shearmen by the clerk of the prosecutors, who advanced to him such sums as, according to a written account or note delivered to him by the prisoner, were necessary to pay them. The prisoner was not authorized to draw money generally on account, but merely for the sums actually earned by the shearmen; and the clerk was not authorized to pay any sums, except such as he carried in, in his note or account. The prisoner delivered to the prosecutor's clerk a note in writing, in this form, "9 Sept. 1796, 44*l.* 11*s.* 0*d.*," which was the common form in which he made out the note. In a book in his handwriting, which it was his business to keep, were the names of several men who had not been employed, who were entered as having earned different sums of money, and also false accounts of the work done by those who were employed, so as to make out the sum of 44*l.* 11*s.* 0*d.* The prisoner being found guilty, on a case reserved for the opinion of the judges it was argued that the statute did not extend to cases where there was a pre-
[*434] vious confidence. At first there was some diversity *of opinion; but finally they all agreed, that if the false pretence created the credit, the case was within the statute. They considered thatt he defendant would not have obtained the credit but for the false account he had delivered in; and, therefore, that he was properly convicted. The defendant, as was observed by one of the judges, was not to have any sum that he thought fit on account, but only so much as was worked out. R. v. Witchell, 2 East, P. C. 830.

The indictment charged that one Barrow, at K., &c., delivered to the prisoner, a common carrier, certain goods to be carried by him from K. to one Leach, at L., there to be delivered, &c.; that the defendant received the goods under pretence of carrying them and delivering them, and undertook so to do, but that, intending to cheat Barrow of his money, he afterwards unlawfully, &c., pretended to Barrow that he had carried the goods from K. to L., for the purpose of delivering them to Leach, and had delivered them to Leach at L., and that Leach had given him, the defendant, a receipt, expressing the delivery of the goods to him, but that he had lost or mislaid the same, or had left it at home, and that the defendant thereupon demanded of Barrow 16*s.* for the carriage of the said goods, by means of which false pretences he obtained the money, &c. On a writ of error, after conviction, the judgment was affirmed. R. v. Airey, 2 East, P. C. 831; 2 East, R. 30.

The prisoner was indicted for unlawfully producing to A. B., &c., at the Nottingham post-office, a money order for the payment of one pound to one John Storer, and that he unlawfully pretended to the said A. B. that he was the person named in such order, with intent, &c., whereas, &c. It appeared in evidence, that the prisoner had gone to the post-office, and inquired for letters for John *Story*, whereupon by mistake a letter for John *Storer*, containing the money order, was delivered to him. He remained a sufficient time to read the letter, and then presented the order to A. B., who desired him to write his name upon it, which he did in his real name, John *Story*, and received the money. The terms of the letter clearly explained, that the order could not have been intended for the prisoner, who, on being apprehended,

denied that he had ever received the money, but afterwards assigned the want of cash as the reason of his conduct. Chambre, J., left it to the jury to find against the prisoner, if they were satisfied that he had, by his conduct, fraudulently assumed a character which did not belong to him, although he made no false assertions. The jury found him guilty. The judges held the conviction right, being of opinion, 1st, that the prisoner writing *his own name* on the order, did not amount to a forgery; and 2dly, that by presenting the order for payment, and signing it at the post-office, he was guilty of obtaining money by a false pretence within the statute. R. v. Story, Russ. & Ry. 81; see R. v. Freeth, Id. 127, S. P. *infra*. So where a person at Oxford, who was not a member of the university, went to a shop for the purpose of fraud, wearing a commoner's gown and cap, and obtained goods; this was held a sufficient false pretence to satisfy the statute, though nothing passed in words. R. v. Barnard, 7 C. & P. 784: 32 E. C. L. R.

If a person, with intent to defraud, gives a check upon a banker with whom he keeps no account, this is a false pretence within the statute. Where a prisoner was indicted for so doing, Bayley, J., said, "This point has been recently before the judges, and they were *all of opinion that it was an indictable offence fraudu- [*435] lently to obtain goods by giving in payment a check upon a banker with whom the party keeps no cash, and which he knows will not be paid." R. v. Jackson, 3 Camp. 370. So where the prisoner was charged with falsely pretending that a post-dated check, drawn by himself, was a good and genuine order for 25*l.* and of the value of 25*l.*, whereby he obtained a watch and chain; and the jury found that, before the completion of the sale and delivery of the watch by the prosecutor, the prisoner represented that he had an account with the bankers on whom the check was drawn; that he had a right to draw the check which he post-dated for his own convenience; and that the check would be paid on the day on which it was dated; all which was false; and that the prisoner had no reasonable ground to believe that the check would be paid, or that he could provide funds to meet it, the judges held that the conviction was right. R. v. Parker, 7 C. & P. 825: 32 E. C. L. R.; S. C. 2 Moo. C. C. 1. See 2 Russ. by Grea. 300 (*n*).

The prisoner had accepted a bill drawn upon him by the prosecutor for 2638*l.*, which he owed the latter. When the bill became due, the prosecutor asked the prisoner if he was prepared to pay it, and the prisoner said he had enough all but 300*l.*, and that he expected to get the loan of that from a friend. The prosecutor, who was not any longer the holder of the bill, expressed his willingness to advance the 300*l.* himself, and ultimately did so; but the prisoner, instead of taking up the bill, applied the 300*l.* to his own purposes, and suffered the bill to be dishonored, and the prosecutor eventually had to pay it. Evidence was also given, that at the time the prisoner obtained the money, he was not in possession of funds sufficient to make up the balance between the 2638*l.* and the 300*l.*, but was in insolvent circumstances. For the prisoner it was contended, that the representation was not a false pretence within the statute, being a mere misstatement, or at the worst a naked lie, and R. v. Codrington, *infra*, p. 452, was cited; and secondly, that the act did not extend to cases where the prosecutor had only lent, not parted with the property or the goods or money. Patteson, J., said, "The words of this act are very general, and I do not think I can withdraw the case from the jury. If they are satisfied that the prisoner fraudulently obtained the 300*l.* from the prosecutor by a deliberate falsehood, averring that he had all the funds required to take up the bill, except 300*l.*, when in fact he knew that he had not, and meaning all the time to apply the 300*l.* to his own purposes, and not to take up the bill, it appears to me that the jury ought

to convict the prisoner. In R. v. Codrington, it does not appear that the prisoner did distinctly allege that he had a good title to the estate which he was selling. As to the money being advanced by the prosecutor only as a loan, the terms of the act of Parliament embrace every mode of obtaining money by false pretences, by loan as well as by transfer." The prisoner was acquitted. R. v. Crossley, 2 Moo. & R. 17; 2 Lew. C. C. 164.

The third count of the indictment charged the defendant with having falsely pretended to A. C. that he was an unmarried man, and having thereby obtained a promise of marriage from the said A. C.; that she refused to marry the defendant, and that he falsely pretended, at the time of such refusal, that he was an unmarried man, and entitled to bring an action against her for the breach of promise of marriage, by which means he obtained from her 100*l*. Whereas, in truth, &c., he was not an [*436] unmarried man, and not entitled to *maintain an action for the breach of promise of marriage against her. The fact that the prisoner was a married man was proved; and the prosecutrix stated that she, being a single woman, and possessed of considerable property, the prisoner had paid his addresses to her, and that she had consented to marry him; she being ignorant, at the time, that he was already married. She further stated that, after promising to marry the prisoner, she changed her mind, and wished "to be off" the match; that she intimated as much to the prisoner, and that he, thereupon, threatened her with an action at law for breach of promise of marriage, and, he added, that by means of such proceedings he could take half her fortune from her; and that she, believing that he could and would carry his threat into effect, and in order to induce him to refrain from doing so, agreed to pay, and did pay him the sum of money. The money was paid and received on a written stipulation (produced at the trial) that, in consideration of such payment, he (the prisoner) would forego proceedings at law against the prosecutrix for the promise of marriage broken by her. She stated, on cross-examination, that, but for the prisoner's threat of bringing an action she would not have paid the money; and that she was induced by such threat to pay it; and she added that, had she known that the prisoner was a married man she would not have paid the money. Lord Denman, C. J., allowed the case to proceed, notwithstanding an objection raised to the sufficiency of the evidence. At the close of the case, his lordship left it to the jury to say, whether the money was, in fact, obtained by the false pretence that the prisoner was single, and a verdict of "Guilty" was returned. On the following day his lordship intimated that he had conferred with Mr. Justice Maule, and that they were both clearly of opinion that there was evidence to go to the jury that the money was obtained by the false pretence that the prisoner was a single man, and in a condition to intermarry with the prosecutrix; and that Mr. Justice Maule was further of opinion that there was also evidence of the money having been obtained by the false pretence of the prisoner that he was entitled to maintain an action for breach of promise of marriage; and that such latter false pretence was a sufficient false pretence within the statute. R. v. Copeland, C. & Mar. 516: 41 E. C. L. R.

The fourth count of an indictment stated, that the defendants unlawfully, knowingly, and designedly did falsely pretend to G. W. F., that a phaeton, mare, and gelding, which the defendants offered him for sale, had been the property of a lady then deceased, and were then the property of her sister, and were not the property of any horse-dealer, and that the mare and gelding were then respectively quiet to ride and drive. Evidence was given that the bargain had been made by G. W. F. in consequence of his belief in these representations; that they were false; and that the horses were vicious. The prisoner was convicted, and a rule having been ob-

tained for arresting the judgment on the ground that the indictment was insufficient, and on other grounds; as to this point, Lord Denman said, in delivering the judgment of the court, "A general question seems here to be raised, whether, if money be obtained through the medium of a contract between the defendant and the party defrauded, the charge of false pretences can be maintained. Questions approaching this have been raised in the criminal courts. With some plausibility the thing obtained through the false pretence may be said to be the *contract, and not [*437] the money which is paid in fulfilment of it, and which the party is probably by its terms liable to repay." His lordship then referred to a case of R. v. Adamsom, 2 Moo. C. C. 286, and concluded thus, "We think that in this case the two ingredients of the offence of obtaining money under false pretences were proved by the evidence. The pretences were false; and the money was obtained by their means. The count therefore is good." R. v. Kenrick, 5 Q. B. 49: 48 E. C. L. R. The indictment charged that the prisoner having in his possession divers lbs. weight of cheese of little value and of inferior quality, and contriving and intending to cause it to be believed that the said cheese was of good flavor and of excellent quality, and also having in his possession divers pieces of cheese called "tasters" of good flavor, taste and quality, and contriving and intending to cheat one W. B., unlawfully and knowingly, did falsely pretend to the said W. B., that the said pieces of cheese called "tasters," which he the said prisoner then and there delivered to the said W. B., were part of the said cheese then offered for sale. It was proved at the trial that the prisoner kept a cheese stall at F., and sold to W. B. a quantity of cheese at 6½*d.* per lb. At the time the prisoner offered the cheese for sale, he bored two of them with an iron scoop, and produced a piece of cheese which is called a "taster" for the prosecutor to taste, and the prosecutor did so. The cheese, however, which he so tasted, had not in fact been extracted from the cheese from which it was pretended, but was a taster of another and superior kind of cheese, which the prisoner had privily inserted into the top of the scoop. The prosecutor would not have bought the cheese unless he had believed that the taster had been extracted from it. The cheese which had been so bought was delivered to the prisoner, and he retained it. It was of a very inferior kind. This and two other similar cases were reserved for the opinion of the judges, and they held the convictions right, on the authority of R. v. Kenrick, *supra*. R. v. Abbott, 1 Den. C. C. 273.

It appeared that the prisoner was the secretary of an Odd Fellows' Lodge, whose duty it was to receive money for the members at lodge hours, but not at other times. The prisoner made a written demand on J. B., a member, in the following form: "I hereby give you notice, that you owe to your lodge for contributions, &c., the sum of 13*s.* 9*d.*, due on the 20th instant." The 20th of November was the ensuing lodge-night. Prisoner brought this demand himself to J. B., who said, "Do I owe that amount, 13*s.* 9*d.*?" Prisoner said, "You do." J. B. said, "It is not very long since I paid a sum at the lodge to you." Prisoner said, "That is what you owe." J. B. paid him. The real sum which would have been due on the 30th of November from J. B. was 2*s.* 2*d.* The prisoner did not pay over to the treasurer the 13*s.* 9*d.* received from J. B. It further appeared that W. B. was a member of the lodge, and that on the 18th of June he presented himself at the lodge, it being a lodge-night, and that the prisoner told him he could not be admitted till he was clear. W. B. asked what was due. The prisoner said, 13*s.* 5*d.* W. B. gave him a sovereign and was then admitted. The prisoner paid over to the treasurer 5*s.* only, which was the sum really due for W. B. The prisoner was found guilty on both indictments, and a case was reserved as to whether there was in either a false pretence within the

meaning of the statute. In the argument Lord Campbell said, "What is your defi- [*438] nition of a false pretence, *which would exclude this case? Do you mean that it must be a representation of some fact the truth of which cannot be ascertained?" Alderson, B.: "If a man represents as an existing fact that which is not an existing fact, and so gets your money, that is a false pretence: for instance, that a certain church had been built, and that there was a debt still due for the building, when there was no debt due, that would be a false pretence, yet the matter might easily be inquired into and ascertained. Or take the common case: The prisoner says, 'I am sent by Mrs. T. for a pair of shoes.' Is not that a false pretence? Yet inquiry can be made, and after the thing has happened usually is made and the falsehood detected." Lord Campbell: "It seems that the legislature meant to prevent such gross frauds as may easily be perpetrated, though an inquiry might easily be made. Suppose a tax-gatherer demands money for taxes alleged to be due; you inquire and find that the persons through whom you usually make such payments have not paid it, and you accordingly pay it, though in reality nothing be due, would not that be a false representation?" Parke, B., referred to 2 Russ. by Grea. 289 (*g*), and to the observations of Lord Denman in R. v. Wickham, 10 Ad. & El. 34: 37 E. C. L. R.; and said that Mr. Greaves' view seemed to be correct. Erle, J.: "It was once thought that the law was only for the protection of the strong and prudent; that notion has ceased to prevail." Alderson, B.: "The old law about a false token was a much more stringent rule. Why should we not hold that a mere lie about an existing fact, told for a fraudulent purpose, should be a false pretence?" Lord Campbell: "If a tradesman, knowing that a customer owes him nothing whatever, says that he owes him 5*l.*, and gets the money, I think he comes within the statute. I entirely agree with the observations of Lord Denman in R. v. Wickham, and think this case clearly within the statute." The rest of the court concurred. R. v. Woolley, 1 Den. C. C. 559.

Fraudulently offering a "flash-note" in payment, under a false pretence that it is a Bank of England note, is within the statute. R. v. Coulson; 1 Den. C. C. 592; S. C. 19 L. J. M. C. 182.

A baker contracted with the guardians of the poor of a parish to deliver to the outdoor poor, as the guardians should direct, loaves, each weighing 3½ lbs., at 7*d.* a loaf. The course of business was for the relieving officer to give tickets to the outdoor poor, upon which was specified the number of loaves they were to receive. Upon receiving their loaves, the poor persons gave up their tickets to the baker, and he, in the ensuing week, returned them to the relieving-officer with a note stating the whole number sent. He was then credited in an account between him and the guardians accordingly, and the account was paid at certain specified times. The baker knowingly delivered three loaves of less weight than 3½ lbs., but charged them to the guardians as of full weight; and it was held that he was properly convicted of attempting to obtain one shilling, the value of the difference in weight, from the guardians by false pretences. R. v. Eagleton, 1 Dear. C. C. 515; S. C. 25 L. J. M. C. 39. In this case, Parke, B., in delivering the judgment of the court said, "It was contended for the prisoner that the indictment for attempting to obtain money by false pretences could not be supported, because the offence of obtaining money under false pretences was committed only when that money was obtained wholly without consideration, and the offence was analogous to larceny, of which the prisoner [*439] *might, by stat. 7 & 8 Geo. 4, c. 29, s. 53, be convicted in case the offence should appear on the trial to be larceny. There are many cases, no doubt, as is mentioned in that section, in which the distinction is very subtle between the misde-

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meanor of obtaining money under false pretences and larceny, and it was very proper to make that provision in the statute; but it does not follow that all the cases of obtaining money by false pretences are of that description. But it was strongly contended that the statute against obtaining money by false pretences applied to no cases where there was some bargain or consideration for giving the money, and so some cause for the giving other than the false pretence; as where goods were sold under a false representation of the quality or value, and the purchaser had the commodity; otherwise the range of indictable offences would be greatly extended and breaches of contract made the ground of criminal proceedings. If this had been the sale of bread to the prosecutors with a false representation of the weight, and an attempt thereby to receive a larger price than was really due, we should have had to decide whether an indictable offence had been thereby committed, and should have had to consider the case of R. v. Kenrick, *supra*, and also that of R. v. Abbott, *supra*, decided upon the authority of R. v. Kenrick. In all these cases, the prosecutor did not part with his money merely on account of the false pretences, but principally because he had a consideration for it in the property vested in him by the contract. But this is not the case of the sale of goods by a false pretence of their weight, it is an attempt to obtain money by the false and fraudulent representation of an antecedent fact, viz., that a greater number of pounds of bread had been delivered than had been actually delivered, and that representation made with a view of obtaining as many sums of twopence as the number of pounds falsely pretended to have been furnished amount to. In this respect the case exactly resembles that of R. v. Witchell, *supra*, where the prisoner obtained money by the false pretence that certain workmen had earned more than they really had, and there since are cases of similar convictions where the prisoner falsely stated the quantity of work which he had done, according to which he was to be paid; we therefore think that the indictment would be maintainable if the money had been paid."

The prisoner represented to the prosecutor that he had built a house worth 300*l.* on certain land, and deposited with the prosecutor a lease of the land as a security, and entered into a written agreement to execute a mortgage of the land; whereas, in fact, the house was built on land adjoining, which had already been mortgaged by the defendant. By these false statements, the prosecutor was induced to advance the sum of 80*l.*, by way of loan, which he paid to the prisoner. It was held by all the judges that the prisoner was properly convicted of obtaining the money by false pretences. R. v. Burgon, 25 L. J. M. C. 105.

The prisoner called at a pawnbroker's shop with a chain, on which he asked for an advance of ten shillings. The pawnbroker asked if the chain was silver; the prisoner replied that it was. The pawnbroker then examined the chain, and tested it with an acid, which the chain withstood. The pawnbroker then lent the prisoner ten shillings on the chain, which he took as a pledge. He paid the money, relying on his own examination and test, and without placing any reliance on the statement of the prisoner. Evidence was admitted *to prove that the prisoner, a few days [*440] afterwards, offered a chain, similar in appearance, to another pawnbroker, requesting him to advance ten shillings upon it. Twenty-six similar chains were found on the person of the prisoner when he was apprehended. The chains were worth a farthing an ounce, being much less than ten shillings each. The recorder told the jury that, though they could not convict of the offence charged in the indictment, they might convict of an attempt, which they did. The judges, upon the authority of R. v. Abbott, upheld the conviction: Jervis, C. J., apparently being the only one who approved of the decision. Parke, B., who was present at the argument, but gave no

judgment, was very strong against the conviction. R. v. Roebuck, 25 L. J. M. C. 101.

The prisoner having agreed with the prosecutrix to sell and deliver a load of coal at a certain price per cwt., delivered a load which he knew to be only 14 cwt., but which he falsely and fraudulently pretended to be 18 cwt., stating that it had been weighed at the colliery; and he produced a ticket which showed the weight to be 18 cwt., and which ticket he said he had made out himself when the coal was weighed, and he thereupon received the money for 18 cwt. It was held, that upon this evidence the prisoner was properly convicted of obtaining the money of the prosecutrix by false pretences. R. v. Sherwood, Dear. & B. C. C. 251; S. C. 26 L. J. M. C. 8. The attention of the court was drawn to R. v. Reed, 7 C & P. 848: 32 E. C. L. R., a precisely similar case, in which the twelve judges held the other way; but it was considered that that case was already overruled by R. v. Abbott, R. v. Burgon, and R. v. Roebuck, *supra*.

The prisoner fraudulently pretended that a genuine 1*l*. Irish bank note was a 5*l*. note, and thereby obtained the full change for a 5*l*. note. It was held, that he was properly convicted of obtaining money by false pretences, although the person to whom the note was passed could read, and the note, upon the face of it, afforded simple means of detecting the fraud. R. v. Jessop, Dear. & B. C. C. 442; S. C. 27 L. J. M. C. 70; see also R. v. Woolley, 1 Den. C. C. 559, *acc.*

The prisoner falsely told the prosecutrix that she kept a shop at N., and promised the prosecutrix that if she lent her half a sovereign, she should go home with her until she got a situation, and that the money should be paid as soon as they arrived home. The prosecutrix lent her the half sovereign, and the prisoner immediately decamped. The jury found that the prosecutrix parted with the money under the belief that the prisoner kept a shop at N., and that she (the prosecutrix) should have the money when they arrived home. It was held, that the prisoner was rightly convicted. R. v. Fry, Dear. & B. 449; S. C. 27 L. J. M. C. 68. So, when the prisoner pretended that he had bought some skins and had paid ten shillings on them, and wanted 4*l*. 10*s*. to enable him to fetch them away; all which was false, but the prosecutrix, believing it to be true, lent him the ten shillings, with which he decamped; this was held to be obtaining money by false pretenees. R. v. West, 27 L. J. M. C. 227.

The prisoner, knowing that certain money was due from a society to two persons, each of whom was known as J. B., fraudulently sent a boy to fetch it. The boy innocently went as directed, and obtained the money. The treasurer of the society [*441] swore that he should not *have paid the money if he had not believed that the boy was authorized to receive it by the persons to whom it was due. The prisoner received the money from the boy and appropriated it. It was held that he was rightly convicted of obtaining the money by false pretences. R. v. Butcher, 1 Bell, C. C. 6; S. C. 28 L. J. M. C. 14.

In R. v. Goss, 29 L. J. M. C. 86, it was attempted to induce the Court of Criminal Appeal to reconsider the decision in R. v. Abbott, *supra*, the facts being precisely similar. But the court confirmed that decision, and held that the prisoner was rightly convicted. And in R. v. Ragg, which was argued at the same time as R. v. Goss, and which was similar to that of R. v. Sherwood, *supra*, they also upheld the conviction. The case of R. v. Bryan, *infra*, p. 443, was relied on by the counsel for the prisoner, but Erle, J., pointed out in the judgment of the court that there the false representation was a matter of undefined opinion, whereas here the statement was not one of undefined opinion or of exaggerated praise, but a false pretence

of a definite fact, about which, with the means of information which the prisoner had, there could be no mistake.

What cases are not within the statute.] In R. v. Codrington, 1 C. & P. 661 : 11 E. C. L. R., the indictment stated that the defendant, by falsely pretending to the prosecutor that he was entitled to a reversionary interest in one-seventh share of a sum of money left by his grandfather, obtained the sum of 29*l.* 3*s.* from the prosecutor. It was proved that the defendant asked the prosecutor to purchase the seventh part of an interest in some money to which he would be entitled on the death of a relation, and that the prosecutor agreed to do so; and an assignment was accordingly prepared, and the money paid by the prosecutor to the defendant. A previous assignment of the same interest by the defendant to a person named Peek was then put in. After argument, Littledale, J., held that this was not an indictable offence. Compare R. v. Burgon, *supra*, p. 439; and R. v. Crossley, *supra*, p. 435.

The indictment stated that the prisoner falsely pretended to A. B. that he was a captain in the East India Company's service, and that a certain promissory note which he then delivered to A. B., was a valuable security for 21*l.*; by means of which false pretences he obtained from A. B 8*l.* 15*s.* It was held that, as it did not appear but that the note was the prisoner's own note, or that he knew it to be worthless, there was no sufficient false pretence in that respect; and that, as the two pretences were to be taken together, the indictment was bad; and the judgment given upon it was reversed in error. Wickham v. Reg. 10 Ad. & E. 34 : 37 E. C. L. R.

In R. v. Johnston, 2 Moo. C. C. 255, the indictment was that the prisoner pretended to H. G. H. that he intended to marry her on the 8th day of February, and that he had purchased a suit of clothes for the wedding, and that he wanted the sum of 4*l.* to pay for the same, by which said false pretences he obtained from the said H. G. H. 4*l.* with intent to cheat and defraud her of the same. To support this indictment, it was proved that the prisoner paid his addresses to H. G. H., and that the banns were regularly published in church with his sanction. That after the publication of both banns, the prisoner met the said H. G. H. at a draper's shop by appointment, in order that he might there buy a suit of clothes for 4*l.*, and asked her for *4*l.* to enable him to pay for them. That she accordingly gave him 4*l.* [*442] for that purpose. The learned judge (Rolfe, B.) doubted whether the pretence stated was one on which a conviction could take place, and reserved the point. The judges held the conviction wrong. Though the evidence in this case to support the count was weak, yet it certainly seems doubtful whether the count was bad. See the case of R. v. Copeland, *supra*.

The defendant was indicted in England for a misdemeanor, in attempting to obtain moneys from L. & Co. by false pretences. The defendant had a circular letter of credit for 210*l.* from D. S. & Co. of New York, with authority to draw on L. & Co. in London in favor of any of the correspondents of the bank for such portions of the 210*l.* as he might require. The defendant came to England and drew drafts for different sums, amounting in all to less than 210*l.*, and then carried the letter to St. Petersburg. He there exhibited it to W. & Co., one of the aforesaid correspondents, having previously altered the sum from 210*l.* to 5210*l.*, and then drew on L. & Co. for, and obtained large amounts far exceeding 210*l.* These drafts were forwarded by W. & Co. to L. & Co., who refused to honor them. The learned judge (Parke, B.) asked the jury whether, although the prisoner's immediate object was to cheat W. & Co., he did not also mean that they or their correspondents, or the indorsers from them, should present these unauthorized drafts, and obtain payment of them

from L. & Co., and the jury found that he did so intend. The case was reserved, and the court held that, even if L. & Co. had paid the checks, no offence would have been committed by the prisoner within the statute; that this act was complete at St. Petersburg, and for what took place afterwards he was not criminally responsible. R. v. Garrett, 1 Dears. C. C. 232. It is said that this case would now be met by the 24 & 25 Vict. c. 96, s. 89; *supra*, p. 432, see Greaves' Crim. Stat. p. 136.

In an indictment for obtaining money by false pretences, the pretence stated in some of the counts was, that the prisoner unlawfully, knowingly, and designedly, did falsely pretend that he, having executed certain work, there was a certain sum of money due and owing to him for and on account of the work, by means of which said false pretence the prisoner did then unlawfully obtain, &c., with intent thereby them to defraud: in other counts, the false pretences were stated to be that the prisoner did falsely pretend that the money was due and owing. It was proved that the defendant worked for the prosecutors as a journeyman, and that the quantities of the work done by him for them during each week were entered in a book kept exclusively for that purpose. The prices for the work so entered were placed in a column opposite to each quantity of work, and were added up on behalf of the prosecutors at the end of each week. The weekly totals of these prices were entered by them in this account book, and the amount of those totals were paid by them to the defendant as the ascertained sum of money due to him for work done on the production by him of the book. It was further proved that, after these weekly totals had been entered as above, the defendant had altered them into larger amounts, and then had procured payment of those larger amounts, and restored the figures of the original totals. The defendant was found guilty. After verdict had been recorded, it was objected that the indictment did not disclose any false pretence within the meaning of the statute. [*443] Parke, B.: "An indictment for false *pretences must disclose a false pretence of an existing fact. In this case there is merely a fraudulent claim in respect of a *quantum meruit* of the prisoner's work and labor; and the indictment would be supported by evidence that the prisoner made a false estimate of the value of his work. I do not think that is an indictable offence. The short ground of my judgment is, that the indictment contains no false statements of an existing fact. The decision in R. v. Woolley (*supra*), went wholly on the facts, and the form of the indictment was not considered by the court. In this case the false pretence consists of nothing more than what might be mere matter of opinion, and it would be frightful if every person who made an overcharge should be liable to a criminal prosecution." Wightman, J., Crompton, J , and Crowder, J., all thought *that the indictment was defective*, as there was no statement of a false pretence of an existing fact, and that the allegations might be proved by evidence of a wrongful overcharge. R. v. Oates, Dears. C. C. 459.

The prisoner induced a pawnbroker to advance him money on some spoons which he represented as silver-plated spoons, which had as much silver on them as "Elkington's A." (a known class of plated spoon), and that the foundations were of the best material. The spoons were plated with silver, but were to the prisoner's knowledge of very inferior quality, and not worth the money advanced on them. It was held by the court (*dissentiente* Willes, J., and *dubitante* Bramwell, J.), that this was not an indictable offence. R. v. Bryan, Dear. & B. C. C. 265; S. C. 26 L. J. M. C. 84. See R. v. Roebuck, *supra*, p. 440.

As was pointed out by Erle, C. J., in R. v. Goss, *supra*, the judgment of Willes, J. (which is very elaborate, and appears to be that also of Jervis, C. J.), proceeded

not so much on a different view of the law, but on a different way of viewing the facts. And the following remarks of Willes, J., have been frequently alluded to as particularly lucid and applicable to cases of this kind. He says, "If the matter was a simple commendation of the goods without any specific falsehood as to what they were: if it was entirely a case of one person dealing with another in the way of business, who might expect to pay the price of the articles which were offered for the purpose of pledge or sale, and knew what they were, I apprehend it would easily have been disposed of by the jury, who were to pass an opinion upon the subject, acting as persons of common sense and knowledge of the world, and abstaining from coming to any conclusion as that praise of that kind should have the effect of making the party resorting to it, guilty of obtaining money by a false pretence. I say nothing on the effect of a simple exaggeration except that it appears to me that it would be a question for the jury, in each case, whether the matter was such ordinary praise of the goods (*dolus bonus*) as that a person ought not to be taken in by it, or whether it was a representation of a specific fact material to the contract, and intended to defraud, and did defraud, and by which the money in question was obtained. . . . . It is said that the effect of establishing a rule, such as that for which I contend, would be to interfere with trade; no doubt it would, and I think it ought to prevent trade being carried on in the way in which it is said to be carried on. . . . . I am far from wishing to interfere with the rule as to simple commendation or praise of the articles which are sold, on the one hand, or to fair cheapening on the other; those are things persons may *expect to meet with in the ordinary and usual [*444] course of trade; but I cannot help thinking that people ought to be protected from any such acts, as those I have referred to, being resorted to for the purpose and with intent to cheat and defraud purchasers of their money, and tradesmen of their goods. If the result of it would be to multiply prosecutions, that must be because we live in an age in which fraud is multiplied to a very great extent, and amongst others in this form. I agree in what the late C. J. Jervis said, as peculiarly applicable to such a supposed state, though I hope not to ordinary trade, that if there be such a commerce as requires to be protected by the statute being limited in the mode proposed, it ought to be made honest and conform to the law, and not the law bent to the purpose of allowing fraudulent commerce to go on."

Proof of the false pretences being made.] That the false pretences were made must be proved as laid. Where in the averment of the pretence it was stated "that the defendant pretended that he had paid a certain sum into the Bank of England," and the witness stated that the words used were "the money has been paid at the bank." Lord Ellenborough said, "In an indictment for obtaining money by false pretences, the pretences must be distinctly set out, and at the trial they must be proved as laid. An assertion that money has been paid into the bank, is very different from an assertion that it had been paid into the bank by a particular individual. The defendant must be acquitted." R. v. Plestow, 1 Camb. 494. There the assertion that an individual had paid the money was not proved. See per Maule, J., in R. v. Hewgill, 1 Dears. C. C. R. 322. But where the indictment charged, that the defendant having in his custody a *certain parcel* to be delivered, &c., for which he was to charge 6s., delivered a ticket for the sum of 9s. 10*d.* by means, &c., and it appeared in evidence that the parcel mentioned in the indictment was a *basket* of fish, it was objected that this was a variance, but Lord Ellenborough overruled the objection, saying that a basket answered the general description of a parcel well enough, but that if the indictment had been on the 39 Geo. 3, c. 58 (which enacts,

that if any porter, or other person employed in the porterage or delivery of boxes, *baskets*, packages, *parcels*, trusses, game, or other things, shall take any greater sum, &c.) it would have been a fatal variance. R. v. Douglas, 1 Camp. 212.

It is sufficient if the actual substantial pretence, which was the main inducement to the prosecutor to part with his money, be alleged and proved; although it may be shown by evidence, that other matters, not laid in the indictment, operated in some measure upon the mind of the prosecutor, as an inducement to him to part with his money. R. v. Hewgill, 1 Dears. C. C. R. 315. But the rule that it is sufficient to prove any part of the pretences laid, if the property were obtained thereby, must be confined to those cases where such part is a separate and independent pretence; for if false pretences are so connected together upon the record that one cannot be separated from the other, and the statement of one of those pretences is insufficient in point of law, no judgment can be given on the other pretence. 2 Russ. by Grea. 310, citing R. v. Wickham, 10 Ad. & E. 34: 37 E. C. L. R, *ante*, p. 441.

Parol evidence is admissible of the false pretences laid in the indictment, though [*445] a deed between the parties, stating different *considerations for parting with the money, be also put in evidence for the prosecution, such deed having been made for the purpose of the fraud. R. v. Adamson, 2 Moo. C. C. 286. The prisoner was indicted for falsely pretending that his wife was dead, with intent to defraud a benefit society. The stewards required a certificate of her death, and the prisoner produced to them a false one. It was held, that the real false pretence was that of the wife's death, and not the feigned certificate of it, which latter was the only evidence of the actual false pretence. R. v. Dent. 1 C. & K. 249: 47 E. C. L. R. Where the false pretences are contained in a letter, and such letter has been lost, the prisoner, after proof of the loss, may be convicted on parol evidence of its contents. R. v. Chadwick, 6 C. & P. 181: 25 E. C. L. R.

The prisoner was indicted for obtaining a filly, by the false pretence that he was a gentleman's servant, and had lived at Brecon, and had bought twenty horses in Brecon fair. It appeared that the prisoner bought the filly of the prosecutor, and made him this statement, which was false, and also told him that he would come down to the Cross Keys and pay him. The prosecutor stated that he parted with his filly because he believed that the prisoner would come to the Cross Keys and pay him, and not because he believed that the prisoner was a gentleman's servant, &c. It was held by Coleridge, J., that the prisoner must be acquitted. R. v. Dale, 7 C. & P. 351: 32 E. C. L. R.; see also R. v. Smith, 2 Russ. by Grea. 312.

A. was indicted for a misdemeanor in unlawfully attempting, by false pretences made to "B. and others," to obtain goods, the property of the said B. and others, with intent thereby to cheat the said B. and others of the same. It was proved that B. was one of a firm, and that the pretences were made to B. alone, though with intent to defraud the firm. On a case reserved, Jervis, C. J., said, in delivering his judgment, "I am of opinion that the conviction was right. The averment of the pretences may be viewed in three ways: The words 'Baggallay and others' may either mean 'B. and the rest of the firm,' in which case we should have to consider whether a pretence made to one partner alone may be laid as made to the whole firm; or they may mean 'B. and other persons' not belonging to the firm, in which case, I think, proof of a pretence to B. alone would be sufficient; or, which is, I think, the correct view, the words 'and others' may be rejected as surplusage, and the objection of variance thereby removed." Patteson, J., concurred in the latter view. Cresswell, J., concurred. Erle, J: "I think that the allegation of a pretence to Baggallay and others only admitted proof of a pretence to B. alone; it would per-

haps have been different if the pretence had been laid as made to two persons, A. and B. by name; proof of a distinct several pretence to each must then have been regarded." Martin, B.: "I think that the pretence as laid means a pretence to the firm, and was correctly proved." R. v. Kealey, 2 Den. C. C. 69; S. C. 20 L. J. M. C. 57.

Proof that the property was obtained by means alleged.] In R. v. Ady, 7 C. & P. 140, for the defence an endeavor was made to show that the prosecutor and his friend went to the defendant, well knowing who he was, for the purpose of making evidence to support the case against him, and that they parted with their money with a full *knowledge that the pretence was false. Patteson, J., is reported to [*446] have said, if the defendant did obtain the money by false pretences, and knew them to be false at the time, it does not signify whether they intended to entrap him or not. But according to the subsequent cases the defence set up would, if proved, have been good. Thus, in R. v. Mills, Dears. & B. C. C. 205; S. C. 26 L. J. M. C. 79, the prisoner was convicted on an indictment which alleged that the money was obtained by the prisoner by a false pretence that he had cut sixty-three fans of chaff, when in fact he had only cut forty-five fans, for which he demanded 10*s.* 6*d.*, being at the rate of 2*d.* a fan. The prosecutor had seen the prisoner remove eighteen fans of chaff from a heap for which he was not entitled to be paid, and place them with that for which he was entitled to be paid; and notwithstanding that the prisoner's fraud was thus exposed, paid him the amount which he demanded. It was held, that the conviction was wrong, as the money was not obtained by means of the false pretence.

The prisoner, by falsely pretending and representing himself to be a naval officer, induced the prosecutrix to enter into a contract to lodge and board him at a guinea a week. Under this contract he was lodged and supplied by her with meat and drink for more than a week. Held, that the supply of the articles of food was too remotely the result of the false pretence to support a conviction for obtaining them by the false pretence. R. v. Gardner, 25 L. J. M. C. 100.(1)

Proof of the falsity of the pretence.] This must be clearly proved. The prisoner bought from the prosecutor a horse for 12*l.* and tendered him in payment notes to that amount on the Oundle bank. On the prosecutor objecting to receive these notes, the prisoner assured him they were good notes, and upon this assurance the prosecutor parted with the horse. The prisoner was indicted for obtaining the horse on false pretences, viz, by delivering to the prosecutor certain papers purporting to be promissory notes, well knowing them to be of no value, &c. It appeared in evidence, that these notes had never been presented by the prosecutor at Oundle, or at Sir J. Esdaile's in London, where they were made payable. A witness stated, that he recollected Rickett's bank at Oundle stopping payment seven years before, but added that he knew nothing but what he saw in the papers or heard from the people who had bills there. The notes appeared to have been exhibited under a commission of bankruptcy against the Oundle bank. The words importing the memorandum of exhibit had been attempted to be obliterated, but the names of the commissioners remained on each of them. The jury found the prisoner guilty, and said they were of

(1) People v. Haynes, 11 Wend. 557. The pretences proved false need not be the *only* inducement to the credit or delivery. It is enough, if without them the credit would not have been given or the delivery made. Ibid.

Where an indictment for cheating by false pretences alleges that the goods were obtained by several specified false pretences, it is not necessary to prove the whole of the pretences charged; but proof of part thereof, and that the goods were obtained thereby, is sufficient. State v. Mills, 17 Maine, 211.

opinion that when the prisoner obtained the horse he well knew that the notes were of no value, and that it was his intention to cheat the prosecutor. On a case reserved, the judges held the conviction wrong, and that the evidence was defective in not sufficiently proving that the notes were bad. No opinion was given whether this would have been an indictable fraud, if the evidence had been sufficient. R. v. Flint, Russ & Ry. 460. The defendant was indicted for obtaining money by falsely pretending that a note purporting to be the promissory note of Coleman, Smith & Morris, was a good and available note of C., S. & M., whereas it was not a good and available note. The defendant gave the note to the prosecutor in payment for meat. [*447] A witness *proved that he had told the defendant that the Leominster bank (from which the note issued) had stopped payment. It was also proved that the bank was shut up, and that Coleman and Morris had become bankrupts; but it appeared that Smith, the third partner, had not become bankrupt. Gaselee, J., said, that upon this evidence the prisoner must be acquitted, because, as it appeared that the note might ultimately be paid, it could not be said that the defendant was guilty of a fraud in passing it away. R. v. Spencer, 3 C. & P. 420: 14 E. C. L. R.; R. v. Clark, 2 Dick. Q. S., by Talfourd, 315; R. v. Evans, 29 L. J. M. C. 20, *acc.*

The question of proof was a good deal discussed in R. v. Copeland, *supra*, p. 447; where it was held that the fact of the prisoner paying his addresses was sufficient evidence for the jury on which they might find the first pretence that the prisoner was a single man, and in a condition to marry; and that this, coupled with the fact that he was at the time married to another woman, was sufficient evidence on which to find the falseness of the other pretence, that he was entitled to maintain his action for breach of promise of marriage. An indictment for false pretences alleged that the prisoner obtained goods by falsely pretending that a person who lived in a large house down the street, and had a daughter married, had asked him to procure the goods. No person was named in the indictment, or appears to have been named by the prisoner as being the lady in question. A lady was called who answered the description given by the prisoner, and denied that she had ever asked the prisoner to procure any goods. The prisoner was convicted, and on a case reserved as to whether the false pretence was sufficiently negatived by the evidence, the court affirmed the conviction. R. v. Burnsides, 30 L. J. M. C. 42. The court probably thought that the jury must have been satisfied that the lady called was from local circumstances sufficiently identified with the person alluded to by the prisoner.

Evidence confined to the issue.] The general rule is applicable that the evidence must be confined to the issue: see p. 86. But sometimes a fraud is constructed out of a long series of transactions. If that is the case, then all may be given in evidence upon their connection being shown. Thus in R. v. Welman, Dears. C. C. 188; S. C. 22 L. J. M. C. 118, the evidence showed that the prisoner, in July, 1850, called upon the prosecutrix and made false representations relative to a benefit club, but failed on this occasion to obtain any money. In August of the same year the prisoner again called relative to the club, and referred to the previous conversation. It was held, on a case reserved, that it was for the jury to say whether these conversations were so connected as to form one continuing representation; and that if so, they might connect them.

In R. v. Roebuck, *supra*, p. 440, the prisoner was indicted for obtaining money from a pawnbroker by falsely pretending that a chain was silver. The chain was of a very inferior metal, and evidence was admitted, apparently without objection, that twenty-six chains were found on the prisoner, and that these were of similar ma-

terials. Evidence was also admitted that the defendant, a few days after the occasion in question, offered a similar chain to another pawnbroker, under similar circumstances. This was objected to, and the point, with other points, reserved. There is no trace of any discussion on this point, or any allusion to it in the judgment of the *court, in any of the reports; but the conviction was affirmed. The de- [*448] fendant did not appear by counsel. In R. v. Holt, 30 L J. M. C. 10, the defendant obtained money by falsely representing to a creditor of his employer that he was authorized to receive payment of the debt. Evidence that the prisoner had obtained money from another creditor of his employer by a similar representation was admitted. But the Court of Criminal Appeal quashed the conviction, saying that the evidence was inadmissible. In this case no counsel appeared on either side, and no reasons are given in the judgment. The latter case, however, seems to overrule the inference which might be drawn from R. v. Roebuck; even supposing that, had that case stood alone, it was sufficiently decisive to overrule the previous law, with which it is so far inconsistent.

Proof of intent to cheat or defraud.] It must appear that the defendant obtained the money, &c., with intent to cheat or defraud some person of the same. Thus, where in an indictment for obtaining money under false pretences, the allegation of the obtaining the money did not state that it was with intent, &c., the judges, on the point being reserved for their consideration, were of opinion that the indictment was bad. R. v. Rushworth, Russ. & Ry. 317; 1 Stark. 396: 2 E. C. L. R. (1)

The primary intent must be to cheat and defraud. Thus, where the prisoner was indicted for having procured from the overseer of a parish, from which he received parochial relief, a pair of shoes, by falsely pretending that he could not go to work because he had no shoes, when he had really a sufficient pair of shoes; and it appeared in evidence, that on the overseer bidding him go to work, he said he could not, because he had no shoes, upon which the overseer supplied him with a pair of shoes, whereas the prisoner had a pair before; the prisoner being convicted, the case was considered by the judges, who held that it was not within the act (30 Geo. 3, c. 24), the statement made by the prisoner being rather a false excuse for not working than a false pretence to obtain goods. R. v. Wakeling, Russ & Ry. 504. A. owed B. a debt, of which B. could not obtain payment. C., a servant of B., went to A.'s wife, and got two sacks of malt from her, saying that B. had bought them of A., which he knew to be false, and took the malt to his master, in order to enable him to pay himself; it was held by Coleridge, J., that if C. did not intend to defraud A., but only to put it in his master's power to compel A. to pay him a just debt, he could not be convicted of obtaining the malt by false pretences. R. v. Williams, 7 C. & P. 354: 32 E. C. L. R. A defendant was charged in the first count of an indictment with having falsely pretended that he was Mr. H., who had cured Mrs. C. at the Oxford Infirmary, and thereby obtained one sovereign with intent to defraud G. P. "of the same." The second count laid the intent to be to defraud G. P. "of the sum of 5s., parcel of the value of the said last-mentioned piece of current gold coin." It was proved that the defendant made the pretence, and thereby induced the prosecutor to buy, at the price of 5s., a bottle containing something which he said would cure the eye of the prosecutor's child. The prosecutor gave him a sovereign, and received 15s. in change. It was further proved that the defendant was not Mr. H.

(1) A false representation tending merely to induce one to pay a debt previously due from him, is not within the statute against obtaining property by false pretences, though payment be thereby obtained. The People v. Thomas, 3 Hill, 169.

It was held that this was a false pretence within the act, and that the intent was properly laid in the second count. R. v. Bloomfield, Carr. & M. 537: 41 E. C. L. R. [*449] But see *the note to R. v. Leonard, 1 Den. C. C. R. 306, where it is suggested that the second count in R. v. Bloomfield was bad, as averring an obtaining of one thing with intent to cheat of another. In R. v. Leonard the first count of the indictment charged the prisoner with obtaining from the prosecutor an order for the payment of 14*l.* 1*s.* 2*d.* by false pretences with intent to defraud him of the same: the evidence as to this count was that the prisoner only intended to defraud the prosecutor of 7*s.*, as the rest of the money was really due: it was held that the first count was proved. The second count was similar to the second count in R. v. Bloomfield, and the court recommended the recorder, who had reserved the case, to pass a separate sentence upon it.

Now by sect. 8 of the 14 & 15 Vict. c. 96, s. 88, *supra*, p. 431, it is sufficient to allege in the indictment, "that the defendant did the act with intent to defraud, without alleging the intent of the defendant to be to defraud any particular person." And by the same section it is not necessary "to prove an intent on the part of the defendant to defraud any particular person, but it shall be sufficient to prove that the defendant did the act charged with intent to defraud."

Proof of the obtaining some chattel, money, or valuable security.] In order to render it an offence within the statute, the property obtained must come within the description of "*chattel, money, or valuable security.*" An unstamped order for the payment of money, which ought to be stamped under 55 Geo. 3, c. 184, is not a valuable security within the statute. R. v. Yates, 1 Moody, C. C. 170. But see R. v. Watts, *infra*, tit. Larceny, and the 24 & 25 Vict. c. 96, s. 1.

G., a secretary to a burial society, was indicted for falsely pretending that a death had occurred, and so obtaining from the president an order on the treasurer in the following form: "Bolton United Burial Society. No. 23. Bolton, Sept. 1st, 1853. Mr. A. Entwistle, Treasurer. Please to pay the bearer £2 10*s.*, Greenhalgh, and charge the same to the above society. Robert Ford. (Signed.) B. B., President." It was held that this was a valuable security within the meaning of the 7 & 8 Geo. 4, c. 29, s. 53, as explained by s. 5. See the 24 & 25 Vict. c. 96, s. 1, *infra*, tit. Larceny; R. v. Greenhalgh, Dears. C. C. 267.

The prisoner was convicted on an indictment which charged him with obtaining a valuable security by false pretences. The facts were that the prisoner falsely represented to the prosecutor that a third person was buying up a quantity of leather for him, which was to come into his warehouse that afternoon. The prosecutor thereupon agreed to purchase the leather and to accept a bill for the amount of the purchase-money. The prisoner then handed to the prosecutor a bill drawn in the usual way which the prosecutor accepted and returned to the prisoner. The prisoner negotiated the bill and got money for it. It was held that the indictment could not be supported, as the prisoner had obtained nothing from the prosecutor, but had only by his fraud induced him to sign the bill. R. v. Danger, Dears. & B. C. C. 307. But this case is now met by the 24 & 25 Vict. c. 96, s. 90, *supra*, p. 432.

A railway pass-ticket, enabling a person to travel free on the journey, is a "chattel" within the statute. "The ticket," said Pollock, C. B., in delivering the judgment of the court, "while in the hands of the party using it, was an article of value, en- [*450] titling him to *travel without further payment; and the fact that it was to be returned at the end of the journey does not affect the question." R. v. Boulton, 1 Den. C. C. R. 508; S. C. 19 L. J. M. C. 67.

Obtaining a dog by false pretences is not an obtaining a chattel within the 7 & 8 Geo. 4, c. 29, as dogs are not the subject of larceny. R. v. Robinson, 1 Bell, C. C. 34; S. C. 28 L. J. M. C. 58.

The defendant was indicted for obtaining money under false pretences. The first count stated the false pretences by which the defendant procured the prosecutors to cash a check in favor of one Jacob, and concluded thus, "and obtained from them the amount of the check to be paid to the said Jacob, and further advances to him to answer other checks drawn by him on the prosecutors, viz., &c., with intent, &c." In the second count it was alleged, that the defendant, by means, &c., obtained a large sum of money, to wit, &c., from the prosecutors, and also the check mentioned to be paid to the said Jacob, with intent, &c. It appeared in evidence, that in order to induce the prosecutors, who were the defendant's bankers, to give him credit and honor his checks, he delivered to them a bill drawn by him upon a person with whom he had no account, and which had no chance of being paid. The prosecutors paid the amount of the check to Jacob. The defendant was convicted, and on a case reserved for the opinion of the judges, they were of opinion that the prisoner could not be said to have obtained any specific sum on the bill; all that was obtained was credit on account, and they therefore held the conviction wrong. R. v. Wavell, 1 Moody, C. C. 224. In R. v. Garrett, *supra*, p. 442, where the prisoner, by drawing on L. & Co., induced W. & Co. at St. Petersburg, to advance him money, it was held that he could not be convicted of obtaining money by false pretences from L. & Co., as he had obtained nothing from them, *not even credit*. Campbell, C. J., in giving judgment, said, "No advantage could arise to the prisoner, from the check being honored. He had gained his full object at St. Petersburg. It was a matter of perfect indifference to him whether W. & Co. were paid by L. & Co. or not." In R. v. Eagleton, *supra*, p. 438, all that the prisoner obtained was credit in account between him and the prosecutor. The money was not actually due until after the trial of the prisoner took place, but he was nevertheless held to be rightly convicted. See also R. v. Witchell, *supra*, p. 434.

It is sufficient for the prosecutor to prove that some part of the goods, &c., stated in the indictment (for the rule in this respect is the same as in larceny, see that title), were obtained from him by the false pretences used.

Proof of the ownership of the property.] The property obtained by means of the false pretences, must be proved to be the property of the party mentioned in the indictment. The prisoner was indicted for obtaining the sum of 3*s*. 4*d*. of the moneys of the Countess of Rochester. It appeared in evidence, that the prisoner brought a basket of fish, which he delivered to the servant of the countess, with a false ticket, charging 3*s*. 4*d*. too much for carriage. The servant paid him the full amount and was repaid by Lady Ilchester. On it being objected, that at the time of payment this was not her money, Lord Ellenborough said, that her subsequent allowance did not make the money paid to the defendant her money at the time. She was not *chargeable for more than was actually due for the carriage, and it de- [*451] pended upon her whether she should pay the overplus. The servant, however, afterwards swore that, at the time of this transaction, he had in his hands upwards of 9*s*. 10*d*. (the whole sum charged), the property of his mistress, which Lord Ellenborough considered sufficient to sustain the averment.(1) R. v. Douglas, 1 Campb. 212.

(1) In an indictment for obtaining goods and chattels by false pretences, it is necessary to allege that they were the property of some person, as in a case of larceny, or an excuse must be stated for not making the averment. State v. Lathrop, 15 Verm. 279.

Proof of all being principals.] Where several persons were indicted for obtaining money under false pretences, it was objected, that although they were all present when the representation was made to the prosecutor, yet the words could not be spoken by all, and one of them could not be affected by words spoken by another, but that each was answerable for himself only, the pretence conveyed by words being, like the crime of perjury, a separate act in the person using them; the Court of King's Bench, however, held, that as the defendants were all present, acting a different part in the same transaction, they were guilty of the imposition jointly. R. v. Young, 3 T. R. 98.(1)

On an indictment for obtaining money under false pretences, a party who has concurred and assisted in the fraud may be convicted as principal, though not present at the time of making the pretence and obtaining the money. R. v. Moland and others, 2 Moo. C. C. 276.

When the offence amounts to forgery.] It was formerly the law, that where goods were obtained by false representation, but that representation was in writing and amounted to a warrant or order for the payment of money or delivery of goods, so as to constitute a forgery, the offender must be indicted for the forgery, and could not be convicted of obtaining the property by false pretences. R. v. Evans, 5 C. & P. 553: 24 E. C. L. R.; R. v. Anderson, 2 Moo. & R. 469; R. v. Tuder, 1 Den. C. C. 325. But now by the 14 & 15 Vict. c. 100, s. 12, any person tried for misdemeanor is not to be acquitted if the offence turn out to be felony.

When the offence amounts to larceny.] By the 24 & 25 Vict. c. 96, s. 88 (*vide ante*, p. 431), if it appears on the trial that the defendant obtained the property in question in any such manner as to amount in law to larceny, he shall not be entitled to be acquitted by reason thereof. In all cases, therefore, where it is doubtful whether, in point of law, the offence is larceny or a misdemeanor, the safest course is to indict the party as for a misdemeanor; for should it appear upon an indictment for larceny, that the offence is in fact, that of obtaining money, &c., under false pretences, the prisoner must be acquitted. As to the distinction between the false pretences and larceny, see tit Larceny.

The Irish statute, the 9 Geo. 4, c. 55, also recites in s. 46, that a failure of justice frequently arises from this subtle distinction between larceny and fraud; but the provision in this clause, which was intended to obviate the defect in the law, was rendered nugatory and ineffectual by the omission of the word *not*; the error is now amended by the 5 & 6 Wm. 4, c. 34.

Form of indictment] As to the allegation of the intent to defraud, it is enacted [*452] by the 24 & 25 Vict. c. 96, s. 88, that it shall be *sufficient in any indictment for obtaining or attempting to obtain any property by false pretences, to allege that the defendant did the act with intent to defraud, without alleging the intent of the defendant to be to defraud any particular person, but it shall be sufficient to prove that the defendant did the act charged with intent to defraud. This is similar to the 14 & 15 Vict. c. 100, s. 8, now repealed.(2)

(1) Where two persons are jointly indicted for obtaining goods by false pretences, made designedly and with intent to defraud, evidence that one of them, with the knowledge, approbation, concurrence, and direction of the other, so made the false pretences charged, warrants the conviction of both. Commonwealth v. Harley, 7 Metcalf, 462. And it is not necessary, in order to convict the defendants in such case, to prove that they, or either of them, obtained the goods on their own account, or desired or expected to derive personally any pecuniary benefit therefrom. Ibid.

(2) An indictment for obtaining goods by false pretences must contain an absolute negative of the truth of the pretences employed. Tyler v. The State, 2 Humphreys, 37.

The great difficulty in framing indictments for obtaining property by false pretences, arises on the statement of the false pretences themselves. Many of the cases already stated, where the question of the sufficiency of the false pretences has arisen on the statement in the indictment, will be a guide on this subject. The following are cases in which objections of a more formal nature have been taken. An indictment alleged that "F. P. was possessed of a mare, and H. of a horse, and that H. and B. falsely pretended to F. P. that B. was possessed of the sum of 12*l.*, and that if F. P. would exchange his mare for H.'s horse, B. was willing to purchase the said horse of F. P. and give him 12*l.* for it;" whereas in truth and in fact B. was not then possessed of 12*l.* This indictment was held on demurrer to be insufficient, as not averring that the defendant H. *knew* that B. was not possessed of the 12*l.* R. v. Henderson, 2 Moo. C. C. 192; S. C. Car. & M. 328: 41 E. C. L. R. In Hamilton v. Reg., 9 Q. B. 271: 58 E. C. L. R.; S. C. 16 L. J. M. C. 9, the indictment charged that the defendant contriving and intending to cheat W., on a day named, did falsely pretend to W. that he, the defendant, then was a captain in the 5th Dragoons, by means of which false pretence the defendant did obtain of W. a valuable security, the property of W., with intent to cheat W. of the same, whereas the defendant was not at the time of making such false pretence a captain in the 5th Regiment, as he well knew. It was held in error, that, after conviction and judgment, this was a good indictment, as to the allegation both of the intent and the mode of obtaining the money, and as to the denial of the truth of the pretence, and that it was unnecessary to aver that the security was unsatisfied, it being generally sufficient, after verdict, that the indictment as in this case followed the words of the statute creating the offence. In R. v. Bowen, 13 Q. B. 790: 66 E. C. L. R.; S. C. 19 L. J. M. C. 65, where the indictment alleged that the defendant "did unlawfully, falsely pretend," &c., this was objected to on a motion to arrest the judgment on the same ground as that taken in R v. Henderson, *supra*, but the court thought that in that case it was not sufficiently noticed that the word "knowingly" did not occur in the statute, and they held the indictment good. An indictment stated that the defendant "did unlawfully attempt and endeavor fraudulently, falsely, and unlawfully to obtain from the Agricultural Cattle Insurance Company a large sum of money, to wit, 22*l.* 10*s.*, with intent thereby to cheat and defraud the company." It was held that there was no misdemeanor stated of which the prisoner could be convicted of attempting. See R. v. Marsh, 1 Den. C. C. 505; S C. 19 L. J. M. C. 12. In Fill v. Reg., Dears. C. C. 132; S. C. 22 L. J. M. C. 41, it was held that notwithstanding the provision in the 14 & 15 Vict. c. 100, s. 8, it was necessary to allege whose property the money obtained was, and that this was not a formal defect which might be amended under s. 25 of the same statute. An indictment, charging that A. unlawfully did falsely pretend that a printed paper was a good and valid promissory note, is sufficient without setting out *the paper. R. v. Coulson, 1 Den. [*453] C. C. 592; S. C. 19 L. J. M. C. 182. An allegation that the prisoner obtained "from A. a check for the sum of 1*l.* 14*s.* 6*d.* of the moneys of B., is a sufficient allegation that the check was the property of B." R. v. Godfrey, I Dears. & B. C. C. 426.

Description of property.] See *post*, tit. Larceny.

Obtaining bounty-money.] By the Annual Mutiny Act, recruits obtaining enlistment-money improperly are punishable summarily before justices of the peace. Under the old mutiny acts it was made punishable in the same way as obtaining

money by false pretences, to obtain money by making false representations as to any matters contained in the oaths and certificates mentioned in those acts. See R. v. Jessup, 25 L. J. M. C. 54. There can be no doubt that obtaining bounty-money fraudulently is within the general law relating to false pretences.

Venue.] In R. v. Buttory, cited in R. v. Burdett, 4 Barn. & Ald. 179: 1 E. C. L. R., the prisoner was indicted for obtaining money by false pretences, the venue being laid in Herefordshire. The false pretences were made in Herefordshire, but the money was received in Monmouthshire. The judges thought the indictment was laid in the wrong county. The prisoner, residing in the county of M., wrote a begging letter to the prosecutor, who resided in the same county, but which letter was posted by an accomplice of the prisoner in the county of L. The prosecutor, according to the request contained in the letter, sent a post-office order to the prisoner, addressed to him at G., in the county of L., which the accomplice received, and delivered the proceeds to the prisoner in the county of M. It was held that the prisoner was rightly tried in M. R. v. Jones, 1 Den. C. C. 551. The prisoner wrote and posted in the county of A. a letter containing a false pretence, which the prosecutor received in the borough of B. The prosecutor, in answer, posted a letter in the borough of B., containing money, which the prisoner received in the county of A. It was held, that under the 7 Geo. 4, c. 64, s. 12 (*supra*, p. 228), which authorizes the trial in any jurisdiction where the offence is begun or completed, the prisoner might be tried in the borough. R. v. Leech, 25 L. J. M. C. 77. Where the prisoner was indicted for obtaining money by sending a false return of fees to the Commissioners of the Treasury, and it appeared that the return was posted in Northampton, and received at Westminster, upon which a minute was drawn up, directing the money to be paid by the paymaster-general, and the money was paid at Westminster, it was held that the prisoner might be indicted and tried as for an offence in Northamptonshire. R. v. Cooke, 1 F. & F. 65.

[*454] *FERÆ NATURÆ.

LARCENY OF ANIMALS.

Of domestic animals, as sheep, oxen, horses, &c., or of domestic fowls, as hens, ducks, geese, &c., and of their eggs, larceny may be committed at common law, for they are the subjects of property, and serve for food. 1 Hale, P. C. 511; Hawk. P. C. b. 1, c. 33, 843. The indictment should show the species of eggs, so that it may appear that they are the subject of larceny. R. v. Cox, 1 C. & K. 487: 47 E. C. L. R.; and see R. v. Gallears, 1 Den. C. C. R. 501; S. C. 19 L. J. M. C. 13. And it being felony to steal the animals themselves, it is also felony to steal the product of any of them, though taken from the living animal. Thus, milking cows at pasture, and stealing the milk, was held felony by all the judges. Anon. 2 East, P. C. 617. So pulling the wool from a sheep's back. R. v. Martin, Id. 618. The stealing of a stock of bees also seems to be admitted to be felony. Tibbs v. Smith, L. Raym. 33; 2 East, P. C. 607; 2 Russ. by Grea. 83. The Scotch law corresponds with that of England in this respect, the stealing of bees *in a hive* being considered theft at common law, and the prosecutions for such thefts being very numerous. Alison's Princ. Crim. Law of Scotland, 280; see also 1st Rep. Crim. Law C., p. 14.

Larceny cannot be committed of animals in which there is no property, as of beasts that are *feræ naturæ*, and unreclaimed, such as deers, hares, or conies in a forest, chase, or warren, fish in an open river or pond, or wild fowl at their natural liberty, although any person may have the exclusive right, *ratione loci aut privilegii*, to take them, if he can, in those places. 1 Hale, P. C. 511; 4 Bl. Com. 235, 6; 2 East, P. C. 607. So of swans, though marked, if they range out of the royalty, because it cannot be known that they belong to any person. 1 Hale, P. C. 511. So of rooks in a rookery. See Hannam v. Mocket, 2 B. & C. 934: 9 E. C. L. R.; 4 D. & R. 518: 16 E. C. L. R.

Where animals *feræ naturæ* are dead, reclaimed (and known to be so), or confined, and may serve for food, it is larceny at common law to take them. Thus, deer inclosed in a park, fish in a trench or net, or, as it should seem, in any other place which is private property, and where they may be taken at the pleasure of the owner at any time, pheasants or partridges in a mew, young hawks in a nest, or even old ones, or falcons reclaimed, and known by the party to be so. 1 Hale, P. C. 511; 2 East, P. C. 607. So of young pigeons in a dove-cote. 1 Hale, P. C. 511. So where pigeons were shut up in their boxes every night. Per Parke, B., R. v. Luke, MS., Durham Spring Ass., 1839. And the Court of Criminal Appeal has decided, that tame pigeons, although unconfined, with free access at their pleasure to the open air, are the subjects of larceny: Campbell, C. J., in pronouncing *judgment, say- [*455] ing, "It had been supposed that Parke, B., had decided that there could be no larceny of pigeons, unless they were shut up in a house or box, but Parke, B., had in fact not so decided. We all think that tame pigeons may be the subject of larceny, although they have the opportunity of getting out and enjoying themselves in the open air." R. v. Cheafor, 2 Den. C. C. R. 361. So of tame pheasants. R. v. Head, 1 F. & F. 350.

Of the eggs of hawks, or swans, though reclaimed, larceny cannot be committed, the reason of which is said to be, that a less punishment, namely, fine and imprisonment, is appointed by statute for that offence. 2 East, P. C. 607; 2 Russ. by Grea. 83. And this is probably so as to eggs of pheasants and partridges and other birds irreclaimed; as the taking of the parents is not felony.

When an animal *feræ naturæ* is killed larceny may be committed of its flesh, as in the case of wild deer, pheasants, partridges, &c., for the flesh or skins are the subject of property. 3 Inst. 116; 1 Hale, P. C. 83. An indictment for stealing a dead animal should state that it was dead, for upon a general statement that the party stole the animal, it is to be intended that he stole it alive. Per Holroyd, J. R. v. Edward, Russ. & Ry. 498. So an indictment for stealing two turkeys was held by Hullock., B., not to be supported by proof of stealing two dead turkeys. R. v. Halloway, 1 C. & P. 128: 11 E. C. L. R. So where the prisoner was indicted for stealing a pheasant, value 40*s.*, of the goods and chattels of H. S., all the judges, after much debate, agreed that the conviction was bad; for in the case of larceny of animals *feræ naturæ*, the indictment must show that they were either dead, reclaimed, or confined, otherwise they must be presumed to be in their original state, and it is not sufficient to add "of the goods and chattels" of such a one. R. v. Rough, 2 East, P. C. 607. But where the prisoner was indicted for receiving a lamb before then stolen, and it appeared in evidence that the animal had been killed before it was received by the prisoner, the prisoner being convicted, the judges held the conviction good, according to the report, on the ground that it was immaterial as to the prisoner's offence whether the lamb was alive or dead, his offence and the punishment for it being in both cases the same. R. v. Puckering, 1 Moo. C. C. 242; 1 Lew. C. C. 302.

Before the late game act, it was held that it was not necessary that a person in possession of game, which has been reclaimed, should be qualified, in order to support an indictment laying the property in him. R. v. Jones, 3 Burn's Just. Larceny, 84.

There is, says Lord Coke, a distinction between such beasts as are *ferœ naturæ*, and being made tame serve for pleasure only, and such as being made tame serve for food, &c. 3 Inst. 101. Thus, although the owner may have a lawful property in them, in respect of which he may maintain an action of trespass, yet there are some things of which, in respect of the baseness of their nature, larceny cannot be committed, as mastiffs, spaniels, greyhounds, and bloodhounds; and other things, though reclaimed by art and industry, as bears, foxes, ferrets, &c., and their whelps or calves, because, though reclaimed, they serve not for food but pleasure, and so differ from pheasants, swans, &c., which when made tame, serve for food. 1 Hale, P. C. [*456] 512; R. v. Searing, Russ. & Ry. 350. The rule with regard to *animals *ferœ naturæ* not fit for food, is said to include "bears, foxes, monkeys, apes, polecats, cats, dogs, ferrets, thrushes, singing birds, in general, parrots and squirrels." 1st Rep. Crim. Law Com. p. 14. The young of wild animals are also included. Id.

See as to dogs, *supra*, p. 398.

See as to cattle, *supra*, p. 351.

[*457] *FISH.

TAKING OR DESTROYING FISH.

It will be seen (*post*, title Larceny), that larceny might be committed at common law of fish in a tank or net, or as it seems in any inclosed place, where the owner might take them at his will. 2 East, P. C. 610. But it was no larceny to take fish in a river, or other great water, where they were at their natural liberty. Hawk. P. C. b. 1, c. 33, s. 39. Property of this kind was protected by various statutes (4 & 5 Wm. 3, c. 23, s. 5; 22 & 23 Car. 2, c. 25, s. 7; 9 Geo. 1, c. 22; 5 Geo. 3, c. 14). Those statutes were repealed, and the substance of them re-enacted in the 7 & 8 Geo. 4, c. 29. This statute is also now repealed, and by the 24 & 25 Vict. c. 96, s. 24, "Whosoever shall unlawfully and wilfully take or destroy any fish in any water which shall run through or be in any land adjoining or belonging to the dwelling-house of any person being the owner of such water, or having a right of fishery therein, shall be guilty of a misdemeanor, and whosoever shall unlawfully and wilfully take or destroy, or attempt to take or destroy, any fish in any water not being such as hereinbefore mentioned, but which shall be private property, or in which there shall be any private right of fishery, shall, on conviction thereof before a justice of the peace, forfeit and pay, over and above the value of the fish taken or destroyed (if any), such sum of money, not exceeding five pounds, as to the justice shall seem meet: provided that nothing hereinbefore contained shall extend to any person angling between the beginning of the last hour before sunrise, and the expiration of the first hour after sunset, but whosoever shall by angling between the beginning of the last hour before sunrise, and the expiration of the first hour after sunset, unlawfully and wilfully take or destroy, or attempt to take or destroy, any fish in any such water as first mentioned, he shall, on conviction before a justice of the peace, forfeit and pay any such sum not exceeding five pounds; and if in any such water as last mentioned, he shall, on the like

conviction, forfeit and pay any sum not exceeding two pounds, as to the justice shall seem meet; and if the boundary of any parish, township, or vill shall happen to be in or by the side of any such water as is hereinbefore mentioned, it shall be sufficient to prove that the offence was committed either in the parish township, or vill named in the indictment or information, or in any parish, township, or vill adjoining thereto."

On an indictment under the above section, the taking of the fish need not be such a taking as would be necessary to constitute larceny. See R. v. Glover, R. & R. 269.

The words "adjoining," &c., "to the dwelling-house," import actual contact, and, therefore, ground separated from a house by a narrow walk and paling, wall, or gate, is not within their meaning. R. v. Hodges, M. & M. 341: 22 E. C. L. R.

By the 24 & 25 Vict. c. 96, s. 25, "If any person shall at any time *be [*458] found fishing, against the provisions of this act, it shall be lawful for the owner of the ground, water, or fishery where such offender shall be so found, his servants, or any person authorized by him, to demand from such offender any rods, lines, hooks, nets, or other implements for taking or destroying fish, which shall then be in his possession, and in case such offender shall not immediately deliver up the same, to seize and take the same from him, for the use of such owner: provided that any person angling, against the provisions of this act, between the beginning of the last hour before sunrise, and the expiration of the first hour after sunset, from whom any implement used by anglers shall be taken, or by whom the same shall be delivered up as aforesaid, shall by the taking or delivering thereof be exempted from the payment of any damages or penalty for such angling."

And by s. 26, "Whosoever shall steal any oysters or oyster-brood from any oyster-bed, laying, or fishery, being the property of any other person, and sufficiently marked out or known as such, shall be guilty of felony, and, being convicted thereof, shall be liable to be punished as in the case of simple larceny; and whosoever shall unlawfully and wilfully use any dredge, or any net, instrument, or engine whatsoever, within the limits of any such oyster-bed, laying, or fishery, being the property of any other person, and sufficiently marked out and known as such, for the purpose of taking oysters or oyster-brood, although none shall be actually taken, or shall unlawfully and wilfully, with any net, instrument, or engine drag upon the ground or soil of any such fishery, shall be deemed guilty of a misdemeanor, and, being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding three months, with or without hard labor, and with or without solitary confinement; and it shall be sufficient in any indictment to describe either by name or otherwise, the bed, laying, or fishery in which any of the said offences shall have been committed, without stating the same to be in any particular parish, township, or vill: provided that nothing in this section contained shall prevent any person from catching or fishing for any floating fish within the limits of any oyster fishery, with any net, instrument, or engine adapted for taking floating fish only."

As to destroying the dams of fish ponds, &c., see title, Sea and River Banks, &c.

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*FIXTURES. [*459]

At common law larceny could not be committed of things which were attached to land, or which belonged to it, as trees, grass, bushes, bridges, stones, the lead of a house, and the like. 1 Hale, P. C. 510; 2 East, P C. 587; and this is said to extend not only to things actually attached to the realty, but to things savoring of

and belonging to the realty, as title-deeds. R. v. Westbeer, 1 Lea, 12; R. v. Walker, 1 Moo. C. C. 155. But this would probably not now be extended, as it has frequently been held that if these things be severed from the freehold, as wood cut, grass in cocks, stones dug out of a quarry, &c., then felony may be committed by stealing them, for then they are personal goods. So if a man came to steal trees, or the lead of a church, and severed it, and after about an hour's time came and fetched it away, this was held felony, because the act was not continued, but interpolated, and in that interval the property lodged in the right owner as a chattel; and so with regard to corn standing on the ground, for that is a chattel personal. 1 Hale, P. C. 510. "If," says Gibbs, C. J., "a thief severs a copper, and instantly carries it away, it is no felony at common law, yet if he lets it remain after it is severed any time, then the removal constitutes a felony, if he comes back and takes it; and so of a tree which has been some time severed." Lee v. Ridson, 7 Taunt. 191. The rule on this subject is thus stated by the criminal law commissioners: "Although a thing be part of the realty, or be any annexation to, or unsevered produce of the realty, yet if any person sever it from the realty with intent to steal it, after an interval, which so separates the acts of severance and removal that they cannot be considered as one continued act, the thing taken is a chattel, the subject of theft, notwithstanding such previous connection with the realty. If any parcel of the realty, or any annexation to or unsevered produce of the realty be severed, otherwise than by one who afterwards removes the same, it is the subject of theft, notwithstanding it be stolen instantly after that severance." 1st Rep. p. 11. To remedy the inconvenience which arose from this state of the law, it has been made larceny in certain cases to steal things annexed to a part of the freehold. These enactments will now be stated.

By the 24 & 25 Vict. c. 96, s. 31, replacing the 7 & 8 Geo. 4, c. 29, s. 44, "Whosoever shall steal, or shall rip, cut, sever, or break with intent to steal, any glass or woodwork belonging to any building whatsoever, or any lead, iron, copper, brass, or other metal, or any utensil or fixture, whether made of metal or other material, or of both, respectively fixed in or to any building whatsoever, or any thing made of metal fixed in any land being private property, or for a fence to any dwelling-house, garden, or area, or in any square or street, or in any place dedicated to public use or ornament, or in any burial-ground, shall be guilty of felony, and being convicted thereof shall be liable to be punished as in the case of simple larceny; and in [*460] the case of any such thing fixed in any such square, street or place as *aforesaid, it shall not be necessary to allege the same to be the property of any person."

See, as to the punishment, 24 & 25 Vict. c. 96, ss. 4, 7, 8, 9, *infra*, tit. Larceny. As to the proof of previous summary convictions for larceny, see 24 & 25 Vict. c. 96, s. 112, ib. As to venue, see 24 & 25 Vict. c. 96, s. 114, ib.

Upon the repealed statute 4 Geo. 2, c. 32, it was held, that a person who procured possession of a house under a written agreement between him and the landlord, with a fraudulent intention to steal the fixtures belonging to the house, was, in stealing the lead affixed to the house, guilty of a felony within the statute. R. v. Munday, 2 Leach, 850; 2 East, P. C. 594.

With regard to what shall be deemed a *building* within this act, it was held (upon the 4 Geo. 2, which, after specifying certain buildings, used the words, "any other building whatever"), that a summer-house, half a mile from the dwelling-house, was within the act. R. v. Norris, Russ. & Ry. 69. So upon the same statute a majority of the judges determined that a church was within the meaning of the act. R. v. Parker, 2 East, P. C. 592. But it was agreed that the property in lead affixed to a church could not be laid to be either in the churchwardens, or in the parishioners or

inhabitants. Id. The new statute, by omitting to specify any particular building, and using only the words, "any building whatsoever," has removed the doubts which gave rise to the above decisions. An unfinished building intended as a cart-shed, which was boarded up on all its sides, and had a door with a lock to it, and the frame of a roof ready for thatching, with loose gorse thrown on, was held by Littledale, J., to be a building within the above section. R. v. Worral, 7 C. & P. 516: 32 E. C. L. R.

Upon the words, "any square, street or other place dedicated to public use or ornament," it has been held that a churchyard comes within the meaning of the act. Per Bosanquet, J., R. v. Blick, 4 C. & P. 377; see also R. v. Reece, 2 Russ. by Grea. 65; and a similar decision with respect to a tombstone in a churchyard, in R. v. Jones, 2 Russ. by Grea. 66.

The prisoner was indicted (in the usual form) for stealing lead affixed to a building. The jury found him guilty of stealing the lead when lying severed, but not of stealing it when fixed. Tindal, C. J., after conferring with Vaughan, B, held that the prisoner could not be found guilty of a simple larceny on such an indictment, and directed a verdict of not guilty to be entered. R. v. Gooch, 8 C. & P. 293: 34 E. C. L. R.

An indictment for stealing a copper pipe fixed to the dwelling-house of A. and B., is not supported by proof of stealing a pipe fixed to two rooms, of which A. and B. are separate tenants, in the same house. R. v. Finch, 1 Moo. C. C. 418.

A copper sun-dial fixed on the top of a wooden post standing in a churchyard is "metal fixed to land" within the above section. R. v. Jones, Dean & B. 555; S. C. 27 L. J. M. C. 171. The prisoner was indicted for stealing lead fixed to a wharf, and it was proved that the wharf was made of bricks and timber; this was held to be sufficient. R. v. Price, Bell, C. C. 93; S. C. 28 L. J. M. C. 64.

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*FORCIBLE ENTRY AND DETAINER. [*461]

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Offence at common law.] It seems that entering with such force and violence into lands or tenements as to exceed a bare trespass, was an offence indictable at common law. Wilson's Case, 8 T. R. 357; 1 Russ. by Grea. 304. But against this offence provision has been made by various statutes.

Offence by statute] The first enactment against forcible entries is that of 5 Rich. 2, c. 8, which merely forbids them.

By the 15 Rich. 2, c. 2, it is accorded and assented that the ordinances and statutes, made and not repealed, of them that make entries with strong hand into lands and tenements, or other possessions whatsoever, and them hold with force, and also of those that make insurrections, or great ridings, riots, routs, or assemblies, in disturbance of the peace or of the common law, or in affray of the people, shall be holden

and kept, and fully executed, joined to the same, that at all times that such forcible entry shall be made, and complaint thereof cometh to the justices of the peace, or to any of them, that the same justices or justice take sufficient power of the county and go to the place where such force is made; and if they find any that hold such place forcibly after such entry made, they shall be taken and put in the next gaol, there to abide convict by the record of the same justices or justice, until they have made fine and ransom to the king.

This statute was followed by that of 8 Hen. 6, c. 9, which, after reciting the 15 Rich. 2, c. 2, enacts, for that the said statute doth not extend to entries in tenements in peaceable manner, and after holden with force, nor if the persons which enter with force into lands and tenements be removed and voided before the coming of the said justices or justice as before, nor any pain ordained, if the sheriff do not obey the commandments and precepts of the said justices for to execute the said ordinances, many wrongful and forcible entries be daily made in lands and tenements, by such as have no right, and also divers gifts, feoffments, and discontinuances, sometimes made to lords and other puissant persons, and extortioners, within the said counties where they be conversant, to have maintenance, and sometimes to such persons as be unknown to them so put out, to the intent to delay and defraud such rightful possessors of their right and recovery forever to the final disherison of divers of the king's [*462] *faithful liege people, and likely daily to increase, if due remedy be not provided in this behalf, enacts, that from henceforth, where any doth make any forcible entry on lands and tenements, or other possessions, or them hold forcibly after complaint thereof made within the same county where such entry is made, to the justices of the peace, or to one of them, by the party grieved, that the justices or justice so warned within a convenient time, shall cause, or one of them shall cause, the said statutes duly to be executed, and that at the cost of the party so grieved. See R. v. Wilson, *post*, p. 464.

By section 9 of this statute, the justices are directed to re-seize the lands or tenements entered upon, and to put the party put out into full possession of the same. But it is provided by s. 7, that they who keep their possession with force in any lands and tenements whereof they or their ancestors, or they whose estate they have in such lands and tenements have continued their possession in the same for three years or more, be not endamaged by the statute. This proviso is enforced by the 31 Eliz., c. 11, s. 3, which declares that no restitution shall be made, if the person indicted has had the occupation or been in quiet possession for the space of three whole years together next before the day of the indictment found, and his estate therein not ended or determined.

In order to extend the remedy for forcible entries upon other estates than those of freehold, it was, by 21 Jac. 1, c. 15, enacted, "that such judges, justices, or justices of the peace, as, by reason of any act or acts of Parliament now in force, are authorized and enabled, upon inquiry, to give restitution of possession unto tenants of any estate of freehold of their lands or tenements which shall be entered upon with force, or from them withholden by force, shall, by reason of this present act, have the like and the same authority and ability from henceforth (upon indictment of such forcible entries, or forcible withholding before them duly found), to give like restitution of possession unto tenants for term of years, tenants by copy of court-roll, guardians by knight's service, tenants by *elegit*, statute-merchant, and staple, of lands or tenements by them so holden, which shall be entered upon by force or holden from them by force."

Upon a prosecution under these statutes the prosecutor must prove—1, the entry

or detainer; 2, that it was forcible; 3, the possession upon which the entry was made; and 4, that it was made by the defendant.

Proof of the entry.] A forcible entry or detainer is committed by violently taking or keeping possession of lands or tenements by menaces, force, and arms, and without the authority of law. 4 Bla. Com. 248. It must be accompanied with some circumstances of actual violence or terror, and therefore an entry which has no other force than such as is implied by law in every trespass, is not within the statutes. Hawk. P. C. b. 1, c. 64, s. 25. The entry may be violent, not only in respect to violence actually done to the person of a man, as by beating him if he refuses to relinquish possession; but also in respect to any other kind of violence in the entry, as by breaking open the doors of a house, whether any person be within or out, especially if it be a dwelling-house; and perhaps by acts of outrage after the entry, as by carrying away the party's goods. Ibid. s. 26; see 3 Burr. 1702 (*n*).

*But if a person who pretends a title to lands, barely goes over them, either [*463] with or without a great number of attendants armed or unarmed, in his way to the church or market, or for such like purposes, without doing any act which expressly or impliedly amounts to a claim to such lands, this is not an entry within the meaning of the statutes. Hawk. P. C. b. 1, c. 64, s. 20. Drawing a latch and entering a house is said not to be a forcible entry, according to the better opinion. Id. s. 26; Bac. Abr. Forcible Entry (B.), 1 Russ. by Grea. 710.

Proof of the force and violence.] Where the party, either by his behavior or speech, at the time of his entry, gives those who are in possession just cause to fear that he will do them some bodily hurt if they do not give way to him, his entry is esteemed forcible, whether he cause the terror by carrying with him such an unusual number of servants, or by arming himself in such a manner as plainly to intimate a design to back his pretensions by force, or by actually threatening to kill, maim, or beat those who continue in possession, or by making use of expressions which plainly imply a purpose of using force against those who make resistance. Hawk. P. C. b. 1, c. 64, s. 27. But it seems that no entry is to be judged forcible from any threatening to spoil another's goods, or to destroy his cattle, or to do him any similar damage, which is not personal. Id. s. 28; *sed vide supra.*

It is not necessary that there should be any one assaulted to constitute a forcible entry; for, if persons take or keep possession of either house or land, with such numbers of persons and show of force as are calculated to deter the rightful owner from sending them away, and resuming his own possession, that is sufficient in point of law to constitute a forcible entry, or a forcible detainer. Per Abbott, C. J., Milner v. Maclean, 2 C. & P. 18: 12 E. C. L. R. An indictment for a forcible entry cannot be supported by evidence of a mere trespass, but there must be proof of such force, or at least such kind of force as is calculated to prevent any resistance. Per Lord Tenterden, C. J., R. v. Smyth, 5 C. & P. 201: 24 E. C. L. R.

Proof that the detainer was forcible.] The same circumstances of violence or terror which make an entry forcible will make a detainer forcible also; therefore, whoever keeps in his house an unusual number of people, or unusual weapons, or threatens to do some bodily hurt to the former possessor if he return, shall be adjudged guilty of a forcible detainer, though no attempt is made to re-enter; so also, it is said, if he place men at a distance from the house, to assault any one who shall attempt to make an entry: but barely refusing to go out of a house, and continuing

therein in despite of another, is not a forcible detainer. Hawk. P. C. b. 1, c. 64, s. 30. So where a lessee, at the end of his term, keeps arms in his house to prevent the entry of the lessor, or a lessee at will retains possession with force, after the determination of the will: these are forcible detainers. Com. Dig. Forc. Det. (B. 1).

The statute, 15 Ric. 2, only gave a remedy in cases of forcible detainer, where there had been a previous forcible entry; but the statute, 8 Hen. 6. c. 9, gives a remedy for forcible detainer after a previous *unlawful* entry; for the entry may be unlawful, though not forcible. R. v. Oakley, 4 B. & Ad. 307: 24 E. C. L. R. But [*464] it does not hence *follow that the statute 8 Henry 6, does not apply to the case of a tenant at will, or for years, holding over after the will is determined, or the term expired; because the continuance in possession afterwards may amount, in judgment of law, to a new entry. Per Parke, J., Id. p. 312, citing Hawk. P. C. b. 1, c. 64, s 34.

A conviction for a forcible detainer is bad, if it only state that the prosecutor complained to the justices of an entry and unlawful expulsion and foreible detainer, and that they personally came and found the defendant forcibly detaining the premises, whereupon they convict him, &c. For the justices cannot know by their view, without evidence, that the detainer was unlawful, or that there had been an unlawful entry. Semble, that the conviction ought to show that the defendant was summoned, or had otherwise an opportunity to defend himself. Held also, that the court was bound to award a re-restitution as a consequence of quashing the conviction without inquiring into the legal or equitable claims of the respective parties. R. v. Wilson, 3 A. & E. 817: 30 E. C. L. R.; Attwood v. Joliffe, 3 N. Sess. Cas. 116.

Proof of the possession upon which the entry was made.] With regard to the kind of entry in respect of which a person may be guilty of a forcible entry, it is said by Hawkins to be a general rule, that a person may be indicted for a forcible entry into such incorporeal hereditaments, for which a writ of entry will lie either at common law, as for rent, or by statute, as for tithes; but that there is no good authority that such an indictment will lie for a common or an office. So no violence offered in respect of a way or other easement, will make a forcible entry. Hawk. P. C. b. 1, c. 64, s. 31. Nor can a person be convicted under the 15 Ric. 2, of a detainer of any tenements into which he could not have made a forcible entry. Ibid.

It is said by Hawkins, that it seems clear that no one can come within the intention of the statutes, by any force whatsoever done by him on entering into a tenement whereof he himself had the sole and lawful possession, both at and before the time of such entry, as by breaking open the door of his own dwelling-house, or of a castle, which is his own inheritance, but forcibly detained from him by one who claims the bare custody of it, or by forcibly entering into the land of his own tenant at will. The learned writer has added a "*sed quære*" to this passage, and Lord Kenyon has observed that perhaps some doubt may hereafter arise respecting what Mr. Sergeant Hawkins says, that at common law the party may enter with force into that to which he has a legal title. R. v. Wilson, 8 T. R. 361.

There seems now to be no doubt that a party may be guilty of a forcible entry, by violently and with force entering into that to which he has a legal title. Newton v. Harland, 1 M. & G. 644: 39 E. C. L. R.; 1 Russ. by Grea. 305, and (*n*).

The possession of a joint tenant, or tenant in common, is such a possession as may be the subject of a forcible entry or detainer by his co-tenant; for though the entry of the latter be lawful *per mie et per tout*, so that he cannot in any case be punished for it

in an action of trespass, yet the lawfulness of the entry is no excuse for the violence. Hawk. P. C. b. 1, c. 64, s. 33.

Upon an indictment founded on the 8 Hen. 6, it must be shown *that the [*465] entry was on a freehold; and if founded on the 21 Jac. 1, that it was upon a leasehold, &c., according to that statute. R. v. Wannop, Sayer, 142. On a prosecution for a forcible entry on the possession of a lessee for years, it is sufficient to prove that such lessee was *possessed*, although the indictment allege that the premises were his freehold. R. v. Lloyd, Cald. 415. Proof that the party holds colorably, as a freeholder or leaseholder, will suffice; for the court will not, on the trial, enter into the validity of an adverse claim, which the party ought to assert by action, and not by force. Per Vaughan, B., R. v. Williams, Talf. Dick. Sess. 239.

Proof that the offence was committed by the defendant] This offence may be committed by one person as well as by several. Hawk. P. C. b. 1, c. 64, s. 29. All who accompany a man when he makes a forcible entry, will be adjudged to enter with him, whether they actually come upon the land or not. Id. s. 22. So also with those who, having an estate in land by a defeasible title, continue by force in possession, after a claim made by one who has a right of entry. Id. s. 23. But where several come in company with one who has a right to enter, and one of the company makes a forcible entry, that is not a forcible entry in the others. 3 Bac. Abr. Forcible Entry (B.) And a person who barely agrees to a forcible entry made to his use, without his knowledge or privity, is not within the statutes, because he no way concurred in, or promoted the force. Hawk. P. C. b. 1, c. 64, s. 24.

An infant or feme covert may be guilty of a forcible entry, for actual violence done by such party in person; but not for violence done by others at their command, for such command is void. A feme covert, it is said, may be imprisoned for such offence, though not an infant, because he shall not be subject to corporal punishment by force of the general words of any statute in which he is not expressly named. Hawk. P. C. b. 1, c. 64, s. 35. A feme covert may be guilty of a forcible entry, by entering with violence into her husband's house. R. v. Smyth, 5 C. & P. 201: 24 E. C. L. R.

Award of restitution.] The court in which the indictment is found, or the Court of King's Bench upon the removal thither of the indictment by *certiorari*, has power on the conviction of the defendant to award restitution to the party upon whose possession the entry has been made. Hawk. P. C. b. 1, c. 64, ss. 49, 50, 51. Though by the provisos in the statutes of Hen. 6 and James 1, the defendants may set up a possession for three years to stay the award of restitution. Id. s. 53. A supersedeas of the award of restitution may be granted by the same court that made the award. Id. s. 61. And a re-restitution may be awarded by the King's Bench. Id. s. 66. See R. v. Wilson, *ante*, p. 464.

Before conviction it is in the discretion of the judge of assize to award a restitution or not, although a true bill has been found by the grand jury for a forcible entry. R. v. Harland, 2 Lew. C. C. 170; 8 Ad. & E. 826: 35 E. C. L. R.; 1 P. & D. 93; 2 M. & R. 141.

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Forgery at common law.] AT common law the offence of forgery was punishable as a misdemeanor. It is defined by Sir W. Blackstone as "the fraudulent making or alteration of a writing, to the prejudice of another man's right:" 4 Com. 247; and by Mr. East, as "a false making, a making *malo animo* of any written instrument, for the purpose of fraud and deceit."(1) 2 East, P. C. 852.

*The forgery of any document, whether public or private, with intent to de- [*468] fraud, is punishable as a misdemeanor at common law. And in R. v. Hodgson, Dear. & B. C. C. 3; S. C. 25 L. J. M. C. 78, the court said it was unnecessary to consider whether or not the document which the prisoner was charged with forging (a diploma of the College of Surgeons) was of a public nature or not, because, whether it was or was not, in order to make out the offence there must have been, at the time of the instrument being forged, an intention to defraud some person. The distinction, therefore, as to the intent to defraud, between the forgery of public and private documents *at common law*, which has been sometimes drawn, seems to be of little importance. If any other inference is to be drawn from the passage in Hawk. P. C. b. 1, c. 70, it must be considered as overruled by this case. There are indeed many public documents the forgery of which is made punishable by statute as a criminal offence without any intent. But these provisions in no way affect the general principle of law just stated; on the other hand, they impliedly recognize it, as, had it been otherwise, they would, many of them, have been unnecessary.

Though doubts were formerly entertained on the subject, it is now clear that forging any document, with a fraudulent intent, and whereby another person may be prejudiced, is within the rule.(2) Thus, after much debate, it was held, that forging an order for the delivery of goods was a misdemeanor at common law.(3) R. v. Ward, Str. 747; 2 Ld. Raym. 1461. And the same was held by a majority of the judges with regard to a document purporting to be a discharge from a creditor to a gaoler, directing him to discharge a prisoner in his custody. R. v. Fawcett, 2 East, P. C. 862. R. v. Ward is considered by Mr. East to have settled the rule that the counterfeiting of *any writing*, with a fraudulent intent, whereby another may be prejudiced, is forgery at common law. 2 East, P. C. 861.

Forgery at common law must be of some document or writing. Therefore, where the prisoner was indicted for forging the name of J. Linnell, and the evidence was that he painted it in the corner of a picture, with intent to pass off the picture as a

(1) Forgery is the alteration of a deed or writing in a material part, to the prejudice of another, as well as when the whole deed or writing is forged. 5 Strobhart, 58.

In an indictment for forgery, the proof was that the defendant wrote a promissory note for $141. 26, and read it to another, who was unable to read, as a note for $41.26, and induced him to sign it as maker. *Held*, that this did not constitute a forgery. The Commonwealth v. Sankey, 10 Harris, 390.

(2) Ames's Case, 2 Greenl. 365; Peona. v. McKee, Addison, 33.

(3) The Commonwealth v. Ayer, 3 Cushing, 150.

work of that artist, this was held not to be a forgery. But that, if money had been obtained by the fraud, the defendant was indictable for a cheat at common law. R. v. Closs, Dear. & B. C. C. 460; S. C. 27 L. J. M. C. 54. So where the prisoner caused wrappers to be printed similar to those of another tradesman, and sold in them a composition called "Borwick's Baking Powder," but caused the signature and the notification that without such signature no powder was genuine, which appeared on the genuine wrappers, to be omitted; it was held that this was no forgery, though the jury found that the wrappers were procured by the prisoner with intent to defraud. R. v. Smith, Dear. & B. C. C. 566; S. C. 27 L. J. M. C. 225.

It is not necessary to the sustaining an indictment for forgery at common law, that any prejudice should in fact have happened by reason of the fraud.(1) R. v. Ward, Str. 747; 2 Ld. Laym. 1461. Nor is it necessary that there should be any publication of the forged instrument. 2 East, P. C. 855, 951; 1 Russ. by Grea. 318.

It is not forgery fraudulently to procure a party's signature to a document the contents of which have been altered without his knowledge: R. v. Chadwicke, 2 Moo. & R. 545; or fraudulently to induce a person to execute an instrument on a misrep- [*469] resentation of *its contents. Per Rolfe, B., R. v. Collins, MS., 2 Moo. & R. 461. This comes under another class of offences, and is specially provided for by the 24 & 25 Vict. c. 96, s. 90, *supra*, p. 432.

Forgery by statute.] By several statutes certain forgeries have been made felonies, and the punishment increased. Many of these statutes were consolidated by the 11 Geo. 4 and 1 Wm. 4, c. 66, which is now repealed, and the statutes again consolidated by the 24 & 25 Vict. c. 98.

Forging her majesty's seals.] By s. 1 of that act, "Whosoever shall forge or counterfeit, or shall utter, knowing the same to be forged or counterfeited, the great seal of the United Kingdom, her majesty's privy seal, any privy signet of her majesty, her majesty's royal sign manual, any of her majesty's seals appointed by the twenty-fourth article of the union between England and Scotland, to be kept, used, and continued in Scotland, the great seal of Ireland, or the privy seal of Ireland, or shall forge or counterfeit the stamp or impression of any of the seals aforesaid, or shall utter any document or instrument whatsoever, having thereon or affixed thereto the stamp or impression of any such forged or counterfeited seal, knowing the same to be the stamp or impression of such forged or counterfeited seal, or any forged or counterfeited stamp or impression made or apparently intended to resemble the stamp or impression of any of the seals aforesaid, knowing the same to be forged or counterfeited, or shall forge or alter, or utter, knowing the same to be forged or altered, any document or instrument having any of the said stamps or impressions thereon or affixed thereto, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Forging transfers of stock, and powers of attorney relating thereto.] By s. 2, "Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any transfer of any share or interest of or in any

(1) Arnold v. Cost, 8 Gill & Johns. 220.

stock, annuity, or other public fund which now is or hereafter may be transferable at the bank of England or at the bank of Ireland, or of or in the capital stock of any body corporate, company, or society which now is or hereafter may be established by charter, or by, under, or by virtue of any act of Parliament, or shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any power of attorney or other authority to transfer any share or interest of or in any such stock, annuity, public fund, or capital stock, or to receive any dividend or money payable in respect of any such share or interest, or shall demand or endeavor to have any such share or interest transferred, or to receive any dividend or money payable in respect thereof, by virtue of any such forged or altered power of attorney or other authority, knowing the same to be forged or altered, with intent in any of the cases aforesaid to defraud, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years,—or to be imprisoned for any term not *ex- [*470] ceeding two years, with or without hard labor, and with or without solitary confinement."

Personating the owner of stock, and transferring or receiving dividends.] By s. 3, "Whosoever shall falsely and deceitfully personate any owner of any share or interest of or in any stock, annuity, or other public fund, which now is or hereafter may be transferable at the bank of England or at the bank of Ireland, or any owner of any share or interest of or in the capital stock of any body corporate, company, or society, which now is or hereafter may be established by charter, or by, under, or by virtue of any act of Parliament, or any owner of any dividend or money payable in respect of any such share or interest as aforesaid, and shall thereby transfer or endeavor to transfer any share or interest belonging to any such owner, or thereby receive or endeavor to receive any money due to any such owner, as if such offender were the true and lawful owner, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Forging attestation to power of attorney for transfer of stock.] By s. 4, "Whosoever shall forge any name, handwriting, or signature, purporting to be the name, handwriting, or signature of a witness attesting the execution of any power of attorney or other authority to transfer any share or interest of or in any such stock, annuity, public fund, or capital stock, as is in either of the last two preceding sections mentioned, or to receive any dividend or money payable in respect of any such share or interest, or shall offer, utter, dispose of, or put off any such power of attorney or other authority, with any such forged name, handwriting, or signature thereon, knowing the same to be forged, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Making false entries in the books of the public funds.] By s. 5, "Whosoever shall wilfully make any false entry in, or wilfully alter any word or figure in, any of the books of account kept by the governor and company of the bank of England or the governor and company of the bank of Ireland, in which books the accounts of the

owners of any stock, annuities, or other public funds which now are or hereafter may be transferable at the bank of England or at the bank of Ireland shall be entered and kept, or shall in any manner wilfully falsify any of the accounts of any such owners in any of the said books, with intent in any of the cases aforesaid to defraud, or shall wilfully make any transfer of any share or interest of or in any stock, annuity, or other public fund which now is or hereafter may be transferable at the bank of England or at the bank of Ireland, in the name of any person not being the true and lawful owner of such share or interest, with intent to defraud, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the [*471] *court, to be kept in penal servitude for life, or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Clerks of the bank making out false dividend warrants.] By s. 6, "Whosoever being a clerk, officer, or servant of, or other person employed or intrusted by the governor and company of the bank of England, or the governor and company of the bank of Ireland, shall knowingly make out or deliver any dividend warrant or warrant for payment of any annuity, interest, or money payable at the bank of England or Ireland for a greater or less amount than the person on whose behalf such warrant shall be made out is entitled to, with intent to defraud, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Forging East India securities.] By s. 7, "Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any bond commonly called an East India bond, or any bond, debenture, or security issued or made under the authority of any act passed or to be passed relating to the East Indies, or any indorsement on or assignment of any such bond, debenture, or security, with intent to defraud, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Forging exchequer bills, bonds, debentures, &c.] By s. 8, "Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any exchequer bill, or exchequer bond, or exchequer debenture, or any indorsement on or assignment of any exchequer bill, or exchequer bond, or exchequer debenture, or any receipt or certificate for interest accruing thereon, with intent to defraud, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Making plates, &c., in imitation of those used for exchequer bills, &c.] By s. 9, "Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall make, or cause or procure to be made, or shall aid or assist in making, or shall knowingly have in his custody or possession, any frame, mould, or instrument having therein any words, letters, figures, marks, lines, or devices pecu-

liar to and appearing in the substance of any paper provided or to be provided or used for exchequer bills, or exchequer bonds, or exchequer debentures, or any machinery for working any threads into the substance of any paper, or any such thread, and intended to imitate such words, letters, figures, marks, lines, threads, *or [*472] devices, or any plate peculiarly employed for printing such exchequer bills, bonds, or debentures, or any die or seal peculiarly used for preparing any such plate, or for sealing such exchequer bills, bonds, or debentures, or any plate, die, or seal intended to imitate any such plate, die, or seal as aforesaid, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Making paper in imitation of that used for exchequer bills.] By s. 10, "Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall make, or cause or procure to be made, or aid or assist in making, any paper in the substance of which shall appear any words, letters, figures, marks, lines, threads, or other devices peculiar to and appearing in the substance of any paper provided or to be provided or used for such exchequer bills, bonds, or debentures, or any part of such words, letters, figures, marks, lines, threads, or other devices, and intended to imitate the same, or shall knowingly have in his custody or possession any paper whatsoever, in the substance whereof shall appear any such words, letters, figures, marks, lines, threads, or devices as aforesaid, or any parts of such words, letters, figures, marks, lines, threads, or other devices, and intended to imitate the same, or shall cause or assist in causing any such words, letters, figures, marks, lines, threads, or devices as aforesaid, or any part of such words, letters, figures, marks, lines, threads, or other devices, and intended to imitate the same, to appear in the substance of any paper whatever, or shall take or assist in taking any impression of any such plate, die, or seal, as in the last preceding section mentioned, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Having in possession paper, plates, or dies to be used for exchequer bills, &c] By s. 11, "Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall purchase or receive or knowingly have in his custody or possession any paper manufactured and provided by or under the directions of the commissioners of inland revenue or commissioners of her majesty's treasury, for the purpose of being used as exchequer bills, or exchequer bonds, or exchequer debentures, before such paper shall have been duly stamped, signed, and issued for public use, or any such plate, die, or seal, as in the last two preceding sections mentioned, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding three years, with or without hard labor."

Forging bank notes and bills.] By s. 12, "Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any note or bill of exchange of the governor and company of the bank of England, or of the governor and company *of the bank of Ireland, or of any other body cor- [*473] porate, company, or persons carrying on the business of bankers, commonly called a

bank note, a bank bill of exchange, or a bank post bill, or any indorsement on or assignment of any bank note, bank bill of exchange, or bank post bill, with intent to defraud, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Purchasing or receiving or having forged bank notes and bills.] By s. 13, "Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall purchase or receive from any other person, or have in his custody or possession, any forged bank note, bank bill of exchange, or bank post bill, or blank bank note, blank bank bill of exchange, or blank bank post bill, knowing the same to be forged, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor."

Making or having mould or paper for forging notes of Banks of England and Ireland.] By s. 14, "Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall make or use, or knowingly have in his custody or possession, any frame, mould, or instrument for the making of paper with the words 'bank of England' or 'bank of Ireland,' or any part of such words intended to resemble and pass for the same, visible in the substance of the paper, or for the making of paper with curved or waving bar lines, or with the laying wire lines thereof in a waving or curved shape, or with any number, sum, or amount expressed in a word or words, in Roman letters, visible in the substance of the paper, or with any device or distinction peculiar to and appearing in the substance of the paper used by the governor and company of the banks of England and Ireland respectively for any notes, bills of exchange, or bank post-bills of such banks respectively, or shall make, use, sell, expose to sale, utter, or dispose of, or knowingly have in his custody or possession, any paper whatsoever with the words 'bank of England' or 'bank of Ireland,' or any part of such words intended to resemble and pass for the same, visible in the substance of the paper, or any paper with curved or waving bar lines, or with the laying wire lines thereof in a waving or curved shape, or with any number, sum or amount expressed in a word or words in Roman letters, appearing visible in the substance of the paper, or with any device or distinction peculiar to and appearing in the substance of the paper used by the governor and company of the banks of England and Ireland respectively for any notes, bills of exchange, or bank post bills of such banks respectively, or shall by any art or contrivance cause the words 'bank of England' or 'bank of Ireland,' or any part of such words intended to resemble and pass for the same, or any device or distinction peculiar to and appearing in the substance of the paper used by the governor and company of the banks of England and Ireland respectively for any notes, bills of exchange, or bank post [*474] bills of such banks respectively, to appear visible in the substance of *any paper, or shall cause the numerical sum or amount of any bank note, bank bill of exchange, or bank post bill, blank bank note, blank bank bill of exchange, or blank bank post bill, in a word or words in Roman letters, to appear visible in the substance of the paper whereon the same shall be written or printed, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three

years,—or to be imprisoned for any term not exceeding two years, with or without hard labor."

But it is provided, by section 15, that "nothing in the last preceding section contained shall prevent any person from issuing any bill of exchange or promissory note having the amount thereof expressed in guineas, or in a numerical figure or figures denoting the amount thereof in pounds sterling appearing visible in the substance of the paper upon which the same shall be written or printed, nor shall prevent any person from making, using, or selling any paper having waving or curved lines, or any other devices in the nature of watermarks visible in the substance of the paper, not being bar lines or laying wire lines, provided the same are not so contrived as to form the groundwork or texture of the paper, or to resemble the waving or curved laying wire lines or bar lines, or the watermarks of the paper used by the governor and company of the banks of England and Ireland respectively."

Engraving or having any plate or paper for making forged bank notes or bills.] By s. 16, "Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall engrave or in anywise make upon any plate whatsoever, or upon any wood, stone, or other material, any promissory note, bill of exchange, or bank post bill, or part of a promissory note, bill of exchange, or bank post bill, purporting to be a bank note, bank bill of exchange, or bank post bill of the governor and company of the bank of England, or of the governor and company of the bank of Ireland, or of any other body corporate, company, or person carrying on the business of bankers, or to be a blank bank note, blank promissory note, blank bank bill of exchange, or blank bank post bill of the governor and company of the bank of England, or of the governor and company of the bank of Ireland, or of any such other body corporate, company, or person as aforesaid, or to be a part of a bank note, promissory note, bank bill of exchange, or bank post bill of the governor and company of the bank of England, or of the governor and company of the bank of Ireland, or of any such other body corporate, company, or person as aforesaid, or any name, word, or character resembling or apparently intended to resemble any subscription to any bill of exchange or promissory note issued by the governor and company of the bank of England, or the governor and company of the bank of Ireland, or by any such other body corporate, company, or person as aforesaid, or shall use any such plate, wood, stone, or other material, or any other instrument or device, for the making or printing any bank note, bank bill of exchange, or bank post bill, or blank bank note, blank bank bill of exchange, or blank bank post bill, or part of a bank note, bank bill of exchange, or bank post bill, or knowingly have in his custody or possession any such plate, wood, stone, or other material, or any such instrument or device; *or shall knowingly offer, utter, dispose of, or put off, [*475] or have in his custody or possession any paper upon which any blank bank note, blank bank bill of exchange, or blank bank post bill of the governor and company of the bank of England, or of the governor and company of the bank of Ireland, or of any such other body corporate, company, or person as aforesaid, or part of a bank note, bank bill of exchange, or bank post bill, or any name, word, or character resembling or apparently intended to resemble any such subscription, shall be made or printed, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Engraving any part of a bank note or bill, or using or having any such plate,

uttering or having any impression thereof.] By section 17, "Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall engrave or in anywise make upon any plate whatsoever, or upon any wood, stone, or other material, any word, number, figure, device, character, or ornament, the impression taken from which shall resemble or apparently be intended to resemble any part of a bank note, bank bill of exchange, or bank post bill of the governor and company of the bank of England, or of the governor and company of the bank of Ireland, or of any other body corporate, company, or person carrying on the business of bankers, or shall use or knowingly have in his custody or possession any such plate, wood, stone, or other material, or any other instrument or device for the impressing or making upon any paper or other material, any word, number, figure, character, or ornament which shall resemble or apparently be intended to resemble any part of a bank note, bank bill of exchange, or bank post bill of the governor and company of the bank of England, or of the governor and company of the bank of Ireland, or of any such other body corporate, company, or person as aforesaid, or shall knowingly offer, utter, dispose of, or put off, or have in his custody or possession, any paper or other material upon which there shall be an impression of any such matter as aforesaid, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Making or having mould for making paper with the name of any banker thereon, or making or having such paper.] By section 18, "Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall make or use any frame, mould, or instrument for the manufacture of paper, with the name or firm of any body corporate, company, or person carrying on the business of bankers (other than and except the banks of England and Ireland respectively), appearing visible in the substance of the paper, or knowingly have in his custody or possession any such frame, mould, or instrument, or make, use, sell, expose to sale, utter, or dispose of, or knowingly have in his custody or possession any paper in the substance of [*476] which the name or firm of any such body corporate, company, *or person shall appear visible, or by any art or contrivance cause the name or firm of any such body corporate, company, or person to appear visible in the substance of the paper upon which the same shall be written or printed, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Engraving plates for foreign bills or notes, or using or having such plates, or uttering or having any impression thereof.] By s. 19, "Whosoever, without lawful authority or excuse (the proof whereof shall lie on the party accused), shall engrave or in anywise make upon any plate whatsoever, or upon any wood, stone, or other material, any bill of exchange, promissory note, undertaking, or order for payment of money, or any part of any bill of exchange, promissory note, undertaking, or order for payment of money, in whatever language the same may be expressed, and whether the same shall or shall not be, or be intended to be under seal, purporting to be the bill, note, undertaking, or order, or part of the bill, note, undertaking, or order of any

foreign prince or state, or of any minister or officer in the service of any foreign prince or state, or of any body corporate, or body of the like nature, constituted or recognized by any foreign prince or state, or of any person or company of persons resident in any country not under the dominion of her majesty, or shall use, or knowingly have in his custody or possession any plate, stone, wood, or other material, upon which any such foreign bill, note, undertaking, or order, or any part thereof, shall be engraved or made, or shall knowingly offer, utter, dispose of, or put off, or have in his custody or possession any paper upon which any part of such foreign bill, note, undertaking, or order shall be made or printed, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Forging deeds, bonds, &c.] By s. 20, "Whosoever, with intent to defraud, shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any deed or any bond or writing obligatory, or any assignment at law or in equity of any such bond or writing obligatory, or shall forge any name, handwriting, or signature purporting to be the name, handwriting, or signature of a witness, attesting the execution of any deed, bond, or writing obligatory, or shall offer, utter, dispose of, or put off any deed, bond, or writing obligatory, having thereon any such forged name, handwriting, or signature, knowing the same to be forged, shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Forging wills] By s. 21, "Whosoever, with intent to defraud, *shall [*477] forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any will, testament, codicil, or testamentary instrument, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, —or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Forging bills of exchange or promissory notes.] By s. 22, "Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any bill of exchange, or any acceptance, indorsement, or assignment of any bill of exchange, or any promissory note for the payment of money, or any indorsement, or assignment of any such promissory note, with intent to defraud, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Forging orders, receipts, &c., for money or goods.] By s. 23, "Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any undertaking, warrant, order, authority, or request for the pay-

ment of money, or for the delivery or transfer of any goods or chattels, or of any note, bill, or other security for the payment of money, or for procuring or giving credit, or any indorsement on or assignment of any such undertaking, warrant, order, authority, or request, or any accountable receipt, acquittance, or receipt for money or for goods, or for any note, bill, or other security for the payment of money, or any indorsement on or assignment of any such accountable receipt, with intent, in any of the cases aforesaid, to defraud, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Drawing, making, accepting, indorsing, or signing bills, notes, receipts, &c., without authority.] By s. 24, "Whosoever, with intent to defraud, shall draw, make, sign, accept, or indorse any bill of exchange or promissory note, or any undertaking, warrant, order, authority, or request for the payment of money, or for the delivery or transfer of goods or chattels, or of any bill, note, or other security for money, by procuration or otherwise, for, in the name, or on the account of any other person, without lawful authority or excuse, or shall offer, utter, dispose of, or put off any such bill, note, undertaking, warrant, order, authority, or request, so drawn, made, signed, accepted, or indorsed by procuration or otherwise, without lawful authority or excuse as aforesaid, knowing the same to have been so drawn, made, signed, accepted, or indorsed as aforesaid, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

[*478] **Obliterating crossings on checks.*] By s. 25, "Whenever any check or draft on any banker shall be crossed with the name of a banker, or with two transverse lines with the words 'and company,' or any abbreviation thereof, whosoever shall obliterate, add to, or alter any such crossing, or shall offer, utter, dispose of, or put off any check or draft whereon any such obliteration, addition, or alteration has been made, knowing the same to have been made with intent, in any of the cases aforesaid, to defraud, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Forging debentures.] By s. 26, "Whosoever shall fraudulently forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or fraudulently altered, any debenture issued under any lawful authority whatsoever, either within her majesty's dominions or elsewhere, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Forging proceedings of courts of record.] By s. 27, "Whosoever shall forge, or fraudulently alter, or shall offer, utter, dispose of, or put off, knowing the same to be

forged or fraudulently altered, any record, writ, return, panel, process, rule, order, warrant, interrogatory, deposition, affidavit, affirmation, recognizance, cognovit actionem, or warrant of attorney, or any original document whatsoever of or belonging to any court of record, or any bill, petition, process, notice, rule, answer, pleading, interrogatory, deposition, affidavit, affirmation, report, order, or decree, or any original document whatsoever of or belonging to any court of equity or court of admiralty in England or Ireland, or any document or writing, or any copy of any document or writing used or intended to be used as evidence in any court in this section mentioned, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Forging copies or certificates of records, process of courts not of record, and using forged process.] By s. 28, "Whosoever, being the clerk of any court, or other officer having the custody of the records of any court, or being the deputy of any such clerk or officer, shall utter any false copy or certificate of any record, knowing the same to be false; and whosoever, other than such clerk, officer, or deputy, shall sign or certify any copy or certificate of any record as such clerk, officer, or deputy; and whosoever shall forge or fraudulently alter, or offer, utter, dispose of, or put off, knowing the same to be forged or fraudulently altered, any copy or certificate of any record, or shall offer, utter, dispose of, or put off any copy or certificate *of [*479] any record having thereon any false or forged name, handwriting, or signature, knowing the same to be false or forged; and whosoever shall forge the seal of any court of record, or shall forge or fraudulently alter any process of any court other than such courts as in the last preceding section mentioned, or shall serve or enforce any forged process of any court whatsoever, knowing the same to be forged, or shall deliver or cause to be delivered to any person any paper falsely purporting to be any such process, or a copy thereof, or to be any judgment, decree, or order of any court of law or equity, or a copy thereof, knowing the same to be false, or shall act or profess to act under any such false process, knowing the same to be false, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

See also 9 & 10 Vict. c. 95, s. 57, which contains a similar provision as to county court process.

Forging instruments made evidence by act of Parliament.] By s. 29, "Whosoever shall forge or fraudulently alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or fraudulently altered, any instrument, whether written or printed, or partly written and partly printed, which is or shall be made evidence by any act passed or to be passed, and for which offence no punishment is herein provided, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Forging court rolls.] By s. 30, "Whosoever shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any court roll or copy of any court roll, relating to any copyhold or customary estate, with intent to defraud shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Forging register of deeds.] By s. 31, "Whosoever shall forge or fraudulently alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or fraudulently altered, any memorial affidavit, affirmation, entry, certificate, indorsement, document, or writing, made or issued under the provisions of any act passed or hereafter to be passed for or relating to the registry of deeds, or shall forge or counterfeit the seal of or belonging to any office for the registry of deeds, or any stamp or impression of any such seal; or shall forge any name, handwriting, or signature, purporting to be the name, handwriting, or signature of any person to any such memorial, affidavit, affirmation, entry, certificate, indorsement, document, or writing which shall be required or directed to be signed by or by virtue of any act passed or to be [*480] passed, or shall offer, utter, dispose *of, or put off any such memorial or other writing as in this section before mentioned, having thereon any such forged stamp or impression of any such seal, or any such forged name, handwriting, or signature, knowing the same to be forged, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Forging orders of justices, recognizances, affidavits, &c.] By s. 32, "Whosoever, with intent to defraud, shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any summons, conviction, order, or warrant of any justice of the peace, or any recognizance purporting to have been entered into before any justice of the peace, or other officer authorized to take the same or any examination, deposition, affidavit, affirmation, or solemn declaration, taken or made before any justice of the peace, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Forging name of officer of any court, or of the bank of England or Ireland.] By s. 33, "Whosoever, with intent to defraud, shall forge or alter any certificate, report, entry, indorsement, declaration of trust, note, direction, authority, instrument, or writing, made, or purporting or appearing to be made by the accountant-general, or any other officer of the Court of Chancery in England or Ireland, or by any judge or officer of the Landed Estates Court in Ireland, or by any officer of any court in England or Ireland, or by any cashier or other officer or clerk of the governor and company of the bank of England or Ireland, or the name, handwriting, or signature of any such accountant-general, judge, cashier, officer, or clerk as aforesaid, or shall offer, utter, dispose of, or put off, any such certificate, report, entry, indorsement, declaration of trust, note, direction, authority, instrument, or writing, knowing the same to be forged or altered, shall be guilty of felony, and being convicted thereof

shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Forging of marriage license or certificate.] By s. 35, "Whosoever shall forge or fraudulently alter any license of or certificate for marriage, or shall offer, utter, dispose of, or put off any such license or certificate, knowing the same to be forged or fraudulently altered, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

**Destroying, altering, or forging parish registers, and giving false certifi-* [*481] *cates.*] By s. 36, "Whosoever shall unlawfully destroy, deface, or injure, or cause or permit to be destroyed, defaced, or injured, any register of births, baptisms, marriages, deaths, or burials, which now is or hereafter shall be by law authorized or required to be kept in England or Ireland, or any part of any such register, or any certified copy of any such register, or any part thereof, or shall forge or fraudulently alter in any such register any entry relating to any birth, baptism, marriage, death, or burial, or any part of any such register, or any certified copy of such register, or of any part thereof, or shall knowingly and unlawfully insert or cause or permit to be inserted in any such register, or in any certified copy thereof, any false entry of any matter relating to any birth, baptism, marriage, death, or burial, or shall knowingly and unlawfully give any false certificate relating to any birth, baptism, marriage, death, or burial, or shall certify any writing to be a copy or extract from any such register, knowing such writing or part of such register whereof such copy or extract shall be so given to be false in any material particular, or shall forge or counterfeit the seal of or belonging to any register office, or burial board, or shall offer, utter, dispose of, or put off any such register, entry, certified copy, certificate, or seal, knowing the same to be false, forged, or altered, or shall offer, utter, dispose of, or put off any copy of any entry in any such register, knowing such entry to be false, forged, or altered, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Making false entries in copies of register sent to registrar.] By s. 37, "Whosoever shall knowingly and wilfully insert, or cause or permit to be inserted, in any copy of any register directed or required by law to be transmitted to any registrar or other officer any false entry of any matter relating to any baptism, marriage, or burial, or shall forge or alter, or shall offer, utter, dispose of, or put off, knowing the same to be forged or altered, any copy of any register so directed or required to be transmitted as aforesaid, or shall knowingly and wilfully sign or verify any copy of any register so directed or required to be transmitted as aforesaid, which copy shall be false in any part thereof, knowing the same to be false, or shall unlawfully destroy, deface, or injure, or shall, for any fraudulent purpose, take from its place of deposit, or conceal, any such copy of any register, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servi-

tude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Demanding property on forged instruments.] By s. 38, "Whosoever, with intent to defraud, shall demand, receive, or obtain, or cause, or procure to be delivered or paid to any person, or endeavor to receive or obtain, or to cause or procure to be delivered or paid to any person, any chattel, money, security for money, or other property whatsoever, under, upon, or by virtue of any forged or altered instrument whatso- [*482] ever, knowing the same to be forged or altered, or *under, upon, or by virtue of any probate or letters of administration, knowing the will, testament, codicil, or testamentary writing on which such probate or letters of administration shall have been obtained to have been forged or altered, or knowing such probate or letters of administration to have been obtained by any false oath, affirmation, or affidavit, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Forging any instrument however designated which is in law a will, deed, bill of exchange, &c.] By s. 39, "Where by this or by any other act any person is or shall hereafter be made liable to punishment for forging or altering, or for offering, uttering, disposing of, or putting off, knowing the same to be forged or altered, any instrument or writing designated in such act by any special name or description, and such instrument or writing, however designated, shall be in law a will, testament, codicil, or a testamentary writing, or a deed, bond, or writing obligatory, or a bill of exchange, or a promissory note for the payment of money, or an indorsement on, or assignment of a bill of exchange or promissory note for the payment of money, or an acceptance of a bill of exchange, or an undertaking, warrant, order, authority, or request for the payment of money, or an indorsement on or assignment of an undertaking, warrant, order, authority, or request for the payment of money, within the true intent and meaning of this act, in every such case the person forging or altering such instrument or writing, or offering, uttering, disposing of, or putting off such instrument or writing, knowing the same to be forged or altered, may be indicted as an offender against this act, and punished accordingly."

Forging documents purporting to be made abroad or bills of exchange, &c., passable abroad.] By s. 40, "Where the forging or altering any writing or matter whatsoever, or the offering, uttering, disposing of, or putting off any writing or matter whatsoever, knowing the same to be forged or altered, is in this act expressed to be an offence, if any person shall, in England or Ireland, forge or alter, or offer, utter, dispose of, or put off, knowing the same to be forged or altered, any such writing or matter, in whatsoever place or country out of England and Ireland, whether under the dominion of her majesty or not, such writing or matter may purport to be made or may have been made, and in whatever language the same or any part thereof may be expressed, every such person, and every person aiding, abetting, or counselling such person, shall be deemed to be an offender within the meaning of this act, and shall be punishable thereby in the same manner as if the writing or matter had purported to be made or had been made in England or Ireland; and if any person shall in England or Ireland forge or alter, or offer, utter, dispose of, or put off, knowing

the same to be forged or altered, any bill of exchange, or any promissory note for the payment of money, or any indorsement on or assignment of any bill of exchange or promissory note for the payment of money, or any acceptance of any bill of exchange, or any undertaking, warrant, order, authority, or *request for the payment [*483] of money, or for the delivery or transfer of any goods or security, or any deed, bond, or writing obligatory for the payment of money (whether such deed, bond, or writing obligatory shall be made only for the payment of money, or for the payment of money together with some other purpose), or any indorsement on or assignment of any such undertaking, warrant, order, authority, request, deed, bond, or writing obligatory, in whatsoever place or country out of England and Ireland, whether under the dominion of her majesty or not, the money payable or secured by such bill, note, undertaking, warrant, order, authority, request, deed, bond, or writing obligatory, may be or may purport to be payable, and in whatever language the same respectively or any part thereof may be expressed, and whether such bill, note, undertaking, warrant, order, authority, or request be or be not under seal, every such person, and every person aiding, abetting, or counselling such person, shall be deemed to be an offender within the meaning of this act, and shall be punishable thereby in the same manner as if the money had been payable or had purported to be payable in England or Ireland."

Offences triable where prisoner apprehended.] By s. 41, "If any person shall commit any offence against this act, or shall commit any offence of forging or altering any matter whatsoever, or of offering, uttering, disposing of, or putting off any matter whatsoever, knowing the same to be forged or altered, whether the offence in any such case shall be indictable at common law or by virtue of any act passed or to be passed, every such offender may be dealt with, indicted, tried, and punished in any county or place in which he shall be apprehended or be in custody, in the same manner in all respects as if his offence had been actually committed in that county or place; and every accessory before or after the fact to any such offence, if the same be a felony, and every person aiding, abetting, or counselling the commission of any such offence, if the same be a misdemeanor, may be dealt with, indicted, tried, and punished, in any county or place in which he shall be apprehended or be in custody, in the same manner in all respects as if his offence and the offence of his principal had been actually committed in such county or place."

Description of instruments in indictments for forgery.] By s. 42, "In any indictment for forging, altering, offering, uttering, disposing of, or putting off any instrument, it shall be sufficient to describe such instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or fac-simile thereof, or otherwise describing the same or the value thereof."

See also 14 & 15 Vict. c. 100, s. 5.

Description of instruments in indictments for engraving, &c.] By s. 43, "In any indictment for engraving or making the whole or any part of any instrument, matter, or thing whatsoever, or for using or having the unlawful custody or possession of any plate or other material upon which the whole or any part of any instrument, matter, or thing whatsoever shall have been engraved or made, or for having the unlawful custody or possession of any paper upon *which the whole or any part of any [*484] instrument, matter, or thing whatsoever shall have been made or printed, it shall be sufficient to describe such instrument, matter, or thing by any name or designation by

which the same may be usually known, without setting out any copy or fac-simile of the whole or any part of such instrument, matter, or thing."

Intent to defraud particular persons need not be alleged or proved.] By s. 44, "It shall be sufficient in any indictment for forging, altering, uttering, offering, disposing of, or putting off any instrument whatsoever, where it shall be necessary to allege any intent to defraud, to allege that the party accused did the act with intent to defraud, without alleging an intent to defraud any particular person; and on the trial of any such offence it shall not be necessary to prove an intent to defraud any particular person, but it shall be sufficient to prove that the party accused did the act charged, with an intent to defraud."

Interpretation of the term "possession."] By s. 45, "Where the having any matter in the custody or possession of any person is in this act expressed to be an offence, if any person shall have any such matter in his personal custody or possession, or shall knowingly and wilfully have any such matter in the actual custody and possession of any other person, or shall knowingly and wilfully have any such matter in any dwelling-house or other building, lodging, apartment, field, or other place, open or inclosed, whether belonging to or occupied by himself or not, and whether such matter shall be so had for his own use or for the use or benefit of another, every such person shall be deemed and taken to have such matter in his custody or possession within the meaning of this act."

Punishment of forgery under statutes not repealed.] By s. 47, "Whosoever shall, after the commencement of this act, be convicted of any offence which shall have been subjected by any act or acts to the same pains and penalties as are imposed by the act passed in the fifth year of the reign of Queen Elizabeth, entitled 'An act against forgers of false deeds and writings,' for any of the offences first enumerated in the said act, shall be guilty of felony, and shall, in lieu of such pains and penalties, be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

And by s. 48, "Where, by any act now in force, any person falsely making, forging, counterfeiting, erasing, or altering any matter whatsoever, or uttering, publishing, offering, disposing of, putting away, or making use of any matter whatsoever, knowing the same to have been falsely made, forged, counterfeited, erased, or altered, or any person demanding or endeavoring to receive or have anything, or to do or cause to be done any act upon or by virtue of any matter whatsoever, knowing such matter to have been falsely made, forged, counterfeited, erased, or altered, would, according to the provisions contained in any such act, be guilty of felony, and would, before the passing of the act of the first year of King William the Fourth, chapter sixty-six, have been liable to suffer death as a felon; or where, by any act now in [*485] force, any person falsely *personating another, or falsely acknowledging anything in the name of another, or falsely representing any other person than the real party to be such real party, or wilfully making a false entry in any book, account, or document, or in any manner wilfully falsifying any part of any book, account, or document, or wilfully making a transfer of any stock, annuity, or fund, in the name of any person not being the owner thereof, or knowingly taking any false oath, or knowingly making any false affidavit or false affirmation, or demanding or receiving any

money or other thing by virtue of any probate or letters of administration, knowing the will on which such probate shall have been obtained to have been false or forged, or knowing such probate or letters of administration to have been obtained by means of a false oath or false affirmation, would, according to the provisions contained in any such act, be guilty of felony, and would, before the passing of the said act of the first year of King William the Fourth, have been liable to suffer death as a felon; or where, by any act now in force, any person making or using, or knowingly having in his custody or possession any frame, mould, or instrument for the making of paper, with certain words visible in the substance thereof, or any person making such paper, or causing certain words to appear visible in the substance of any paper, would, according to the provisions contained in any such act, be guilty of felony, and would, before the passing of the said act of the first year of King William the Fourth, have been liable to suffer death as a felon; then, and in each of the several cases aforesaid, if any person shall, after the commencement of this act, be convicted of any such felony as is hereinbefore in this section mentioned, or of aiding, abetting, counselling, or procuring the commission thereof, and the same shall not be punishable under any of the other provisions of this act, every such person shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Principals in the second degree and accessories.] By section 49, "In the case of every felony punishable under this act, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by this act punishable; and every accessory after the fact to any felony punishable under this act shall on conviction be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement: and every person who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable under this act shall be liable to be proceeded against, indicted, and punished as a principal offender."

Forging seal, stamp, or signature of public documents.] By 8 & 9 Vict. c. 113, s. 4, "If any person shall forge the seal, stamp, or signature of any such certificate, official or public document, or document or proceeding of any corporation, or joint stock or other company, or of any certified copy of any document, by-law, entry in any register or other book or other proceeding as aforesaid, or shall tender in evidence any such certificate, official or public document, or document or proceeding of any corporation or joint stock or other *company, or any certified copy of any document, [*486] by-law, entry in any register or other book, or of any other proceeding, with a false or counterfeit seal, stamp, or signature thereto, knowing the same to be false or counterfeit, whether such seal, stamp, or signature be those of, or relating to any corporation or company already established, or to any corporation or company to be hereafter established; or if any person shall forge the signature of any such judge as aforesaid to any order, decree, certificate or other judicial or official document, or shall tender in evidence any order, decree, certificate or other judicial or official document, with a false or counterfeit signature of any such judge as aforesaid thereto, knowing the same to be false or counterfeit; or if any person shall print any copy of any private act of, or of the journals of either house of Parliament, which copy shall falsely purport to have been printed by the printers to the crown, or by the printers to either

house of Parliament, or by any or either of them; or if any person shall tender in evidence any such copy, knowing that the same was not printed by the person or persons by whom it so purports to have been printed, every such person shall be guilty of felony, and shall, upon conviction, be liable to transportation for seven years, or to imprisonment for any term not more than three, nor less than one year, with hard labor."

Forging seal, stamp, or signature of documents made evidence by statute.] By the 14 & 15 Vict. c. 99, s. 17, "If any person shall forge the seal, stamp, or signature of any document in this act mentioned or referred to, or shall tender in evidence any such document with a false or counterfeit seal, stamp, or signature thereto, knowing the same to be false or counterfeit, be shall be guilty of felony, and shall upon conviction be liable to transportation for seven years, or to imprisonment for any term not exceeding three years nor less than one year, with hard labor; and whenever any such document shall have been admitted in evidence by virtue of this act, the court or the person who shall have admitted the same may, at the request of any party against whom the same is so admitted in evidence, direct that the same shall be impounded and be kept in the custody of some officer of the court or other proper person for such period and subject to such conditions as to the said court or person shall seem meet; and every person who shall be charged with committing any felony under this act, or under the 8 & 9 Vict. c. 113, may be dealt with, indicted, tried, and, if convicted, sentenced, and his offences may be laid and charged to have been committed in the county, district, or place in which he shall be apprehended, or be in custody; and every accessory before or after the fact to any such offence may be dealt with, indicted, tried, and, if convicted, sentenced, and his offence laid and charged to have been committed, in any county, district, or place in which the principal offender may be tried."

Forgery in other cases.] There are innumerable provisions scattered through the statute book which relate to the crime of forgery. Many of these relate to offences which are also provided for by the 24 & 25 Vict. c. 98.

It is always usual, when an act is passed which creates government securities, to provide specially against the offence of forging such securities. If this was necessary before, it is necessary since the 24 & 25 Vict. c. 98, with respect to exchequer bills, [*487] &c., the clause *relating to that class of securities (s. 8) not containing the prospective words of the clause (s. 7) relating to East India securities.

The forgery of stamps is also generally provided for by the acts of Parliament, which authorize their issue. See 52 Geo. 3, c. 143, s. 7; 55 Geo. 3, c. 184, s. 7; 1 Geo. 4, c. 48, s. 13 (paper); 56 Geo. 3, c. 73 (pasteboard); 10 Ann. c. 19, s. 97 (linens); 4 Geo. 3, c. 87 (cambrics); and 7 & 8 Vict. c. 22, s. 2 (gold and silver wares).

As to making or possessing materials for forging stamps, see 3 & 4 Wm. 4, c. 97, ss. 11, 12,

As to the forgery of non-parochial registers, see the 3 & 4 Vict. c. 92, s. 8; 7 & 8 Geo. 4, c. 28, ss. 8 & 9; and the 7 Wm. 4 & 1 Vict. c. 90, s. 5.

As to forgeries relating to the army and navy, see the 11 Geo. 4 & 1 Wm. 4, c. 20, for amending and consolidating the laws relating to the pay of the royal navy. 2 Wm. 4, c. 40, forgeries relating to the civil business of the navy. 5 & 6 Wm. 4, c. 24, s. 3, forgeries relating to service in the navy. See also 57 Geo. 3, c. 127; 10 Geo. 3, c. 26 (U. K.); 23 Geo. 3, c. 50, forging name of paymaster of the forces.

47 Geo. 3, sess. 2, c. 25, s. 8, forging names of persons entitled to pay or pensions. 2 & 3 Wm. 4, c. 106, forging certificates of half-pay. 54 Geo. 3, c. 86, s. 8, altering names in prize lists. 7 Geo. 4, c. 16, false certificate or representation as to Chelsea Hospital: s. 38, false personation of officers and soldiers entitled to pay, forging their names, &c. 2 Wm. 4, c. 83, s. 49, forgeries relating to officers entitled to prize money, or to the officers of Chelsea Hospital. 19 & 20 Vict. c. 15, s. 5, as to both hospitals. 46 Geo. 3, c. 45, s. 9, forging name of treasurer of the ordnance. 54 Geo. 3, c. 151, forging name of agent-general of volunteers. 2 & 3 Vict. c. 51, forging documents relating to pensions granted for service in the army, navy, royal marines, and ordnance. 19 & 20 Vict. c. 41, s. 6, as to forgeries relating to seamen's savings banks.

Forging the name of the receiver or comptroller-general of the customs, is punishable with transportation for life, by 3 & 4 Wm. 4, c. 51, s. 27 (in Ireland the 6 Geo. 4, c. 106). See also 16 & 17 Vict. c. 107, s. 116. Unauthorized persons making paper in imitation of excise paper, and persons forging or counterfeiting plates or types, are guilty of felony, and subject to transportation, by 2 Wm. 4, c. 16 (U. K.), s. 3; and by section 4, persons counterfeiting permits, or uttering forged permits, are likewise guilty of felony, and punishable in the same manner. By the 7 & 8 Geo. 4, c. 53 (U. K.), the forging of the name of the receiver-general or comptroller of excise, is made a capital felony; but the capital punishment is taken away by 1 Wm. 4, c. 76, s. 10. As to forging debentures and certificates, see 52 Geo. 3, c. 143, s. 10. For these two offences in Ireland, see the 23 & 24 Geo. 3, c. 22.

The forgery of contracts for the redemption of the land tax, is provided against by the 52 Geo. 3, c. 143. So the forging of the names of the commissioners of woods and forests, by the 10 Geo. 4, c. 50, s. 124.

Forging the name of the accountant-general of the Court of Chancery, 12 Geo. 1, c. 32; or of the accountant-general of the Court of Exchequer, 1 Geo. 4, c, 35; or of the receiver at the Alienation Office, 52 Geo. 3, c. 143; or of the registrar of the Court of Admiralty, 53 Geo. 3, c. 151, s. 12; or of certificate of former conviction, *7 & 8 Geo, 4, c. 28, s. 11; or the seal of the register office, 6 & 7 Wm. 4, [*488] c. 86, s 43.

Forging declarations of return of insurance, is punishable under the 54 Geo. 3, c. 133, s. 10. Forgeries of documents relating to the suppression of the slave trade, are provided against by the 5 Geo. 4, c. 113, s. 10; forgeries of Mediterranean passes, by the 4 Geo. 2, c. 18, s. 1 (in Ireland, the 27 Geo. 3, c. 27); and forgeries of certificates of quarantine, by the 6 Geo. 4, c. 78 (U. K.), s. 25.

Forgeries relating to the post-office are provided for by the 7 Wm. 4 & 1 Vict. c. 36, ss. 33 & 34, and 3 & 4 Vict. c. 96, ss. 22, 29, 30.

Forgeries relating to stage and hackney carriages, are provided against by the 2 & 3 Wm. 4, c. 120; and the 1 & 2 Vict. c. 79, s. 12.

Forging any declaration, warrant, order, or other instrument, or any affidavit or affirmation required by the commissioners for the reduction of the national debt, &c., is provided against by the 2 & 3 Wm. 4, c. 59, s. 19. Forging any certificate of a receipt given to or by the commissioners for relief to the West India Islands, by the 2 & 3 Wm. 4, c. 125, s. 64; to or by the commissioners for relief to the Island of Dominica, by the 5 & 6 Wm. 4, c. 51, s. 5; forging any receipts for compensation money to slave owners, by the 5 & 6 Wm. 4, c. 45, s. 12.

Avoiding records is made a felony by 8 Hen. 6, c. 12. Forging a memorial or certificate of registry of lands in Yorkshire or Middlesex, imprisonment for life, forfeiture of lands, &c., 2 & 3 Anne, c. 4, s. 19; 5 & 6 Anne, c. 18, s. 8; 7 Anne, c.

20, s. 15; 8 Geo. 2, c. 6, s. 21. Certifying as true any false copy of, or extract from any of the records in the public record office; felony, transportation for life, or not less than seven years, or imprisonment not exceeding four years. 1 Vict. c. 94, ss. 19 & 20. Uttering a false certificate of a previous conviction; felony, transportation, or imprisonment and whipping. 7 & 8 Geo. 4, c. 28, s. 11. Master's report as to seamen's character; 17 & 18 Vict. c. 104, s. 176.

What amounts to forgery.] The act of forgery consists in the making of a false document or writing. It will make no difference whether an entirely new document be constructed, or whether an old one be altered so as to have a different effect. Thus in R. v. Blenkinsop, 1 Den. C. C. 276; S. C. 17 L. J. M. C. 62, an address was put to the name of the drawer of a bill of exchange, while the bill was in course of completion, with the intention of making the acceptance appear to be that of a different person, and it was held to be forgery.

In R. v. Autey, Dear. & B. C. C. 294; S. C. 26 L. J. M. C. 190, the prisoner was convicted upon an indictment for uttering a dividend warrant of a railway company bearing a forged indorsement. The instrument was regularly drawn and signed by the secretary in favor of one J. L., and it was stated upon it that the name of J. L. must be indorsed upon the back, and it was proved that without such indorsement the bankers would not pay the dividend even to J. L. himself. The indorsement was forged, and it was held that the prisoner was rightly convicted, as the making of the indorsement was a forgery. In this case, R. v. Arscott, 6 C. & P. 408: 25 E. C. L. R, in which it was decided that the forgery of an indorsement of a receipt upon an order for the payment of money was not within the 11 Geo. 4 and 1 Wm. 4, [*489] c. 66, s. 3, was much relied on for the prisoner. But that *case seems to be doubted by some of the judges, and at any rate is confined to the section of the act above mentioned. In R. v. Griffiths, Dear. & B. C. 548; S. C 27 L J. M. C. 205, the prisoner was a railway station-master, and it was his duty to pay B. for collecting and delivering parcels for the company, who provided the prisoner with a form in which to enter under different heads the sums so paid by him. The prisoner then paid B. for collecting only, but filled up items of charges for both delivering and collecting, to which he obtained the signature of B.'s servant, apparently acknowledging the receipt of the money. It was held that the prisoner was rightly convicted of forgery. It was once attempted under the former law to convict a man for forgery for indorsing a bill as by procuration of another person without having that person's authority. In R. v. Maddock, 2 Russ. by Grea. 499, the prisoner was clerk to an attorney, and had no authority to indorse bills. He indorsed a bill in the usual form, "*per pro*, for R. F., G. M.," R. F. being his master's name, and by that means received the amount of the bill. The prisoner was found guilty, and the question whether this was a forgery was reserved for the opinion of the judges, but the prisoner dying in the meantime no decision was given. But in R. v. White, 1 Den. C. C. 208, where the same point arose, the judges held that it was no forgery. If a person, having the blank acceptance of another, be authorized to write on it a bill of exchange for a limited amount, and he write on it a bill of exchange for a larger amount, with intent to defraud either the acceptor or any other person, it has been held that it is forgery. R. v. Hart, 7 C. & P. 652: 32 E. C. L. R. So of a blank check. R. v. Bateman, 1 Cox, C. C. 186. And see now 24 & 25 Vict. c. 98, s 24; *supra*, p. 477. It is not necessary that additional credit should have been gained by the forgery, if any person has been thereby intentionally defrauded. R. v.

Taft, 1 Leach, 172; 2 East, P. C. 954; R. v. Taylor, 2 East, P. C. 960; 1 Leach, 214.

What amounts to forgery—by using a person's own name.] It is essential to the crime of forgery that the document should contain a false statement. But this may be done by a person barely signing his own name to a document. Thus, where a bill of exchange, payable to A. B. or order, came to the hands of another A. B., who fraudulently indorsed it, this was held to be forgery. Meed v. Young, 4 T. R. 28. The indorsement of the bill amounted in fact to a statement that the indorser was *that* A. B. to whom the bill was payable. If a person uses his own name, but attaches a false description to it, it will be the same as if he used a fictitious name.(1) See *infra.*

What amounts to forgery—by using another person's or a fictitious name.] Sometimes the only false statement in the document which is charged as a forgery is the use of a name to which the prisoner is not entitled. If the name be that of a known existing person, which is the commonest species of forgery, there is no difficulty. But it was at one time doubted whether, if the name were a fictitious one and of a non-existing person, it was forgery in any case. But that doubt has long been settled.(2) 2 East, P. C. 957; 2 Russ. by Grea. 331; R. v. Lewis, Foster, 116. And the same rule applies to a signature in the name of a fictitious firm. Per Bosanquet, J., R. v. Rogers, 8 C. & P. 629: 34 E. C. L. R. If the name be an *assumed one, [*490] then it will be forgery to draw up a document in that name, if the name were assumed for the express purpose of giving an appearance of genuineness to the document and carrying the fraud into effect. The prisoner was indicted for forging a bill of exchange, dated 3d of April, 1812, in the name of Thomas White, as drawer It appeared that the prisoner came to Newnham on the 21st of March, 1813, where he introduced himself under the name of White, and where he resided under that name until the 22d of May, officiating as curate under that name. On the 17th of April he passed away the bill in question. Dallas, J., told the jury that if they thought the prisoner went to Newnham in the fictitious character of a clergyman, with a false name, for the sole purpose of getting possession of the curacy, and of the profits belonging to it, they should acquit him; but if they were satisfied that he went there intending fraudulently to raise money by bills, in a false name, and that the bill in question was made in prosecution of such intent, they should convict him. The jury convicted him accordingly, and found that the prisoner had formed the scheme of raising money by false bills before he went to Newnham, and that he went there meaning to commit such fraud. The judges, on a case reserved, were of opinion that where proof is given of a prisoner's real name, and no proof of any change of name until the time of fraud committed, it throws it upon the prisoner to show that he had before assumed the name on other occasions, and for different purposes. They were also of opinion that where the prisoner is proved to have assumed a false name, for the purpose of pecuniary fraud connected with the forgery, drawing, accepting, or indorsing in such assumed name, is forgery. R. v. Peacock, 1 Russ. & Ry. 278.(3)

The prisoner, Samuel Whiley, was indicted for forging a bill of exchange, drawn in the name of *Samuel Milward.* On the 27th of December, 1804, the prisoner

(1) The People v. Peacock, 6 Cowen, 72.
(2) Riley's Case, 5 Rogers's Rec. 37; Gotobed's Case, 6 Id. 25; United States v. Turner, 7 Peters, 132; see Commonwealth v. Boynton, 2 Mass. 77.
(3) The State v. Hayden, 15 N. Hamp. 355.

came to the shop of the prosecutor, at Bath, and ordered some goods, for which, a few days afterwards, he said he would give a draft upon his banker in London, and accordingly he gave the bill in question. No such person as Samuel Milward kept an account with the London banker. The prisoner had been baptized and married by the name of *Whiley*, had gone by that name in Bath in the July preceding this transaction, and at Bristol the following October, and at Bath again on the 4th of December. About the 20th of that month he had taken a house in Worcestershire, under the same name; but on the 28th of December, the day after his first application to the prosecutor, he ordered a brass plate to be engraved with the name of "Milward," which was fixed upon the door of his house on the following day. The prosecutor stated that he took the draft on the credit of the prisoner, whom he did not know; that he presumed the prisoner's name was that which he had written, and had no reason to suspect the contrary; and if the prisoner had come to him under the name of Samuel Whiley, he should have given him equal credit for the goods. In his defence, the prisoner stated that he had been christened by the name of *Samuel Milward*, and that he had omitted the name of *Whiley* for fear of arrest. The judge left it to the jury to say whether the prisoner had assumed the name of "Milward" in the purchase of the goods, and given the drafts with intent to defraud the prosecutor. The jury found the prisoner guilty, and the judges, upon a reference to them, were of opinion that the question of fraud being so left to [*491] *the jury, and found by them, the conviction was right. R. v. Whiley, 2 Russ. 335; Russ. & Ry. 90.

The prisoner, John Francis, was indicted for forging an order for payment of money upon the bankers, Messrs. Praed & Co., in favor of Mrs. Ward. On the 15th of August the prisoner had taken lodgings at Mrs. W.'s house, under the name of Cooke, and continued there till the 9th of September, when he gave her the order in question, for money lent him by her. The order, which was signed "James Cooke," being refused by the bankers, he said he had omitted the word "junior," which he added; but the draft was again refused, and the prisoner in the meantime left the house. The case was left by the judge to the jury, with a direction that they should consider whether the prisoner had assumed the name of Cooke with a fraudulent purpose, and they found him guilty. On a case reserved, all the judges who were present held the conviction right, and were of opinion that, if the name were assumed for the purpose of fraud and avoiding detection, it was as much a forgery as if the name were that of any other person, though the case would be different if the party had habitually used, and become known by, another name than his own. R. v. Francis, Russ. & Ry. 209; 2 Russ. by Grea. 339, 340.

So in R. v. Parkes, 2 Leach, 775; S. C., 2 East, P. C. 963, where a person of the name of T. B. dated a note at Roughton, Salop, and made it payable at Messrs. Thornton & Co.'s, bankers, London, and signed it in the name of T. B., and passed off the note as a note of his brother; and it was proved that the prisoner had no brother of the name of T. B., and that there was no person of that name who resided at Roughton, or kept an account with Thornton & Co.; this was held by Grove, J., to be forgery. The case of R. v. Walker, tried before Chambers, J., 6 Ev. Stat. 580, is sometimes quoted as an authority against this; but there the prisoner had been in the habit of drawing bills in the same fictitious name for some time, and they had been regularly paid, so that the learned judge thought very properly that there was no sufficient evidence to go to the jury that the name had been assumed for the express purpose of carrying out the forgery, which is a necessary ingredient in this class of cases. This appears from the following case: The prisoner, Thomas

Bontien, was charged with forging the acceptance of a bill of exchange. It appeared from the evidence of the prosecutrix, that having a house at Tottenham to let, in October, 1811, the prisoner took it, and to pay for the furniture and fixtures, wrote the bill in question, which the prosecutrix signed as drawer, and the prisoner accepted in the name of Thomas Scott. The bill was dated 12th of November, 1810; the prisoner went at the time by the name of Thomas Scott: at various times he had gone by the name of Bontien; but he called a witness, who stated that he first knew the prisoner at the latter end of August, 1810, and knew him continually by the name of Scott; that he had a nickname of *Bont* or *Bontien* at times. He proved that he had transacted business with the prisoner in the name of Scott, in the year 1810; that he never knew him by any other name; and that his only knowledge of his having gone by other names was from the newspapers. The prisoner being convicted, a majority of the judges, upon a case reserved (Mr. Justice Heath appearing of a contrary opinion), thought that it did not sufficiently appear upon the evidence that the prisoner had not gone by the name *of Scott before the time of [*492] accepting the bill, or that he had assumed the name for that purpose, and they thought the conviction wrong. R. v. Bontien, Russ. & Ry. 260.

What amounts to forgery—not necessary that document should be perfect.] It is not necessary that the document which is forged should be perfectly valid for the purpose for which it was intended. Thus, where a man was indicted at common law for forging a surrender of the lands of J. S., and it did not appear in the indictment that J. S. had any lands; upon motion in arrest of judgment it was held good, it not being necessary to show any actual prejudice. R. v. Goate, 1 Ld. Raym. 737. So the making of a false instrument is forgery, though it may be directed by statute that such instruments shall be in a certain form, which, in the instrument in question, may not have been complied with, the statute not making the informal instrument absolutely void, but it being available for some purposes. This question arose upon a prosecution for forging a power of attorney for the receipt of prize-money, which, by the 26 Geo. 3, c. 63, was required to have certain forms. The power had not, in one particular, followed the directions of the act. The prisoner being convicted, a case was reserved for the opinion of the judges, when all (except Graham, B., and Bayley, J.,) were of opinion that the letter of attorney was not a void instrument, but that it might be the subject of a criminal prosecution; that a payment made under it, to the use of the petty officer, would be good as against him, and that the attorney under it might bring an action for the prize-money, or execute a release. Graham, B., and Bayley, J., thought that it was a void instrument; that no person, without a breach of duty, could make the payment of prize-money under it; and consequently that no person could be guilty of a capital crime by forging it. R. v. Lyon, Russ. & Ry. 255. Upon the same principle, a man may be convicted of forging an unstamped instrument, though such instrument can have no operation in law.(1) See *post*, p. 497.

Upon an indictment for vending counterfeit stamps (contrary to the 44 Geo. 3, c.

(1) Pennsylvania v. Misner. Addis. 44; Butler v. The Commonwealth, 12 Serg. & Rawle, 237; The People v. Shull, 9 Cowen, 778; The People v. Fitch, 1 Wend. 198. A written instrument to be the subject of indictment for forgery must be valid, if genuine, for the purpose intended. If void or invalid on its face, and it cannot be made good by averment, the crime of forgery cannot be predicated of it. The People v. Harrison, 8 Barbour, 560; Harrison v. The People, 9 Barbour, Sup. Ct. 664.

It makes no difference that the name forged is not rightly spelled. Case of Grant et al., 3 Rogers's Rec. 142. Nor need the handwriting resemble his whose name is forged. Dobbs's Case, 6 Id. 61.

98), it appeared that the stamps in all respects resembled a genuine stamp, excepting only the centre part, which in a genuine stamp specifies the duty, but for which, in the forged stamp, the words, "Jones, Bristol," were substituted. The fabrication was likely to deceive the eye of a common observer. The judges, on a case reserved, held that the prisoner was rightly convicted of forgery. R. v. Collicott, 2 Lea. C. C. 1048; 4 Taunt. 300; Russ. & Ry. 212.

See, as to county court process, *post*, p. 506.

Proof of forging transfer of stock.] In the following case, which was an indictment founded on the former stat. 33 Geo. 3, c. 30, several points were ruled with regard to indictments for forging a transfer of stock. Three objections were taken on behalf of the prisoner: 1st, that there did not appear in evidence to be any acceptance of the transfer by the party who was alleged to be possessed of the stock, till which time it was said the transfer was incomplete; 2dly, that till the stock was accepted, no transfer at all could be made; 3dly, that the instrument was not witnessed, which, according to the printed forms used by the bank, should have been done. The prisoner having been convicted, the opinion of the judges on the case was delivered by Buller, [*493] J. He observed, that as to the two *first objections, two answers had been given: 1st, that the stock vested by the mere act of transferring it into the name of the party, and that if he had died before he accepted it, it would have gone to his executors as part of his personal estate; 2dly, that the nature of the offence would not have been altered, if the party had not had any stock standing in his name; for the transfer forged by the prisoner was complete on the face of it, and imported that there was such a description of stock capable of being transferred. Neither the forgery nor the fraud would have been less complete, if the party had really had no stock. As to the third objection, the judges all thought that the entry and signatures, as stated in the indictment, were a complete transfer, without the attestation of witnesses, which was no part of the instrument, but only required by the bank for their own protection. R. v. Gade, 2 East, P. C. 874; S. C. 2 Leach, 732.

Proof of personating owner of stock.] The following case was decided upon the former statute, 31 Geo. 3, c. 22: The prisoner was indicted for personating one Isaac Hart, the proprietor of certain stock, and thereby endeavoring to receive from the bank of England the sum of, &c. It appeared that the prisoner, representing himself to be Isaac Hart, received from the dividend payer, at the bank, a dividend warrant for the sum due, on receiving which, instead of carrying it to the pay-office, he walked another way, and made no attempt to receive the money. It was objected for the prisoner, that there was no proof of his having endeavored to receive the money, but being convicted, the judges held the conviction right. They said, that the manner in which he applied for and received the warrant was a personating of the true proprietor, and that he thereby endeavored to receive the money, within the intent and meaning of the act of Parliament. R. v. Parr, 1 Leach, 434; 2 East, P. C. 1005.

Proof of forging a bank-note.] It has been already said, *supra*, p 491, that it is not essential that the forged instrument should, in all respects, be perfect. Where the forgery, says Mr. East, consists in counterfeiting any other known instrument, it is not necessary that the resemblance should be an exact one; if it be so like as to be calculated to deceive, when ordinary and usual observation is given, it seems sufficient. The same rule holds, in cases of counterfeiting the seals, and coining. 2 East,

P. C. 858. Thus where the prisoner was indicted for forging a bank-note, and a person from the bank stated that he should not have been imposed upon by the counterfeit, the difference between it and the true note being to him so apparent; yet, it appearing that others had been deceived, though the counterfeiting was ill executed, Le Blanc, J., held, that this was a forgery. R. v. Hoost, 2 East, P. C. 950. The prisoner was indicted for forging a bank of England note. The instrument, though it much resembled a real bank-note, was not made upon paper bearing the watermark of the bank; the number also was not filled up, and the word "pounds" was omitted after the word "fifty;" but in the margin were the figures 50*l*. It was contended, that on account of these defects, this could not be held a forgery of a bank-note; but the judges held the prisoner rightly convicted; for, first, in forgery, there need not be an exact resemblance—it is sufficient that the instrument is *prima facie* fitted to pass for a true one; secondly, the *majority inclined to think [*494] that the omission of "pounds" in the body of the note, had nothing else appeared, would not have exculpated the prisoner; but it was matter to be left to the jury, whether the note purported to be for 50*l*., or any other sum; but all agreed that the 50*l*. in the margin removed all doubt. R. v. Elliott, 2 East, P. C. 951; 1 Leach, 175; 2 New. Rep. 93 (*n*). See also R. v. McConnell, 1 C. & K. 371; 2 Moo. C. C. 298.

The prisoner was indicted for uttering a forged note of a private bank. It appeared, that he had altered a note of the Bedford Bank, from one to forty pounds, but had cut off the signature of the party who had signed it, so that the words for "Barnard, Barnard and Green," only were left. The prisoner being convicted, the judges were clearly of opinion that the conviction was wrong. R. v. Pateman, Russ. & Ry. 455.

The prisoner was indicted for having in his custody a certain forged paper writing, purporting to be a bank-note, in the following form:

I promise to pay J. W., Esq., or bearer, £10.
London, March 4, 1776.

For Self and Company of
£Ten. *my* Bank of England.
Entered. John Jones.

A special verdict was found, and the question argued before the court was, whether this paper writing purported to be a bank-note. The court were of opinion, that the representation which the prisoner had made that it was a good note, could not alter the purport of it, which is what appears on the face of the instrument itself; for although such false representations might make the party guilty of a fraud or cheat, they could not make him guilty of felony. R. v. Jones, 1 Leach, 204; 2 East, P. C. 883; see 4 Taunt. 303.

The prisoner was indicted for putting off a forged note. The instrument was as follows:

No. 6414. Blackburn Band. 30 Shillings.

I promise to take this as thirty shillings, on demand, in part for a two pound note, value received.

Entered. J. C. Blackburn, Sept. 18, 1821.
No. 6414.
Thirty shillings. For Cuncliffe, Brooks, and Co.
R. Cuncliffe.

The prisoner was convicted; but it being doubted by the judge whether the instrument had any validity, a case was reserved, and the judges held that the judgment ought to be arrested. It has been observed of this instrument, that it was not payable to the bearer on demand; that it was not payable in money; that the maker only

promised to *take it* in payment; and that the requisitions of the statute, 17 Geo. 3, c. 30, were not complied with. R. v. Burke, Russ. & Ry. 496.

Proof of engraving part of a note.] In R. v. Keith, 1 Dears. C. C. R. 486; S. C. 24, L. J. M. C. 110, the prisoner was convicted under this section for engraving upon a plate part of a promissory note of a banking company. Being possessed of a promissory note of the British Linen banking company, he had cut out the centre of the note on which the whole of the promissory note was written, and had procured to [*495] *be engraved upon a plate part of the ornamental border of the note, consisting of the royal arms. The question reserved for the consideration of the Court of Criminal Appeal was, whether this amounted to an engraving upon a plate, "part of a bill of exchange or promissory note, purporting to be part of the bill or note," within the meaning of this section. The court held that it did. Parke, B., in his judgment said, "To see whether an engraving purports to be part of a note you must compare it with the original note. If the forged engraving is clearly intended to imitate any part of a note, whether that part be the obligatory part of the note or not, it is, I think, an offence within the statute. There must be such a portion engraved, that you can say clearly on comparison that it is intended to imitate part or or to purport to be part of a note. If a single dot or line only were engraved, there would not be enough to induce one to say, that the engraving purported to be part of a note. But in the present case the royal arms of Scotland in the position in which they are found, and the Britannia in the margin, appear on comparison without any doubt to purport to be part of the ornaments of a real note."

Proof of forging deeds.] On an indictment against accessories before the fact to the forging of an administration bond, on administration granted for the effects of J. C., it was objected that the 22 & 23 Car. 2, c. 10, requiring the bond to be given by the party to *whom administration was granted*, and not by the party *that was entitled to administration*, the bond could not be treated as a forgery, but was a good bond within the statute, having been given by the party to whom, in fact, administration was granted. The objection was overruled. R. v. Barber, 1 C. & K. 434: 47 E. C. L. R.

The forging of a power of attorney to receive a seaman's wages, was held to be the forgery of a deed within the repealed statute, 2 Geo. 2, c. 25; R. v. Lewis, 2 East, P. C. 957. So a power of attorney for the purpose of receiving prize-money. R. v. Lyon, Russ. & Ry. 255, *ante*, p. 492. In the same manner, a power of attorney to transfer government stock: R. v. Fauntleroy, 1 Moo. C. C. 56; 2 Bingh. 413; and an indenture of apprenticeship. R. v. Jones, 2 East, P. C. 991; 1 Leach, 366. And though the instrument in question may not comply with the directory provisions of a statute, it may still be described as a deed, R. v. Lyon, Russ. & Ry. 255, if it has some apparent validity. See *supra*, p. 492.

Proof of forging wills.] The prisoner was indicted for forging the will of Peter Perry. The will began "I, Peter Perry," and was signed,

his
John × Perry,
mark.

It was objected that this was not a forgery of the will of Peter Perry as laid in the indictment, but the prisoner was convicted, and afterwards executed. R. v. Fitzgerald, 2 East, P. C. 953.

The prisoner was convicted of forging a will of land of one T. S., deceased,

attested by two witnesses only. It did not appear in evidence what estate the supposed testator had in the land demised, or of what nature it was; and it was urged that it must be presumed to have been freehold, and that the will, therefore, was void by the statute of frauds for want of attestation by three witnesses. The *judges held the conviction wrong; for, as it was not shown to be a chattel [*496] interest, it was to be presumed to be freehold, and the will, therefore, void. R. v. Wall, 2 East, P. C. 953.

It was held that, at common law, it made no difference that the party whose will is forged is living. R. v. Coogan, 1 Lea. 449; 2 East, P. C. 948. Nor does it make any difference that the will is made in the name of a non-existing person. R. v. Avery, 8 C. & P. 596: 34 E. C. L. R., per Patteson, J.

A probate, unrevoked, is not conclusive proof of the validity of a will. R. v. Buttery, Russ. & Ry. 342.

Proof of forging bills of exchange.] It has already been said (*ante*, p. 491 and p. 493) that it is not necessary that the instrument should be perfect; it is sufficient if it bear such a resemblance to the document it is intended to represent as is calculated to deceive. The prisoner was indicted for forging, and also for uttering, a forged bill of exchange. He discounted the bill and indorsed the name upon it; but there was no indorsement of the name of the drawers, to whose order it was payable. It was urged for the prisoner, that as there was no indorsement by the payees, nor anything purporting to be such an indorsement, the instrument could not pass as a bill of exchange, and could not, therefore, effect a fraud. The prisoner was convicted, and all the judges who were present on the argument on a case reserved, held the conviction proper. Lawrence, J., at first doubted, but his doubts were removed by the argument that, had it been the true and genuine bill it purported to be, the holder for a valuable consideration from the payees might have compelled the latter to indorse it. Mr. Justice Bayley was not present at the meeting, but thought the conviction wrong; he was of opinion that, for want of an indorsement, the bill was not negotiable, and therefore, if genuine, not of value to the holder of it. R. v. Wicks, Russ. & Ry. 149.

An instrument drawn by A. upon B., requiring him to pay to the order of C. a certain sum at a certain time "without acceptance" is a bill of exchange. Per Patteson, J., R. v. Kinnear, 2 Moo. & R. 117.

So where the prisoner was indicted for forging the acceptance of a bill of exchange for 3*l.* 3*s.*, and it appeared that the requisitions of the statutes 15 Geo. 3, c. 5, and 17 Geo. 2, c. 30, had not been complied with, the bill not specifying the place of abode of the payee, nor being attested by any subscribing witness, the prisoner having been convicted, the judges, on a reference to them, were unanimously of opinion that the instrument, if real, would not have been valid or negotiable, and that therefore the conviction was wrong. R. v. Moffatt, 1 Leach, 438; 2 East, P. C. 954. This case was distinguished, on the conference of the judges, from R. v. Hawkeswood, *post*, p. 497, where the holder of the bill had a right to get it stamped (see R. v. Morton, *post*, p. 497); and the stamp act only says, it shall not be used in evidence till stamped. 2 East, P. C. 954.

A document in the ordinary form of a bill of exchange, but requiring the drawer to pay to his own order, and purporting to be indorsed by the drawer, and accepted by the drawee, cannot, in an indictment for forging and uttering, be treated as a bill of exchange. Per Erskine, J., R. v. Bartlett, 2 Moo. & R. 362. The prisoner was indicted for forging an order for the payment of money upon the treasurer of the

navy. There was no payee named in the order; and upon this ground, and also [*497] upon the ground that the order was *directed to the *treasurer* and not to the *commissioners of the navy* (the latter being the legal paymasters), it was objected that the prisoner was wrongly convicted. Eleven of the judges having met, agreed that the direction to the treasurer instead of the commissioners would not prevent its being considered an order for the payment of money; but the majority of them (Mansfield, C. J., *diss.*) held that it was not an order for the payment of money, because of the want of a payee, and that the conviction was wrong. R. v. Richard, Russ. & Ry. 193. In a case which occurred soon after the preceding, the judges ruled the same way, with regard to a bill of exchange, in which the name of the payee was left blank. R. v. Randall, Russ. & Ry. 195. But it has been holden, on a case reserved, that an instrument in the form of a bill of exchange with an acceptance on it is a bill of exchange, although there be no person named as drawer in the bill. R. v. Hawkes, 2 Moo. C. C. 60.

Upon the same principle, a man may be convicted of forging an unstamped instrument, though such instrument can have no operation in law. The prisoner was indicted for forging a bill of exchange. It was objected for him that the bill was unstamped, and the 23 Geo. 3, c. 58, s. 11, was referred to, which enacts, that no bill of exchange shall be pleaded, or given in evidence in *any* court, or admitted in *any* court to be good or available at law or in equity, unless stamped. This prisoner was convicted, and the judges determined that the conviction was right; for the words of the act cited mean only, that the bill shall not be made use of to recover the debt; and besides, the holder of a bill was authorized to get it stamped after it was made. R. v. Hawkeswood, 1 Leach, 257. Soon after this decision, the point arose again, and on the authority of R. v. Hawkeswood, the prisoner was convicted and executed. R. v. Lee, Id. 258 (*n*). The question, a few years afterwards, again underwent considerable discussion, and was decided the same way, though, in the mean time, the law, with regard to the procuring of bills and notes to be subsequently stamped, upon which, in R. v. Hawkeswood, the judges appear in some degree to have relied, had been repealed. The prisoner was indicted for knowingly uttering a forged promissory note. Being convicted, the case was argued before the judges, and for the prisoner it was urged that the st. 31 Geo. 3, c. 25, s. 19, which prohibits the stamp from being afterwards affixed, distinguished the case from R. v. Hawkeswood. Though two or three of the judges doubted at first the propriety of the latter case, if the matter were *res integra*, yet they all agreed, that being an authority in point, they must be governed by it; and they held, that the stat. 31 Geo. 3 made no difference in the question. Most of them maintained the principle of R. v. Hawkeswood to be well founded, for the acts of Parliament referred to were mere revenue laws, meant to make no alteration in the crime of forgery, but only to provide that the instrument should not be available for recovering upon it in a court of justice, though it might be evidence for a collateral purpose; that it was not necessary, to constitute forgery, that the instrument should be available; that the stamp itself might be forged, and it would be a strange defence to admit, in a court of justice, that because the man had forged the stamp, he ought to be excused for having forged the note itself, which would be setting up one fraud in order to protect him from the punishment due to another. R. v. Morton, 2 East, P. C. 955; 1 Lea. 258 [*498] (*n*). The doctrine was again confirmed in R. v. Teague, *2 East, P. C. 979, when the judges said, that it had been decided that the stamp acts had no relation to the crime of forgery; but that, supposing the instrument forged to be such, on

the face of it, as would be valid provided it had a proper stamp, the offence was complete.

If the prisoner write another person's name across a blank stamp, on which, after he is gone, a third person who is in league with him writes a bill of exchange, it was said that this is not a forgery of the acceptance of a bill of exchange by the prisoner. R. v. Cooke, 8 C. & P. 582. So where the prisoner who was partner in a firm was indicted for forging an acceptance of a bill of exchange, and it appeared that another party, by the direction of the prisoner, had written the name of a customer across a blank stamp, on which the prisoner some time subsequently drew a bill of exchange in the name of the firm, Parke, B., held that this was not a forgery of an acceptance of a bill of exchange within the statute, which does no tmake it forgery merely to counterfeit an acceptance, but an acceptance of a bill of exchange. R. v. Butterwick, MS.; S. C. 2 Moo. & R. 196. But both these would probably be considered forgeries at common law.

In order to bring the case within the statute, the instrument in question, which is laid to be a bill of exchange or promissory note, must purport on the face of it to be legally such. Where the instrument was in the following form: "I promise to pay the bearer one guinea on demand, here in cash, or a Bank of England note," the judges were of opinion, that this was not a note for the payment of money within the repealed stat. 2 Geo. 2, c. 25, the guinea being to be paid in cash or a Bank of England note, at the option of the payer. R. v. Wilcock, 2 Russ. 456. But it is not necessary, in order to constitute a promissory note for the payment of money within the statute, that it should be negotiable. The prisoner was convicted under the 2 Geo. 2, c. 25, of forging a promissory note, in the following form:

"On demand, we promise to pay to Mesdames S. W. and S. D., stewardesses, for the time being, of the Provident Daughters' Society, held at Mr. Pope's, or their successors in office, 64*l.*, value received.

"For C. F. & Co.,
"J. F."

It was moved in arrest of judgment, that this was no promissory note; but the judges were of a different opinion, saying, that it was not necessary that it should be negotiable, and that it was immaterial whether the payees were legally stewardesses, and that their successors could not take the note. R. v. Box, 2 Russ. 460; Russ. & Ry. 300; 6 Taunt. 325.

Even before the 11 Geo. 4 & 1 Wm. 4, c. 66, s. 4, it was held, that the instrument was not the less a bill of exchange if, containing the requisites which constitute a bill of exchange in law, it professed also to be drawn in pursuance of some particular statute, with the requisitions of which it failed to comply. Thus a bill drawn upon commissioners of the navy for pay was held to be a bill of exchange, although it was not such an instrument as was warranted by the 35 Geo. 3, c. 94. R. v. Chisholm, Russ. & Ry. 297.

It has been already stated, that where the instrument alleged *to be a [*499] promissory note, or bill of exchange, is not signed, it cannot be treated as such. R. v. Pateman, Russ. & Ry. 455, *ante*, p. 494. So where the name of the payee is in blank. R. v. Randall, Russ. & Ry. 195. So an instrument for the payment of money under 5*l.*, but unattested. R. v. Moffatt, 1 Leach, 431, *ante*, p. 495.

An instrument drawn by A. upon B., requiring him to pay to the order of C. a certain sum, at a certain time, "without acceptance," is a bill of exchange, and may

be so described in an indictment for forgery. Per Patteson, J., R. v. Kinnear, 2 Moo. & Rob. 117.

The forgery of a bill of exchange does not include that of the acceptance. R. v. Butterwick, Durham Spring Assizes, 1839, per Parke, B.

A document in the ordinary form of a bill of exchange, but requiring the drawer to pay his own order ("please to pay to your order"), and purporting to be indorsed by the drawer, and accepted by the drawer, is not a bill of exchange for the forgery of which an indictment can be sustained. Per Erskine, J., R. v. Bartlett, 2 Moo. & R. 362; and see R. v. Smith, 1 C. & K. 700: 47 E. C. L. R.

The forgery of a single indorsement on the back of a bill of exchange, made payable to the party whose name is forged, together with several others, as executrixes, was held to be within the third section of the late act. R. v. Winterbottom, 1 Cox, C. C. 164; 1 Den. C. C. R. 41.

Proof of forging undertakings, warrants, or orders for the payment of money.] An undertaking to pay a sum which is uncertain and dependent upon a contingency, is within the third section of the statute.

Thus where the undertaking was to pay W. B. 100*l.*, "or such other sum of money, not exceeding the same, as he may incur, or be put into for or by reason or means of his becoming one of the sureties to M. M., Esq., sheriff elect for the county of Y.;" the judges held it to be within the act. R. v. Reed, 8 C. & P. 623: 34 E. C. L. R.

Forging an *indorsement* upon a warrant or order for the payment of money, is not within the above section. R. v. Arscott, 6 C. & P. 408. But if the undertaking, warrant, or order is incomplete without the indorsement, so that until the indorsement be added, the instrument is of no validity in the hands of any person, then a forgery of the indorsement may be charged as a forgery of a warrant or order for the payment of money. R. v. Autey, *supra*, p. 488.

Previously to the 2 & 3 Wm. 4, c. 123, s. 3, in an indictment for forging an order for the payment of money, it must have appeared, either upon the face of the instrument itself, or by proper averments, that the instrument bore the character of an order. The prisoner was charged with forging "a certain order for payment of money" as follows:

"Gentlemen, "London, April 24, 1809.

"Please to pay the bearer, on demand, fifteen pounds, and accompt it to

"Your humble servant,

"Charles H. Ravenscroft.

"Payable at Messrs. Masterman & Co.,

"White Hart Court.

"Wm. McInerheny."

[*500] *The prisoner being convicted, a majority of the judges, on a case reserved, held that this was not an order for the payment of money, but Mansfield, C. J., Wood, B., and Graham, B., held that it was. R. v. Ravenscroft, Russ. & Ry. 161.

A paper in the following form, "Mr. Johnson, Sir, please to pay to James Jackson the sum of 13*l.* by order of Christopher Sadler, Thornton-le-Moor, brewer. I shall see you on Monday. Yours obliged, Chr. Sadler, The District Bank," was held, on a case reserved, to be an order for the payment of money within the 11 Geo. 4 and 1 Wm. 4, c. 66, s. 3; Sadler being proved to be a customer of the District Bank, whose draft, if genuine, would have been paid, although, as at the time of the

forgery, he had no effects in the bank. R. v. Carter, 1 C. & K. 741; S. C. 1 Den. C. C. R. 65. See also R. v. Vivian, 1 C. & K. 719; S. C. 1 Den. C. C. R. 35; where it was held by the judges on consideration, that "any instrument for payment under which, if genuine, the payer may recover the amount against the party signing it, may properly be considered a warrant for the payment of money, and it is equally this, whatever be the state of the account between the parties, and whether the party signing it has, at the time, funds in the hands of the party to whom it is addressed or not."

To constitute an order for the payment of money, within the statute, it is not necessary that the instrument should specify in terms the amount ordered to be paid. Where the order was, "Pay to Mr. H. Y., or order, all my proportions of prize-money due to me for my services on board his majesty's ship Leander," it was objected, that this was not an order for the payment of money, as no sum of money was mentioned, but the prisoner was convicted, and the judges held the conviction right. R. v. McIntosh, 2 East, P. C. 942.

In the construction of the words, "warrant" and "order" for the payment of money, it has been held, that instruments, which in the commercial world have peculiar denominations, are within the meaning of those words, if they be, in law, orders or warrants. 2 East, P. C. 943. Thus a bill of exchange may be described as an order for the payment of money, for every bill of exchange is, in law, an order for the payment of money. R. v. Lockett, 2 East, P. C. 940, 943; 1 Leach, 94; R. v. Sheppard, 2 East, P. C. 944; 1 Leach, 226. So a bill of exchange is a "warrant for the payment of money," and may be described in the indictment as such; for, if genuine, it would be a voucher to the bankers or drawers for the payment. R. v. Willoughby, 2 East, P. C. 944.

A forged paper purporting to be an authority signed by three officers of a benefit club, to receive the money of the club lodged in a bank, was held, on a case reserved, to be well described in some counts as a *warrant*, and in others as an *order* for the payment of money. R. v. Harris, 2 Moo. C. C. 267. A post-dated check is an order for the payment of money. R. v. Taylor, 1 C. & K. 213: 47 E. C. L. R.

If the instrument purport to be an order which the party has a right to make, although in truth he had no such right, and although no such person be in existence as the order purports to be made by, it is still an order within the statute. 2 East, P. C. 940. The prisoner, Charles Lockett, was convicted of uttering a forged order for the payment of money, as follows: "Messrs. Neale and Co., Pay to Wm. Hopwood, or bearer, 16*l.* 10*s.* 6*d.* R. Vennist." The prisoner *had given this order [*501] in payment for goods. No such person as Vennist kept cash with Neale & Co.; nor did it appear that there was any such person in existence. The judges, on considering the case, held it to be a forgery. They thought it immaterial whether such a man as Vennist existed or not; or if he did, whether he kept cash with Neale & Co. It was sufficient that the order assumed those facts, and imported a right on the part of the drawer to direct such a transfer of his property. R. v. Lockett, 2 East, P. C. 940; 1 Leach, 94. This appears to have been always the law, though there was some confusion at one time upon the point, which appears to have arisen out of the subtle distinctions formerly taken, and the necessity of showing the nature of the document fully upon the face of the indictment. Thus in R. v. Clinch, 2 East, P. C. 938; S. C. 1 Leach, 540, which is sometimes quoted to the contrary, the discussion, as is pointed out by Jervis, C. J., in R. v. Snelling, *infra*, turned entirely on the form of the indictment, which on its face showed that the person whose name was forged had no authority.

In R. v. Dawson, 2 Den. C. C. R. 75; S. C. 20 L. J. M. C. 102, the document was in the following form: "Mr. Lowe, London. Bought of C. Dawson, English and Foreign fruit merchant, two bushels of apples, 9s. Nov. 9. Sir, I hope you will excuse me sending for such a trifle; but I have received a lawyer's letter this morning, and unless I can make up a certain amount by one o'clock, there will be an action commenced against me, and I am obliged to hunt after every shilling. Yours, &c., F. Dawson." It was proved at the trial that Lowe was indebted to F. Dawson, who carried on business in the name of C. Dawson, in the sum of nine shillings for two bushels of apples; that the document was forged and uttered to Lowe as a genuine instrument coming from F. Dawson, with the intention of fraudulently obtaining from Lowe the above sum. The document was held to be a warrant. In that case, Jervis, C. J., stated the test to be, whether "if this had been a genuine document, and payment had been made on its production, proof of those facts would have been a good defence to an action." See, however, R. v. Thorn, 2 Moo. C. C. 210. There was no doubt that this would have been a *request* for the delivery of money, but it was said not to be a *warrant* or *order;* and the word *request* does not occur in the 11 Geo. 4 & 1 Wm. 4, c. 66, s. 3. But this distinction no longer exists. See 24 & 25 Vict. c. 98, s. 22, *supra*, p. 476.

A letter of credit, on which the correspondents of the writer of it, having funds of his in their possession, apply them to the use of the party in whose favor it is given, was held by the judges to be a warrant for the payment of money within the 11 Geo. 4 & 1 Wm. 4, c. 66, s. 3. R. v. Raake, 8 C. & P. 626: 34 E. C. L. R.; 2 Moo. C. C. 66. A forged paper was in the following form: "To M. & Co. Pay to my order, two months after date, to Mr. I. S. the sum of 80*l.*, and deduct the same out of my account." It was not signed; but across it was written, "Accepted, Luke Lade;" and at the back the name and address of I. S. M. & Co. were bankers, and Luke Lade kept cash with them. It was held, on a case reserved, that this paper was a warrant for the payment of money; as, if genuine, it would have been a warrant from Luke Lade to the bankers to pay the money to I. S. R. v. Smith, 1 C. & K. 700: 47 E. C. L. R.; S. C. 1 Den. C. C. R. 79.

[*502] *An instrument containing an order to pay the prisoner or order a sum of money, being a month's advance on an intended voyage, as per agreement with the master, in the margin of which the prisoner had written an undertaking to sail in a certain number of hours, is an order for the payment of money within the 1 Wm. 4, c. 66, s. 3. R. v. Bamfield, 1 Moo. C. C. 416.

The prisoner was charged with forging "a certain warrant *and* order for the payment of money." The instrument in question was a forged check upon a banker. It was objected that this charged an offence with regard to two instruments; but Bosanquet, J., was of opinion that the indictment was sufficient. He thought the instrument was both a warrant and an order; a warrant authorizing the banker to pay, and an order upon him to do so. R. v. Crowther, 5 C. & P. 316: 24 E. C. L. R.; and R. v. Taylor, 1 C. & K. 213: 47 E. C. L. R. So a post-office money order is within this section. R. v. Gilchrist, Carr. & M. 224: 41 E. C. L. R. So also a sailor's shipping note. R. v. Anderson, 2 M. & Rob. 469.

An indictment describing the forged order as being for the payment of 85*l.* is good, although it appears that by the course of business, the bank where it is payable would pay that sum with interest. R. v. Atkinson, Carr. & M. 325.

Nor will the order be less the subject of forgery on account of its not being available, by reason of some collateral objection not appearing on the face of it. 2 Russ. by Grea. 352. The prisoner was convicted of forging an order for the payment of

money, and it appeared that the party whose name was forged was a discharged seaman, who was at the time the order was dated within seven miles of the place where his wages were payable; under which circumstance his genuine order would not have been valid, by virtue of the statute 32 Geo. 3, c. 34, s. 2. The judges, however, held the conviction proper, the order itself on the face of it purporting to be made at another place beyond the limited distance. R. v. McIntosh, 2 East, P. C. 942; 2 Leach, 883; 2 Russ. by Grea. 352.

In R. v. Snelling, 1 Dears. C. C. R. 219; S. C. 23 L. J. M. C. 8, the forged document was in the following form: "Holton, Mar. 31, 1853,—Sirs, please to pay the bearer, Mrs. J., the sum of 854*l.* 10*s.* for me, J. R." It was held that, although not addressed to any one, it might be shown by parol evidence, for whom the document was intended, and this appearing to be the banker with whom J. R. kept an account, the document was an order for the payment of money.

So it is no defence to an indictment for forging and uttering an order of a board of guardians for the payment of money, to show that the person who signed the order as presiding chairman was not in fact chairman on the day he signed, the forgery charged being of another name in the order. R. v. Pike, 2 Moo. C. C. 70.

But an indictment for forging an order for relief to a discharged prisoner, under the 5 Geo. 4, c. 85, which was in many respects ungrammatical and at variance with the act, was held bad. R. v. Donelly, 1 Moo. C. C. 438.

A scrip certificate of a railway company is not an undertaking for the payment of money. R. v. West, 1 Den. C. C. R. 258.(1)

An undertaking by a supposed party to the instrument for the payment of money by a *third* person is within the section. Therefore, *where the supposed [*503] maker of a forged instrument undertook, in consideration of goods to be sold to R. P., to guarantee to the vendor the due payment of such goods; this was held to be the forgery of an undertaking for the payment of money. R. v. Stone, 1 Den. C. C. R. 181.

Proof of forging receipts.] In R. v. West, 1 Den. C. C. R. 258, the majority of the judges held, that an instrument professing to be a scrip certificate of a railway company was not a receipt nor an undertaking for the payment of money within the statute: "That it was not a receipt in ordinary parlance, nor made with the intent of being such, though it might be used as evidence of a payment of the deposit; but that any paper capable of being so used was not a receipt; as, for instance, a letter written by a landlord to a third person, saying that his tenant had duly paid his rent; that it was only an undertaking to deliver shares bearing interest, not that the interest should be paid; as an undertaking to deliver a bond for the payment of money with interest would be no undertaking for the payment of money." See also Clarke v. Newsam, 1 Exch. R. 131; S. C. 16 L. J. Ex. 296.

It was the practice of the treasurer of a county, when an order had been made on him for the payment of expenses of a prosecution, to pay the whole amount to the attorney for the prosecution, or his clerk, and to require the signature of every person named in the order to be written on the back of it, and opposite to each name the sum ordered to be paid to each person respectively. Erle, J., held, that such a signature was not a receipt within this section, but merely an authority to the treasurer to pay the amount. R. v. Cooper, 2 C. & K. 586: 61 E. C. L. R.

(1) The fraudulent counterfeiting of a railroad ticket is forgery by the common law. The Commonwealth v. Ray, 3 Gray, 441.

A turnpike ticket marked with a figure denoting the toll, and which is used as a voucher for having passed a certain gate and paid the toll, is a receipt for money within the 24 & 25 Vict. c. 98, s. 23. Reg. v. Fitch, 10 W. R. 489.

Since the passing of the 2 & 3 Wm. 4, c. 123, s. 3, the document need not be shown to be a receipt upon the face of the indictment, if by the evidence it appears to have been such. Though no reasons were given, this was doubtless the ground of the decision in R. v. Martin, 7 C. & P. 549: 32 E. C. L. R., in which it was held by the judges that an indictment for uttering the acquittance, which set out the bill of parcels with the word "settled," and the supposed signature at the foot of it, without any averment that the word "settled" imported a receipt or acquittance, was sufficient. A servant employed to pay bills received from her mistress a bill of a tradesman, called Sadler, together with money to pay that and other bills. She brought the bill again to her mistress, with the words, "Paid, sadler," upon it; Sadler being written with a small s, and there being no initial of the christian name of the tradesman. Lord Denman, C. J., left it to the jury to say whether, under the circumstances, the document was intended by the servant as a receipt or acquittance for the money under the circumstances, and not merely as a memorandum of her having paid the bill. R. v. Houseman, 8 C. & P. 180: 34 E. C. L. R. So where the prisoner was charged with forging and uttering a receipt, and the proof was that he had altered a figure in the following voucher, "11*l.* 5*s.* 10*d.*, for the high constable, T. H.;" and it was objected, on the authority of R. v. Barton, 1 Moo. C. C. 141, that the indictment was bad for not containing an averment what T. H. meant; Alderson, B., held it sufficient, and that the word "acquittance or receipt" was not necessary to constitute the instrument such, if it contained other words which suffi-
[*504] ciently demonstrated that it *was a receipt. R. v. Boardman, 2 Lew. C. C. 181; 2 Moo. & R. 147.

A scrip receipt, with the blank for the name of the subscriber not filled up, and therefore not purporting to be a receipt of the sum therein mentioned from any person, is not a "receipt for money." Grose, J., in delivering the opinion of the judges in this case, observed, that the instrument, the tenor of which was necessarily set forth in the indictment, was not a receipt for money in contemplation of law, within the stat. 2 Geo. 2, c. 25. That it was the duty of the cashier, appointed by the bank, to receive such subscriptions; to fill up the receipt with the names of the subscribers; and until the blank was filled up, the instrument did not become an acknowledgment of payment, or, in other words, a *receipt for money;* while, in such a state, it was no more a receipt than if the sum professed to be received were omitted. That in R. v. Harrison, 2 East, P. C. 926, the book in which the entry was made imported to be a book containing receipts for money received by the bank from their customers, and showed that the money was received from the person to whom the book belonged. R. v. Lyon, 2 East, P. C. 933; 2 Leach, 597.

The document must be such that, if genuine, it would amount to a receipt. Thus the prisoner was indicted for forging a receipt and acquittance as follows:

"William Chinnery, Esq. paid to X. *tomson* the som of 8 pounds. feb. 13, 1812."

It was not subscribed, but was uttered by the prisoner as a genuine receipt, and taken as such by Mr. Chinnery's housekeeper. The prisoner being convicted, the judges held the conviction wrong, being of opinion that this could not be considered as a

receipt. It was an assertion that Chinnery had paid the money, but did not import an acknowledgment thereof. R. v. Harvey, Russ. & Ry. 227.

On an indictment for uttering a forged receipt for the sum of 10*l.*, it appeared that the prisoner pretended that he was authorized by James Ruse to settle the debt and costs in an action brought by Ruse against Pritchard, and thereby obtained from Pritchard the sum of 10*l.*, for which he produced the following receipt, which was stamped with a 2*s.* 6*d.* stamp:

Received of Mr. William Pritchard by the hands of Mr. Wm. Griffiths the sum of 10*l.*, being in full for debt and costs due to the said Jas. Ruse, having no further claim against the said Wm. Pritchard. As witness my hand, this 15th day of October, 1842.

"The mark of × James Ruse."

And it was clearly proved that Ruse had not signed the receipt or authorized it to be signed, or empowered the prisoner to settle the debt and costs. It was objected that the receipt was not properly stamped; that the instrument was not a receipt, but an agreement; and that the statute only applied to cases where a debt was actually due. But Wightman, J., overruled the objection, and the prisoner was convicted. R. v. Griffith, 2 Russ. by Grea. 997, *Addenda.*

But the document need not be signed. In R. v. Juda, 2 C. & K. 635: 61 E. C. L. R., an unsigned forged paper, "Received from Mr. Bendon, due to *Mr. [*505] Warman, 17*s.*—Settled," was held to be a forged receipt within this section.

Forgery of particular instruments—warrants, orders, and requests for the delivery of goods.] The law as to forging undertakings, warrants, and orders for the payment of money, serves to illustrate this class of forgeries also. The same particularity was formerly required in stating the offence upon the indictment, and the same statutory alteration of the law in this respect has occurred with the same consequences. See p. 513. The prisoner was indicted for uttering a forged request for the delivery of goods, in the words and figures following:

"Gentlemen,

"Be so good as to let bearer have 5½ yards of blue to pattern, &c., and you will oblige

"W. Reading, Mortimer St."

The request was not addressed to any one. The prisoner being convicted, the recorder respited the judgment, to take the opinion of the judges on the question whether, as the request was not addressed to any individual person by name or description, it was a request for the delivery of goods within the words and true intent of the statute. All the judges who were present at the meeting held the conviction right. R. v. Carney, 1 Moo. C. C. 351. This is contrary to some of the previous cases. See R. v. Cullen, Id. 300. No difficulty would arise now in such a case, as the person to whom the request was made might be shown by the evidence under the provisions of the 14 & 15 Vict. c. 100, s. 5, or the 24 & 25 Vict. c. 98, s. 42, *supra*, p. 483. R. v. Pulbrook, 9 C. & P. 37: 38 E. C. L. R., where the judges held that an instrument merely specifying the goods, may be shown to be a request by the custom of the trade. See also R. v. Rogers, 9 C. & P. 41; R. v. Walters, Carr. & M. 588: 41 E. C. L. R.; and R. v. Snelling, *ante*, p. 502.

An instrument may be a request, although it be also an undertaking to pay for the goods. R. v. White, 9 C. & P. 282: 38 E. C. L. R.

In the following case a forged request was held to be within the act, although the party whose name was forged had not any authority over or interest in the goods, neither did the request profess to charge such party, the goods being supplied on the credit of the prisoner. The latter represented to the prosecutor that M. C. was dead, and had left him 50*l.* or 60*l.*, and it was in the hands of A. D., and that he wanted mourning. The prosecutor refused to let the prisoner have the goods, but said he should have them if he would get an order for them from A. D. In about half an hour the prisoner returned with a forged paper, purporting to be signed by A. D., containing (*inter alia*) as follows: "Please to let W. T. have such things as he wants for the purpose. Sir, I have got the *mount* of 27*l.* for M. C. in my keeping these many years." The prisoner being convicted, it was held by the judges that the conviction was right. R. v. Thomas, 7 C. & P. 851: 32 E. C. L. R.; 2 Moo. C. C. 16.

So a forged paper, purporting to be addressed to a tradesman by one of his customers, in the following form: "Pleas to let bearer, William Gof, have spillshoul and grafting tool for me," was held by Gurney, B., to be a forged request for the de-
[*506] livery of goods within *the statute. R. v. James, 8 C. & P. 292; see also R. v. White, 9 C. & P. 282: 38 E. C. L. R.

A tasting order to taste wine in the London docks has been held to be an order for the delivery of goods within this section. R. v. Illidge, 1 Den. C. C. R. 404; S. C. 18 L. J. M. C. 179.

In a forged order for the delivery of goods, it does not appear to be necessary that the particular goods should be specified in the order, provided it be in terms intelligible to the parties themselves to whom the order is addressed. 2 East, P. C. 941. The prisoner was indicted for forging an order for the delivery of goods, as follows: "Sir: Please to deliver my work to the bearer. Lydia Bell." Mrs. Bell, a silversmith, proved that she had sent several articles of plate to Goldsmith's Hall, to be marked. The form of the order is such as is usually sent on such occasions, except that in strictness, and by the rule of the plate-office, the several sorts of work, with the weight of the silver, ought to have been mentioned in it. The prisoner being convicted, the judges were of opinion that the conviction was right. R. v. Jones, 2 East, P. C. 941; 1 Leach, 53; and see R. v. Thomas, *supra*.

Proof of destroying, defacing, or injuring registers.] The prisoner was employed in getting up a pedigree for the purpose of evidence in a civil action, and for that purpose searched the registers of births, &c., in the parish of C. On one occasion, whilst the curate of the parish, who was with him, was looking into an iron chest for another book, and had his back turned, the prisoner tore off the lower portion of one of the leaves of one of the registers. The part torn off was not destroyed, and the book was subsequently repaired, and was then as legible as before. The jury found that the prisoner tore the book wilfully, and he was convicted, and the Court of Criminal Appeal confirmed the conviction. R. v. Bowen, 1 Den. C. C. 22.

Proof of forging county court process.] In R. v. Evans, Dears. & B. C. C. 236; S. C. 26 L. J. M. C. 92, the prisoner, being a creditor of R., sent him a letter, not in any way resembling county court process, but headed with the royal arms, and purporting to be signed by the clerk of the county court, threatening county court proceedings. He afterwards told the wife of R. that he had ordered the county court to send the letter, upon which she paid the debt; he also made a claim for county

court expenses, which was not paid. Held, that the prisoner was rightly convicted on an indictment charging him with forging county court process. In R. v. Castle, Dears. & B. C. C. 363, the prisoner delivered to one T. C. a paper, headed, "In the county court of L., A., plaintiff, and T. C., defendant." It was addressed to "T. C.," the above defendant, and gave him notice to produce, "on the trial of this cause," on a given day, certain accounts and papers; and at the foot of the paper were the words, "By the plaintiff." It was held, that a conviction under the above section was wrong, inasmuch as the paper did not purport to be a copy of summons to witnesses under s. 85 of the 9 & 10 Vict. c. 95, or of any other process of the county court, or to be anything more than a mere notice to produce. In R. v. Richmond, 1 Bell, C. C. 142; S. C. 28 L. J. M. C. 188, the prisoner had obtained a blank printed form for plaintiff's instructions to issue county court summons, which he filled up with particulars of the names and *addresses of himself as plaintiff, and B. as [*507] defendant, and of the nature and amount of the claim. He then, without any authority, signed it with the name of the registrar, and indorsed upon it a notice in the name of that officer, that, unless the amount claimed were paid by a certain day, an execution warrant would issue against him. This paper he delivered to B., with intent thereby to obtain payment of the debt. It was held, that this was a forgery of county court process within the 9 & 10 Vict. c. 95, s. 57.

Proof of the uttering, disposing of, or put off.] It is an offence at common law to utter a forged instrument, the forgery of which is an offence at common law. Where, therefore, the prisoner was indicted for uttering a forged testimonial to his character as a schoolmaster, and the jury found him guilty of uttering the forged document with intent to obtain the emoluments of the place as schoolmaster, and to deceive, it was held that the prisoner was properly convicted. R. v. Sharman, Dears, C. C. 285; S. C. 23 L. J. M. C. 51; overruling R. v. Boult, 2 C. & K. 604: 61 E. C. L. R.

The terms generally used to describe the offence in the various statutes relating to forgery are, "offer, utter, dispose of, or put off."

The proof is very similar to that of uttering, &c., counterfeit coin, as to which, see *supra*, p. 373.

Where the prisoner presented a bill for payment with a forged indorsement on it of a receipt by the payee, and on the person to whom it was presented objecting to a variance between the spelling of the payee's name in the bill and in the indorsement, the prisoner altered the indorsement into a receipt *by himself* for the drawer, it was ruled that the presenting the bill before the objection was a sufficient uttering of the forged indorsement. R. v. Arscott, 6 C. & P. 408: 25 E. C. L. R.

Where upon an indictment for uttering a forged acceptance to a bill of exchange it appeared that the bill in question came inclosed in a letter in the prisoner's handwriting, and that the day before the bill became due the prisoner wrote a letter acknowledging that it was a forgery, it was held not to be necessary to prove either that the prisoner put the letter into the post himself or commissioned anybody else to do so. R. v. McQuin, 1 Cox, C. C. 34.

It seems that handing forged instruments from one person to another is not "uttering," in the criminal sense of that word, if the person to whom the instruments are handed knows that they are forged. Thus, where an engraving of a forged note was given to a party as a pattern or specimen of skill, but with no intention that that particular note should be put in circulation, Littledale, J., held that this was not an uttering. R. v. Harris, 7 C. & P. 428: 32 E. C. L. R. And in R. v. Heywood, 2

C. & K. 852: 61 E. C. L. R., Alderson, B., held that if A. handed to B., who was a party to the fraud, a forged certificate of a pretended marriage between himself and B., in order that B. might give it to a third person, A. was not guilty of uttering.

But a different decision has been come to on the words, "dispose of or put away," in the repealed statute of 15 Geo. 2, c. 13, s. 11. The prisoners were indicted for disposing and putting away forged bank of England notes. It appeared that the prisoner Palmer, had been in the habit of putting off forged bank notes, and had employed the other prisoner, Hudson, in putting them off. The latter having offered a [*508] forged note in payment, in the evening of the same day Palmer *went with her to the person who had stopped it, and said, "This woman has been here to-day, and offered a two-pound note, which you have stopped, and I must either have the note or the change." It was contended for the prisoners that the evidence was of two distinct and separate offences, and not of a joint offence. The jury having found Palmer guilty of the offence of disposing and putting away the note, a case was reserved for the opinion of the judges, which was delivered by Mr. Justice Grose. He said that a difference of opinion had existed among the judges, some holding that until Hudson uttered the note it was to be considered as virtually in Palmer's possession, and that when she did utter it he was to be considered only as an accessory before the fact, and ought to have been so indicted. But a great majority of the judges were of opinion that the conviction was right. It clearly appeared that Palmer knowingly delivered the forged note into the hands of Hudson, for the fraudulent purpose of uttering it for his own use. He could not have recovered it back by any action at law. It was out of his legal power, and when it was actually uttered by her, the note was *disposed of*, and *put away* by him through her means. As delivering an instrument to another was a step towards uttering it, it seemed most consonant to the intentions of the legislature to hold that the delivery to another for a fraudulent purpose was an offence within the words "disposed of," or "put away." R. v. Palmer, 2 Leach, 978; 1 Bos. & P. N. R. 96; Russ. & Ry. 72.

The same point arose, and was decided the same way, in R. v. Giles, 1 Moo. C. C. 166. The jury in that case found the prisoner had given the note to one Burr, and that he was ignorant of its being forged, and paid it away. The judges to whom the case was referred, thought that Burr knew it was forged; but were of opinion that the giving the note to him, that he might pass it, was a *disposing* of it to him, and that the conviction was right. Had the prisoner been charged with *uttering* instead of *disposing* of the note, it seems that, according to the view of the case taken by the judges, Burr being cognizant of the forgery, the prisoner could not have been convicted on that indictment, as in that case his offence would have been that of accessory before the fact. See R. v. Soares, Russ. & Ry. 25; 2 East, P. C. 974; R. v. Davis, Russ. & Ry. 113, *ante*, p. 373.

It seems that in the case of the forgery of an instrument which has effect only by its passing, the mere showing of such false instrument with intent thereby to gain credit is not an offence within the statutes against forgery. The prisoner was indicted (under the 13 Geo. 3, c. 79) for uttering and publishing a promissory note containing the words, &c. It appeared that, in order to persuade an innkeeper that he was a man of substance, he one day after dinner pulled out a pocket-book, and showed him the note in question, and a 50*l.* note of the same kind. He said he did not like to carry so much property about him, and begged the innkeeper to take charge of them, which he did. On opening the pocket-book some time afterwards, the notes were found to be forged. The prisoner being convicted, the judges held that this did not amount to an uttering. In order to make it such, they seemed to

be of opinion that it should be parted with, or tendered, or offered, or used in some way to get money or credit upon it. R. v. Shukard, Russ. & Ry. 200. "The words 'upon it,' we consider as equivalent to 'by means of it,' otherwise there could hardly *be an uttering of court-rolls and other instruments enumerated in the [*509] statute." Per Campbell, C. J., in delivering the judgment of the court in R. v. Jones, *infra*.

But if A. exhibit a forged receipt to B., a person with whom he is claiming credit for it, this is an uttering within the 11 Geo. 4 & 1 Wm. 4, c. 60, s. 10, although A. refuse to part with the possession of the paper out of his hand. R. v. Radford, 1 C. & K. 707: 47 E. C. L. R.; S. C. 1 Den. C. C. 59. In this latter case, which was reserved for the consideration of the judges, Pollock, C. B., said, "In all these cases reference must be had to the subject. A purse is of no use except it be given. Not so a receipt, or turnpike ticket. A promissory note must be tendered to be taken. Not so a receipt, as the person who has it is to keep it." In R. v. Jones, 2 Den. C. C. R. 475; S. C. 21 L. J. M. C. 166, the prisoner placed a forged receipt for poor-rates in the hands of the prosecutor for inspection, in order that by representing who had paid the rates he might induce the prosecutor to advance money to a third person. This was held to be an uttering within the 11 Geo. 4 & 1 Wm. 4, c. 66, s. 10.

The prisoner was indicted in London under the 44 Geo. 3, c. 98, for uttering forged medicine stamps. Having an order to supply medicines to certain persons at Bath, he delivered them at his house in Middlesex to a porter, to carry them to Aldersgate Street, in London, to the Bath wagon. It was objected that this was not an *uttering* by the prisoner in the city of London, and upon the argument of the case before the judges, there was a difference of opinion upon the subject, although the majority held the offence complete in London. R. v. Collicott, 2 Leach, 1048; Russ. & Ry. 212; 4 Taunt. 300, S. C.

In R. v. Fitchie, Dear. & B. C. C. 175; S. C. 26 L. J. M. C. 90, the prisoner, a pawnbroker, was indicted for uttering a forged accountable receipt for goods. The uttering proved was that the prisoner being called upon to produce the pawn-ticket in a proceeding before the magistrates to recover the goods by the person who pledged them, his attorney, in his presence, produced and handed up the forged ticket as the genuine ticket relating to the goods. The jury found that the prisoner, through his attorney, delivered the ticket to the magistrates as a genuine ticket; and it was held that this was an uttering by the prisoner.

A conditional uttering of a forged instrument is as much a crime as any other uttering. Where a person gave a forged acceptance, knowing it to be so, to the manager of a banking company with which he kept an account, saying that he hoped the bill would satisfy the bank as a security for the debt he owed, and the manager replied that that would depend on the result of inquiries respecting the acceptors, Patteson, J., held it to be a sufficient uttering. R. v. Cook, 8 C. & P. 582: 34 E. C. L. R.

Proof of the intent to defraud.] In general, as has already been said (p. 468), an intent to defraud is an essential ingredient in the offence of forgery. The definition of the crime by Grose, J., on delivering the opinion of the judges, is "the false making of a note or other instrument *with intent to defraud*." R. v. Parkes, 2 Leach, 775; 2 East P. C. 853. So it was defined by Eyre, B., "the false making of an instrument, which purports on the face of it to be good and valid, for the purposes for which it was created, *with a design* to *defraud." R. v. Jones, 1 Leach, [*510] 367; 2 East, P. C. 853. The word *deceive* has been used by Buller, J., instead of the word *defraud*; but it has been observed, that the meaning of this word must

doubtless be included in that of the word defraud. 2 East, P. C. 853. In R. v. Tylney, 1 Den. C. C. R. 321, the judges were divided in opinion whether the prisoner could be convicted of forging a will without proof that the forged instrument was capable of effecting a fraud on some person or other.

But this doubt is settled by R. v. Hodgson, *supra*, p. 468, from which it appears that, except in those statutory forgeries where no intent is mentioned in the statute, an intent to defraud is always necessary to be proved.

If A. put the name of B. on a bill of exchange, as acceptor, without B.'s authority, expecting to be able to meet it when due, or expecting that B. will overlook it, this is a forgery; but if A. either had authority from B., or, from the course of their dealing, *bonâ fide* believed that he had authority from B. to use his name, it is not forgery. Per Coleridge, J., R. v. Forbes, 7 C. & P. 224: 32 E. C. L. R.; R. v. Parish, 8 C. & R. 92: 34 E. C. L. R. And the fact that the party in whose name the bills were drawn had not paid or recognized such bills would be good evidence of the authority, or *bonâ fide* belief of the authority. R. v. Beard, 8 C. & P. 143. The prisoner, a solicitor, being applied to for a loan of money by one R. T., entered into a negotiation with J. E. to advance the money. This J. E. agreed to do, upon the prisoner giving him proper security. Accordingly the prisoner handed him a bond, purporting to be signed by R. T. and E. D. the brother-in-law of R. T., whose execution professed to have been witnessed by the prisoner; and the money was handed over by J. E. to the prisoner, and by him paid to R. T. Both the signatures were written by the prisoner, in his own handwriting, and without any attempt at concealment or imitation. Great intimacy was admitted to have existed between all the parties, and R. T. and E. D. being called, though they denied that the prisoner had any authority to sign the deed in their name, admitted that, if they had been applied to for that purpose, they would themselves have executed it. Channell, B., said that if the jury thought the prisoner intended to defraud J. E. when he delivered to him the bond, they ought to convict the prisoner, which they did. R. v. Trenfield, 1 F. & F. 43. So where a clerk received a blank check signed with directions to fill in a certain amount, and he filled in a larger amount and appropriated the check, it was held to be forgery, although the larger amount was due to him for salary. R. v. Wilson, 1 Den. C. C. 284; S. C. 17 L. J. M. C. 82.

The intent to defraud may be presumed from the general conduct of the defendant; and if the necessary consequence of the prisoner's acts be to defraud some particular person, the jury may convict, notwithstanding that that person states his belief, on oath, that the prisoner did not intend to defraud him. R. v. Sheppard, Russ. & Ry. 169; R. v. Hill, 8 C. & P. 274: 34 E. C. L. R.(1)

The only cases in which on an indictment for forgery or uttering an intent to defraud need not be proved, are where the forgery of an instrument is made by any statute criminal without proof of any intent. There it is not necessary. R. v. Ogden, 6 C. & P. 631: 25 E. C. L. R.

Proof of the intent to defraud—party intended to be defrauded.] Although by [*511] the 24 & 25 Vict. c. 98, s. 44 (*supra*, p. 483), an intent *to defraud a par-

(1) United States v. Moses, 4 Wash. C. C. Rep. 726. If the indictment lay the intent to defraud A., proof of an intent to defraud A. and B. will sustain the indictment. Veazie's Case, 7 Greenl. 131. To constitute the offence of forgery in counterfeiting the notes of a bank, it is not necessary that such bank as the notes purport to have been issued by, should have a legal existence. Where, however, the intent is charged to have been to defraud the bank, purporting to have issued the notes, the bank must be shown to be a real body, capable of being defrauded. People v. Peabody, 25 Wend. 472.

ticular person need not be alleged in the indictment, such an intent must still be shown by the evidence. This was so held on the statute 14 & 15 Vict. c. 100, s. 8, which is in similar terms, in the case of R. v. Hodgson, Dear. & B. C. C. 3; S. C. 25 L. J. M. C. 78 (*supra*, p. 468), where the prisoner was indicted for forging a diploma of the College of Surgeons with intent to induce people to believe that he was a member of the college. No intention to defraud any particular person was proved, and it was held that the prisoner was wrongly convicted. Jervis, C. J., in giving judgment, said, "The statute 14 & 15 Vict. c. 100, with reference to criminal pleading, does only that which it professes to do, alter the form of the pleadings; this case, therefore, may be treated just as if it had occurred before the statute." And see also R. v. Nash, 2 Den. C. C. R. 493; S. C. 21 L. J. M. C. 147. R. v. Mazagora, Russ. & Ry. 291, may be considered as overruled.

Proof of the falsity of the instrument.] It is essential, of course, to prove the falsity of the instrument. This may be done in various ways. If the forgery is of the name of an existing person, it is necessary to disprove that the handwriting is his, and circumstances must be shown from which it may be inferred that the prisoner, in assuming to use the name, acted fraudulently. The person whose name is used need not be called. See the cases collected, *supra*, p. 5. But if there be more than one person who might be meant, it is necessary to show, either directly or by inference, that the prisoner did not use the name of any one of these honestly. Thus, where the bill had been sent to one P., the payee and indorser, an intimate friend of D., the drawer, but it never came to his hands, and it was proved to have been uttered by the prisoner, with the indorsement, "William Pearce," upon it, Davis was not called, and the testimony of Pearce was rejected by Adair, S., recorder; for although it might not be *his* handwriting, yet it might be the handwriting of a *William Pearce*, or as he had not been proved to be the person intended as the payee of the bill, it might be the handwriting of the William Pearce to whom the bill was made payable. The prisoner was accordingly acquitted. R. v. Sponsonby, 1 Leach, 332; 2 East, P. C. 996. It has been observed upon this case, that it may be doubted whether the fact of this William Pearce being an intimate acquaintance and correspondent of the drawer, and no evidence being given of the existence of any other William Pearce, to whom it might be supposed that the bill was made payable, was not sufficient evidence of the identity of the payee. 2 East, P. C. 997. The decision in R. v. Sponsonby may be considered as much shaken by the following authority: The prisoner was indicted for forging a promissory note, purporting to be made by one William Holland, payable to the prisoner or order. It appeared that the prisoner had offered the note in payment to the prosecutor, who at first refused to take it, upon which the prisoner said he need not be afraid, for it was drawn by William Holland, who kept the *Bull's Head*, at Tipton. William Holland was called, and proved that it was not his handwriting. He stated that there was no other publican of his name at Tipton, but there was a gentleman of the name of *William Holland* living there on his means, who, for distinction, was called *Gentleman Holland*. The latter William Holland not being called, it was contended for the prisoner that there was not sufficient evidence of the note having *been forged. The prisoner [*512] being convicted, on a case reserved, the judges held, that as the prisoner had stated that William Holland, of the *Bull's Head*, was the maker (and from being payee of the note he must have known the particulars), it was sufficient for the prosecutor to show that it was not the note of that William Holland, and that it lay upon the pris-

oner to prove, if the case were so, that it was the genuine note of another William Holland. R. v. Hampton, 1 Moo. C. C. 225.(1)

But that the party who is called is the same person as the party whose name is forged, may also be established by the admission of the prisoner himself, as in the following case: The prisoner was charged with forging and uttering a bill of exchange in the name of Andrew Helme, with intent to defraud one Anthony, and also with forging an indorsement in the name of John Sowerby, on a bill purporting to be drawn by the said A. Helme, with the like intent. Some letters, written by the prisoner, after his apprehension, to A. Helme, who was the prisoner's uncle, were produced, from which it clearly appeared that the name of A. Helme was forged. In the same manner the forgery of Sowerby's name appeared, and that he was the son of a person of the same name at Liverpool. A witness proved that the prisoner offered him the bill in question, with the indorsement upon it, informing him that A. Helme was a gentleman of credit at Liverpool, and the indorser a cheesemonger there, who had received the bill in payment for cheeses. Sowerby, the father, was then called, who swore that the indorsement was not his handwriting; that he knew of no other person of the same name at Liverpool; that his son had been a cheesemonger there, but had left that town four months before, and was gone to Jamaica, and that the indorsement was not in his handwriting. It was objected that Helme, the drawer, was not called to prove what Sowerby, the payee, was; but the prisoner was convicted. The judges, on a case reserved, held the conviction right. They said, the objection supposed that there was a genuine drawer, who ought to have been called, but to this there were two answers: 1st, that the drawer's name was forged, which the prisoner himself had acknowledged; and 2dly, that the prisoner himself had ascertained who was intended by the John Sowerby whose indorsement was forged, for he represented him as a cheesemonger at Liverpool, and that he meant young Sowerby appeared from his mentioning his mother; and it appearing not to be young Sowerby's handwriting, the proof of the forgery was complete. R. v. Downes, 2 East, P. C. 997.

If the false assertion on which the charge of forgery is founded be the use of a *fictitious* name, the evidence that will be necessary will depend much on the particularity with which the fictitious person is described. In order to prove that the name "Samuel Knight, Market Place, Birmingham," was fictitious, the prosecutor was called, and stated that he went twice to Birmingham to make inquiries, and inquired at a bank there, and at a place where the overseers usually met; and that he also had made inquiries at Nottingham, without success. The prosecutor was a stranger in both of these towns. It was objected for the prisoner, that this evidence was not sufficient; that in the case of a prosecution at the instance of King's College, in order to prove a certain name fictitious, the twopenny postman and police officer of the district were called. The judges at the Old Bailey (Parke and Parke, JJ., and Bol-
[*513] land, B.) were of opinion, that there *was evidence, though not satisfactory, to go to the jury, not being the usual evidence given on such occasions, but that it was for the jury to say whether it was sufficient. The jury found the prisoner not guilty. R. v. King, 5 C. & P. 123: 24 E. C. L. R. Upon an indictment for uttering a forged check upon James Loyd & Co., bankers, purporting to be drawn by G.

(1) Evidence that the prisoner uttered as genuine what purported on its face to be a bank-note, is competent proof that it was a bank-note, though it is not otherwise shown that such a bank existed. United States v. Foye, 1 Curtis, C. C. 364.

In a prosecution for uttering a forged bank-note of the Bank of Delaware, in Pennsylvania, the existence of such a bank may be proved by parol. Cady v The Commonwealth, 10 Grattan, 776.

Andrews, it was held sufficient *primâ facie* evidence of the drawer's name being fictitious to call a clerk of the bankers, who stated that no person of that name kept an account with or had any right to draw checks on their house. R. v. Backler, 5 C. & P. 119; R. v. Brannan, 6 C. & P. 326: 25 E. C. L. R.

Form of indictment.] A material alteration in the form of indictments for forgery was made by the 14 & 15 Vict. c. 100, s. 8, and is continued by the 24 & 25 Vict. c. 98, s. 44, *supra*, p. 483; but that section makes no alteration in the proof. R. v. Hodgson, *supra*, p. 511.

The nature of the forged instrument must be stated in the indictment; R. v. Wilcox, Russ. & Ry. 50; and the proof must correspond with such statement. But any immaterial variance would be amended, stat 14 & 15 Vict. c. 100, s. 1.(1)

At common law the forged instrument might be described by its *purport*, as a paper writing *purporting* to be the particular instrument in question.(2) 2 East, P. C. 980. And now by the 24 & 25 Vict. c. 98, s. 42, replacing the 14 & 15 Vict. c. 100, s. 4 (*supra*, p. 483), it is sufficient to describe any instrument by any name or designation by which the same may be usually known, or by the purport thereof, without setting out any copy or *fac-simile* thereof. And in the 24 & 25 Vict. c. 98, s. 43 (*supra*, p. 483), there is a similar provision with respect to indictments for engraving, &c. Where in one count the instrument was described as purporting to be a bank note, the court, being of opinion that it did not on the face of it purport to be such, held that the count could not be supported, and that the representation of the prisoner at the time he passed it off as such, could not vary the purport of the instrument itself. R. v. Jones, 2 East, P. C. 883, 981. Where a receipt was signed "C. Ollier," and the indictment stated it as purporting to be signed by *Christopher* Oliver, the court (consisting of Heath and Lawrence, JJ., and Thompson, B.) were inclined to think there was no absolute repugnance in the statement, and they reserved the case for the judges, but no opinion was ever given. R. v. Reeves, 2 Leach, 808, 814; 2 East, P. C. 984 (*n*).

Where a fictitious signature is stated, it should be described as *purporting* to be the signature of the real party. Thus, where the instrument was described as "a certain bill of exchange, requiring certain persons by the name and description of Messrs. Down, &c., to pay to the order of R. Thompson the sum, &c., and signed by *Henry Hutchinson*, for T. G. T. and H. Hutchinson, &c., which bill is as follows," &c., and it appeared in evidence that the signature to the bill, "Henry Hutchinson," was a forgery, it was objected that the indictment averring it to have been *signed* by him (and not merely that it *purported* to be signed by him), which was a substantial allegation, was disproved, and so the judges held, on a reference to them after conviction. R. v. Carter, 2 East, P. C. 985.

A bank post bill must not be described as a *bill of exchange*, but it *is suffi- [*514] ciently described by the designation of a *bank* bill of exchange. R. v. Birkett, Russ. & Ry. 251.

Where an indictment for forgery charged that the prisoner "did forge a certain

(1) An indictment for forgery must set out the tenor of the instrument forged. Gustin's Case, 2 Southard, 744. But if the instrument be lost, or in the hands of defendant, it may show the excuse and set forth the instrument in general terms. People v. Kingsley, 2 Cowen 522. As to proof of forgery without producing the writing, see Commonwealth v. Hutchinson, 1 Mass. 7; Commonwealth v. Snell, 3 Id. 82; 2 Russel, 359, n. 1.

It is not necessary to set forth the marks and ciphers, ornaments or mottoes on bank-notes. People v. Franklin, 3 Johns. 299; Commonwealth v. Searle, 2 Binn. 332.

(2) See Commonwealth v. Parmenter, 5 Pick. 279.

promissory note for the payment of 50*l.*," without stating it to be of any value, Patteson, J., said that the court must take judicial notice of what a promissory note is, and held the description to be sufficient. R. v. James, 7 C. & P. 553: 32 E. C. L. R. With reference to this statute, it was held that an instrument payable to the order of A., and directed "at Messrs. P. & Co., bankers," may be described as a bill of exchange: R. v. Smith, 2 Moo. C. C. 295; that "a deed purporting to be a lease of certain premises," is a sufficient description. R. v. Davies, 2 Moo. C. C. 177. So "a request for the delivery of goods:" R. v. Robson, 2 Moo. C. C. 182; that the instrument may be described as a deed, without assuming that it is one which may be the subject of larceny: R. v. Collins, 2 M. & Rob. 461; that an indictment charging that the prisoner "did forge a writing as a certificate of W. N., with intent to deceive and defraud W. P. and others," was good. R. v. Toshack, 1 Den. C. C. 492.

If an instrument is set out in full in the indictment, the description of its legal character would appear to be surplusage. Thus in R. v. Williams, 2 Den. C. C. R. 61; S. C. 20 L. J. M. C. 106, the prisoner was indicted for forging a certain warrant order and request in the words, &c., following: "Please to send by bearer a quantity of basket nails and clasps for E. Lloyd;" it was proved to be only a request. Pollock, C. B., in delivering the judgment of the court, said, "The case has stood over to enable the court to see a copy of the indictment. The judges find that the instrument was set out in *hæc verba*, and therefore the only ground of doubt being removed, the conviction must be affirmed."

It may be remarked, however, that here the proper description was used, but something was added. In R. v. Hunter, Russ. & Ry. 511, where an instrument was set out in the following form:

"Two months after date, pay Mr. B. H., or order, the sum of 28*l.* 15*s.*, value received. "John Jones.

"At Messrs. Spooner & Co.'s,
"Bankers, London,"

which in the indictment was called a promissory note, the judges held that the variance was fatal, and the conviction wrong. The indictment would now, of course, be amended.

It will be no variance, if it appear that the instrument which is described in the indictment as a forged instrument, was originally a genuine one, but that it has been fraudulently *altered* by the prisoner; for every alteration of a true instrument for a fraudulent purpose makes it, when altered, a forgery of the whole instrument. R. v. Teague, 2 East, P. C. 979. Thus where a prisoner altered a figure of 2 in a bank-note into 5, the judges agreed that it was forging and counterfeiting a bank-note, forgery being the alteration of a deed or writing in a material part to the prejudice of another, as well as when the whole deed or writing is forged. R. v. Dawson, 2 East, P. C. 978. In practice, however, forgeries of this kind are stated, in one count at least, as alterations. 2 East, P. C. 986; 2 Russ. by Grea. 288.

[*515] *The power of amendment given by the 14 & 15 Vict. c. 100, s. 1, renders these decisions of much less importance than formerly.

Proof with regard to principals and accessories.] Although, in general, it is necessary, in order to render a party guilty as principal in an offence, that he should have been present at the commission of the complete act, yet it is otherwise in for-

gery, where a person may incur the guilt of a principal offender by bearing a part only in the committing of the act, and in the absence of the other parties. Thus where the prisoner impressed the watermarks, the date, line, and number, on forged bank notes, and the other requisites were added at different times, and by different parties, not in the presence of the prisoner; on conviction, the judges were of opinion that the conviction was right; that each of the offenders acted in completing some part of the forgery, and in pursuance of the common plan each was a principal in the forgery, and that though the prisoner was not present when the note was completed by the signature he was equally guilty with the others. R. v. Bingley, Russ. & Ry. 446. Nor does it make any distinction in the case, that the prisoner was ignorant of those who were to effect the other parts of the forgery; it is sufficient to know that it is to be effected by somebody. R. v. Kirkwood, 1 Moo. C. C. 304; R. v. Dade, Id. 307.

But where three persons were jointly indicted under the 11 Geo. 4 & 1 Wm. 4, c. 66, s. 19, for feloniously using plates containing impressions of foreign notes, it was held by Littledale, J., that the jury must select some one particular time after all three had become connected, and must be satisfied, in order to convict them, that at such time they were all either present together at one act of using, or assisted in such one act, as by two using and one watching at the door to prevent the others being disturbed, or the like; and that it was not sufficient to show that the parties were general dealers in forged notes, and that at different times they had singly used the plates, and were individually in possession of forged notes taken from them. R. v. Harris, 7 C. & P. 416: 32 E. C. L. R.

Where three prisoners were indicted under the same section for feloniously engraving a promissory note of the Emperor of Russia, and it appeared that the plates were engraved by an Englishman, who was an innocent agent, and two of the prisoners only were present at the time when the order was given for the engraving of the plates; but they said they were employed to get it done by a third person, and there was some evidence to connect the third prisoner with the other two in subsequent parts of the transaction; it was held that in order to find all three guilty, the jury must be satisfied that they jointly employed the engraver, but that it was not necessary that they should all be present when the order was given, as it would be sufficient if one first communicated with the other two, and all three concurred in the employment of the engraver. R. v. Mazeau, 9 C. & P. 676: 38 E. C. L. R.; 2 Russ. by Grea. 370.

With regard to the offence of *uttering* forged instruments, it is necessary, in order to render a party guilty as principal, that he should have been present. R. v. Soare, 2 East, P. C. 974, *ante*, p. 373. Where a wife, with her husband's knowledge, and by his procurement, but in his absence, uttered a forged order and certificate for the payment of prize-money, it was held by the judges, that the presumption of coercion on the part of the husband did not arise; *that she might be indicted as [*516] principal, and her husband as accessory before the fact. R. v. Morris, Russ. & Ry. 270; 2 Leach, 1096. So an assent afterwards does not render the party guilty as a principal. 1 Hale, P. C. 684; 2 East, P. C. 973. But in forgery at common law, which is a misdemeanor, as in other cases of misdemeanor, those who, in felony, would be accessories, are principals. 2 East, P. C. 973.

Proof of guilty knowledge.] Where the prisoner is charged with uttering or putting off a forged instrument, knowing it to be forged, evidence of that guilty knowledge must be given on the part of the prosecution; and for that purpose the

uttering or having possession of similar forgeries will be admissible. Most of the cases upon this subject have been already stated. *Ante*, p. 89.

On an indictment for forging and uttering a forged bill, a letter written by the prisoner after he was in custody, to a third party, saying that such party's name is on another bill, and desiring him not to say that the latter bill is a forgery, is receivable in evidence to show guilty knowledge, but the jury ought not to consider it as evidence that the other bill is forged, unless such bill is produced and the forgery of it proved in the usual way. Per Coleridge, J., R. v. Forbes, 7 C. & P. 224: 32 E. C. L. R. So it was held by Patteson, J., that evidence of what the prisoner said respecting other bills of exchange, which are not produced, is not admissible. R. v. Cooke, 8 C. & P. 586: 34 E. C. L. R. There seems to be some doubt as to what is the mode of proving the other instruments to be forgeries. See R. v. Moore, 1 F. & F. 73. As to the proof of a guilty knowledge generally, see *supra*, p. 89.

Venue.] It was formerly necessary to lay the venue in the county where the forgery was committed; and as it was frequently difficult to procure direct proof of the act of forgery, much inconvenience was occasioned.(1) See 2 Russ. by Grea. 389. But this difficulty has been removed by the 11 Geo. 4 & 1 Wm. 4, c. 66, s. 24, which provided that the prisoner might be tried where he was apprehended. This provision is now replaced by the 24 & 25 Vict. c. 98, s. 41, which is similar in its terms. See *supra*, p. 483.

Under the 11 Geo. 4 & 1 Wm. 4, c. 66, s. 24, Patteson, J., held it to be sufficient to prove that the party was in custody in the county where he was tried, and that the indictment need not contain any averment of his being in custody there. R. v. James, 7 C. & P. 553: 32 E. C. L. R. So in R. v. Smythes, 1 Den. C. C. R. 498; S. C. 19 L. J. M. C. 31, the prisoner was not shown to have been in custody till he surrendered just before the trial. The jury found that he was guilty of forging, but that there was no evidence of its having been done within the jurisdiction of the court; this finding was held to amount to a conviction.

[*517] *FURIOUS DRIVING.

THIS, considering the probable danger to the lives of the public, would seem to be an indictable offence at common law. Williams v. E. I. Company, 3 East, 192; and now by the 24 & 25 Vict. c. 100, s. 35, replacing the 1 Geo. 4, c. 4, "Whosoever having the charge of any carriage or vehicle, shall by wanton or furious driving or racing, or other wilful misconduct, or by wilful neglect, do or cause to be done any bodily harm to any person whatsoever, shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labor."

(1) The fact of forging a note within a county cannot be inferred from its having been uttered therein. Commonwealth v. Parmenter, 5 Pick. 279.

*GAME.

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All offences with regard to game, which are the subject of indictment, are statutable offences, not known to the common law. Such animals being *feræ naturæ*, are not, in their live state, the subjects of larceny. *Vide supra*, p. 454.

The principal provisions with regard to offences relating to game, were formerly contained in the 7 & 8 Geo. 4, c. 29, s. 30; the 9 Geo. 4, c. 69; and the 7 & 8 Vict. c. 29. The 7 & 8 Geo. 4, c. 29, s. 30, is now repealed, and a similar provision is substituted by the 24 & 25 Vict. c. 96, s. 17.

Taking or killing hares or rabbits in the night.] By the 24 & 25 Vict. c. 96, s. 17, "Whosoever shall unlawfully and wilfully, between the expiration of the first hour after sunset and the beginning of the last hour after sunrise, take or kill any hare or rabbit, in any warren or ground lawfully used for the breeding or keeping of hares or coneys, whether the same be inclosed or not, every such offender shall be guilty of a misdemeanor."

Taking or destroying game or rabbits by night.] By the 9 Geo. 4, c. 69, s. 1 (repealing 57 Geo. 3, c. 90), it is enacted, that "if any person shall, after the passing of this act, by night, unlawfully take or destroy any game or rabbits, in any land, whether open or inclosed, or shall, by night, unlawfully enter, or be in any land, whether open or inclosed, with any gun, net, engine, or other instrument for the purpose of taking or destroying game (which word, by s. 13, shall be deemed to include hares, pheasants, partridges, grouse, heath or *moor game, black game, [*519] and bustards), such offender shall, upon conviction thereof before two justices of the peace, be committed for the first offence to the common gaol or house of correction, for any period not exceeding three calendar months, there to be kept to hard labor, and, at the expiration of such period, shall find sureties by recognizance, or in Scotland, by bond of caution, himself in 10*l.*, and two sureties in 5*l.* each, or one surety in 10*l.*, for his not so offending again for the space of one year next following; and in case of not finding such sureties, shall be further imprisoned and kept to hard labor for the space of six calendar months, unless such sureties are sooner found; and in case such person shall so offend a second time, and shall thereof be convicted before two justices of the peace, he shall be committed to the common gaol or house of correction, for any period not exceeding six calendar months, there to be kept to hard labor, and at the expiration of such period shall find sureties by recognizance

or bond as aforesaid, himself in 20*l.*, and two sureties in 10*l.* each, or one surety in 20*l.*, for his not so offending again for the space of two years next following, and in case of not finding such sureties, shall be further imprisoned and kept to hard labor for the space of one year, unless such sureties are sooner found; and in case such person shall so offend a third time, he shall be guilty of a misdemeanor; and being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for seven years, or to be imprisoned and kept to hard labor in the common gaol or house of correction, for any term not exceeding two years." By the 20 & 21 Vict. c. 3, s. 2 (*infra*, App.), three years' penal servitude is substituted for seven years' transportation.

Power to apprehend offenders.] By s. 2, "Where any person shall be found upon any land, committing any such offence as is hereinbefore mentioned, it shall be lawful for the owner or occupier of such land, or for any person having a right of free warren or free chase thereon, or for the lord of the manor or reputed manor, wherein such land may be situate, and also for any gamekeeper or servant of any of the persons hereinbefore mentioned, or any person assisting such gamekeeper or servant, to seize and apprehend such offender upon such land, or in case of pursuit being made in any other place to which he may have escaped therefrom, and to deliver him, as soon as may be, into the custody of a peace officer, in order to his being conveyed before two justices of the peace. And in case such offender shall assault or offer any violence with any gun, crossbow, firearms, bludgeon, stick, club, or any other offensive weapon whatsoever, towards any person hereby authorized to seize and apprehend him, he shall, whether it be his first, second, or any other offence, be guilty of a misdemeanor; and, being convicted thereof, shall be liable, at the discretion of the court, to be transported beyond the seas for seven years, or to be imprisoned and kept to hard labor in the common gaol or house of correction, for any term not exceeding two years; and in Scotland, whenever any person shall so offend, he shall be liable to be punished in like manner." See also 7 & 8 Vict. c. 29, s. 1, *infra*, p. 520. By the 20 & 21 Vict. c. 3, s. 2 (*infra*, App.), three years' penal servitude is substituted for seven years' transportation.

[*520] *Limitation of time for prosecutions*] By s. 4, "The prosecution for *every offence punishable upon indictment, or otherwise than upon summary conviction, by virtue of this act, shall be commenced within twelve calendar months after the commission of such offence."

Proof of previous convictions.] By s. 8, "Every conviction under this act for a second offence, the convicting justices shall return the same to the next quarter sessions for the county, riding, division, city, or place wherein such offence shall have been committed; and the record of such conviction, or any copy thereof, shall be evidence in any prosecution to be instituted against the party thereby convicted for a second or third offence."

Three persons entering land by night armed in pursuit of game.] By s. 9, "If any persons to the number of three or more together, shall, by night, unlawfully enter or be in any land, whether open or inclosed, for the purpose of taking or destroying game or rabbits, any such person being armed with any gun, crossbow, firearms, bludgeon, or any other offensive weapon, each and every such person shall be guilty of a misdemeanor, and being convicted thereof before the justices of gaol de-

livery, or of the court of great sessions of the county or place in which the offence shall be committed, shall be liable, at the discretion of the court, to be transported beyond the seas for any term not exceeding fourteen years, nor less than seven years, or to be imprisoned and kept to hard labor for any term not exceeding three years." By the 20 & 21 Vict. c. 3, s. 2 (*infra*, App.), penal servitude is substituted for transportation.

Definition of night.] By s. 12, "For the purposes of this act the night shall be considered, and is hereby declared to commence at the expiration of the first hour after sunset, and to conclude at the beginning of the last hour before sunrise."

Definition of game.] By s. 13, "For the purposes of this act, the word 'game' shall be deemed to include hares, pheasants, partridges, grouse, heath or moor game, black game, and bustards."

Destroying game or rabbits on a public road.] By the 7 & 8 Vict. c. 29, s. 1, "From and after the passing of this act (the 4th July, 1844), all the pains, punishments, and forfeitures imposed by the 9 Geo. 4, c. 69, upon persons by night unlawfully taking or destroying any game or rabbits, in any land open or inclosed, as therein set forth, shall be applicable to, and imposed upon any person by night, unlawfully taking or destroying any game or rabbits on any public road, highway, or path, or the sides thereof, or at the opening, outlets, or gates from any such land into any such public road, highway, or path, in the like manner as upon any such land, open or inclosed; and it shall be lawful for the owner or occupier of any land adjoining either side of that part of such road, highway, or path where the offender shall be, and the gamekeeper or servant of such owner or occupier, and any person assisting such gamekeeper or servant, and for all persons authorized by the said act (the 9 Geo. 4, c. 69) to apprehend any offender against the provisions thereof, to seize and apprehend any person offending against the said act or this act; and the said act and all the powers, provisions, authorities, and jurisdictions therein or thereby contained or given, shall be applicable for *carrying this act into execution [*521] as if the same has been therein specially set forth."

Proof of the taking or killing.] Under the 5 Geo. 3, c. 14 (24 & 25 Vict. c. 96, s. 17), it was held not to be necessary to give evidence that the defendant was seen in the act of taking or killing the hare, nor to prove such a *taking* as would constitute larceny. Thus, where the defendant had set wires, in one of which a rabbit was caught, and the defendant, as he was about to seize it, was stopped by the keeper, this was held by the judges to be a *taking*,—the word *taking* meaning *catching*, and not taking away. R v. Glover, Russ. & Ry. 269.

Proof of the entering or being in the place specified.] The prosecutor must show that at least three persons entered, or *were* (the words of the statute are, "shall unlawfully enter or be"), by night, in the place specified. It will not, therefore, be necessary to show that they *entered* by night, provided they be in the place within the hours meant by the words "by night" (*ante*, p. 520). The indictment must state that the entry and arming were by night. Where an indictment stated that the defendants on, &c., did by night enter divers closes, and were then and there in the closes armed, &c., the judgment was reversed, on the ground that the indictment did not contain a sufficient averment that the defendants were by night in the closes

armed, &c. Davies v. Reg., 10 B. & C. 89: 21 E. C. L. R.; see also R. v. Kendrick, 7 C. & P. 184: 32 E. C. L R.; R. v. Wilks, Id. 811; Fletcher v. Calthrop. It is not necessary to give direct evidence that the men were on the land without the permission of the occupier or landlord; the jury may infer that they were unlawfully, from their conduct and other circumstances. R. v. Wood, Dears. & B. C. C. 1; S. C. 25 L. J. M. C. 96; see *ante*, p. 5.

Where only one defendant was seen in the place charged in the indictment, the others being in a wood separated therefrom by a highroad, Patteson, J., held the indictment not proved. R. v. Dowsell, 6 C. & P. 398: 25 E. C. L. R.; 1 Russ. by Grea. 476 (*n*). In R. v. Whittaker, 1 Den. C. C. R. 310, however, although five of the judges were of opinion that, to constitute a misdemeanor under this section, the party must enter into and be bodily in the close; and that if three were in the close and three out, the latter were not guilty; and that as the three who, in that case entered, could not be ascertained, all were entitled to be acquitted; yet seven of the judges held, that all the others who were aiding and assisting those who entered the field, were guilty of the same misdemeanor, though they themselves were not in the field, and therefore that the conviction of all the prisoners was good. And see R. v. Scotton, 5 Q. B. 493: 48 E. C. L. R. In R. v. Whittaker a particular close was specified in the indictment, but in the subsequent cases of R. v. Eaton and others, 2 Den. C. C. R. 274; S. C. 20 L. J. M. C. 192, Campbell, C. J., observed, "Some confusion seems to have arisen in this matter from not attending sufficiently to the provisions of the act of Parliament: it has been treated as though the word *close* occurred in the act, whereas it only specifies '*any land, whether open or inclosed;*' a practice has consequently prevailed of naming a certain close in the indictment, which is quite needless;" and Parke, B., adverting to R. v. Hargreave, 1 Russ. by Grea. 476, said, "The reasoning appears to me to be founded on the assumption that the statute provided only for the case of three being together in one and the same [*522] *piece of inclosed land, if the land was inclosed, or one and the same piece of land, if it was open, whereas the statute contains no such provision." In R. v. Eaton and others, therefore, the prisoner was held to have been properly convicted, he being one of a party of three, armed with guns, one of whom was in a close occupied by G. W., in which were pheasants, for the purpose of destroying game there, and all of whom were found to have been in another adjoining close of G. W., in which there were not any pheasants, on their way to the former close,—one of the counts of the indictment charging the prisoners with being in inclosed land occupied by G. W.

Merely sending a dog to drive the game in a field, while the owner stands in the road, is not an entry by the owner: R. v. Nichless, 8 Car. & P. 757: 34 E. C. L. R.; R. v. Pratt, Dears. C. C. 502; S. C. 24 L. J. M. C. 113; but the soil of the road frequently belongs to the owner of the adjoining close; and in that case perhaps the defendants might be convicted, though they never left the road. In R. v. Pratt, where the defendant had been summarily convicted before justices for an offence under the 1 & 2 Wm. 4, c. 32, s. 30, for entering and being upon land in pursuit of game, the conviction was upheld under similar circumstances. See also Pickering v. Rudd, *ante*, p. 330, from which it appears that shooting on to a person's land would be an entry. See also p. 520.

Proof of the situation and occupation of the land where the offence was committed.] Under the 24 & 25 Vict. c. 96, s. 17, it must be proved that the offence was committed in some warren or ground lawfully used for the breeding of hares or rabbits.

That is, in some place which is either a warren or which is similar to warren. R. v. Garratt, 6 C. & P. 369: 25 E. C. L. R.

The indictment must particularize, in some manner, the place in which the offence was committed; for being substantially a local offence, the defendant is entitled to know to what specific place the evidence is to be directed. R. v. Ridley, Russ. & Ry. 515. "A certain cover in the parish of A." is too general a description. R. v. Crick, 5 C. & P. 508: 24 E. C. L. R. But it has been held sufficient by Gurney, B., to charge entering certain lands in the occupation of A. B., without specifying whether it is inclosed or not. R. v. Andrews, 2 Moo. & R. 37.

Where the indictment alleged an entry into a particular close, with intent *then and there* to kill game, it was held, that the intent was confined to the killing of game in that particular place. R. v. Barham, 1 Moo. C. C. 151; R. v. Capewell, 5 C. & P. 549; R. v. Gainer, 7 C. & P. 231: 32 E. C. L. R. Where it appeared that the prisoners were in Shutt Leasowe, a place named in the indictment, and which adjoined Short Wood, and were apparently going to the wood, Patteson, J., said, "The intent was evidently to kill game in the wood, into which none of the parties ever got for that purpose. It is true that they were charged with being in Shutt Leasowe, but they had no intention of killing game there. They must be acquitted." R. v. Davis, 8 C. & P. 759: 34 E. C. L. R.

Proof that the prosecution was commenced within the time limited.] On the trial of an indictment under the 9th section of the 9 Geo. 4, c. 69, for night poaching, it appeared that the offence was committed on the 12th January, 1844, the indictment was preferred *on the 1st March, 1845, the warrant of commitment was [*523] dated on the 11th December, 1844. It was held, that it was sufficiently shown that the prosecution was commenced "within twelve calendar months after the commission" of the offence within the 4th section. R. v. Austin, 1 C. & K. 621: 47 E. C. L. R. So where the offence was committed on the 4th December, 1845, the information and warrant were on the 19th December; one prisoner was apprehended on the 5th September, 1846, and the other on the 21st of October, 1846; and the indictment was preferred on the 5th of April, 1847: it was held that the prosecution was commenced in time. R. v. Brooke, 1 Den. C. C. R. 217.

Proof of being armed.] Though it must be proved under the 9 Geo. 4, c. 69, s. 9, that three persons at least were concerned in the commission of the offence, the statute does not require that it should appear that each was armed with a gun or other weapon, the words being, "any of such persons being armed," &c., and this was held upon the former statute, 57 Geo. 3, c. 90, which did not contain the word "any." R. v. Smith, Russ. & Ry. 368. It is not necessary that the gun should be found upon any of the defendants. The prisoners were shooting in a wood in the night, and the flash of their guns was seen by a keeper; but before they were seen, they abandoned their guns and were caught creeping away on their knees. Being convicted, the judges held this a being "found armed" within the 57 Geo. 3, c. 90. R. v. Nash, Russ. & Ry. 368. See also R. v. Goodfellow, 1 C. & K. 724, S. C.: 47 E. C. L. R.; 1 Den. C. C. R. 81, where it was held (overruling on this point R. v. Davis, 8 C. & P. 579) that if one of a party of three or more poaching in the night-time has a gun, all are armed within the 9 Geo. 4, c. 69, s. 9. See also R. v. Whittaker, 1 Den. C. C. R. 310. Where several go out together, and only one is armed, without the knowledge of the others, the latter are not guilty within the statute. R. v. Southern, Russ. & Ry. 444. It must appear that the weapon was

taken out with the intention of being unlawfully used. The defendant was indicted for being out at night for the purpose of taking game armed with a bludgeon. It appeared that he had with him a thick stick large enough to be called a bludgeon, but that he was in the constant habit of using it as a crutch, being lame. Taunton, J., ruled, that it was a question for the jury, whether he took out the stick with the intention of using it as an offensive weapon, or merely for the purpose to which he usually applied it. The defendant was acquitted. R. v. Palmer, 1 Moo. & Rob. 70. A walking-stick of ordinary size was ruled to be an offensive weapon within the 7 Geo. 2, c. 21. R. v. Johnson, Russ. & Ry. 492. The prisoners were indicted for entering land at night armed with bludgeons, with intent to destroy game; there was also a count for a common assault. The only weapons proved to have been used by the prisoners were sticks. One of these was produced, with which one of the prisoners, on being attacked by the gamekeepers, had defended himself and knocked the gamekeeper down. The stick however was a very small one, fairly answering the description of a common walking-stick. On its being objected that the stick could not be considered an offensive weapon within the statute, R. v. Johnson was cited for the prosecution, and it was contended that the use made of the stick by the prisoner [*524] showed both his intention and the nature of the stick. *Gurney, B., said that if a man went out with a common walking-stick, and there were circumstances to show that he intended to use it for purposes of offence, it might, perhaps, be called an offensive weapon within the statute; but if he had it in the ordinary way, and upon some unexpected attack or collision was provoked to use it in his own defence, it would be carrying the statute somewhat too far to say it was an offensive weapon within the meaning of the statute. The prisoners were convicted of a common assault only. R. v. Fry, 2 Moo. & Rob. 42. Large stones are offensive weapons if the jury are satisfied that the stones are of a description capable of inflicting serious injury if used offensively, and that they were brought and used by the defendants for that purpose. R. v. Grice, 7 C. & P. 803: 32 E. C. L. R.

Joinder of offences.] It has been ruled that a count on the 9 Geo. 4, c. 64, s. 4, may be joined with a count on section 2, and with counts for assaulting a gamekeeper in the execution of his duty, and for a common assault. R. v. Finacane, 5 C. & P. 551: 24 E. C. L. R. Where a prisoner was indicted for shooting at a gamekeeper, and was also indicted for night poaching, under the above section; the offences being quite distinct, although they related to the same transaction. R. v. Handley, Id. 565.

Apprehension of offenders.] Although the 9 Geo. 4, c. 69, s. 2, is confined to the offences specified in the first section, yet offenders, under the ninth section, may also be apprehended; for though a greater punishment is inflicted where several are out armed, they are still guilty of an offence under the first section. R. v. Bull, 1 Moo. C. C. 330.

A gamekeeper and his assistants warned a party of poachers off his master's grounds, and followed them into the highway, where the poachers rushed upon the keeper and his men, and blows ensued on both sides. After the keeper had struck several blows, a shot was fired by the prisoner, one of the party, which wounded the prosecutor. The prisoner was indicted under the 9 Geo. 4, c. 31, for shooting at the prosecutor with intent to kill, &c. It was urged for the prisoner, that as the keeper had knocked down three of the men before the shot was fired, it would have been manslaughter only if death had ensued; but the judge (Bayley,

B.), was of opinion that if the keeper struck, not vindictively, or for the purpose of offence, but in self-defence only, and to diminish the violence which was illegally brought into operation against him, it would have been murder if death had ensued. He told the jury that he thought that the keeper and his men, even if they had no right to apprehend, had full right to follow the prisoner and his party, to discover who they were, and that the prisoner and his party were not warranted in attempting to prevent them, and that if they had attempted to prevent them, which, however, they did not, he thought they would have been warranted by the statute in so doing. The prisoner being convicted, on a case reserved, the judges were of opinion that the keeper had power to apprehend, and that notwithstanding the blows given by the keeper, it would have been murder had the keeper's man died. Ib. The rule laid down in the above case, with regard to blows first given by the keeper in self-defence, was soon afterwards recognized in another case. A gamekeeper and his assistants proceeded to apprehend a party of poachers whose guns they heard in a wood. *They rushed in upon the poachers, who ran away, and the keeper followed [*525] one of the poachers, exclaiming, "The first man that comes out, I'll be damn'd if I don't shoot him." At length several of the poachers stopped, and the prisoner, one of them, putting his gun to his shoulder, fired at and wounded the prosecutor; being indicted for this offence, it was objected that it was incumbent on the prosecutor to have given notice to the persons by calling on them to surrender, which he did not appear to have done; the judge reserved the point, and the judges were all of opinion that the circumstances constituted sufficient notice, and that the conviction was right. R. v. Payne, 1 Moo. C. C. 378. Upon an indictment for murder, it appeared that the prisoner, being poaching at night in a wood, was attempted to be apprehended by the deceased, the servant of the prosecutor. The prosecutor was neither the owner nor occupier of the wood, nor the lord of the manor, having only the permission of the owner to preserve the game there. The deceased having been killed by the prisoner in the attempt to apprehend him, it was held to be manslaughter only. R. v. Addis, 6 C. & P. 388 : 25 E. C. L. R. Gamekeepers who were out watching in the night heard firing of guns in the preserves of their employer, and they waited in a turnpike road, expecting the poachers to come there, which they did, and an affray ensued between the gamekeepers and the poachers. Wightman, J., held, that if the gamekeepers were there endeavoring to apprehend the poachers they were not justified in so doing. R. v. Meadham, 2 C. & K. 633 : 61 E. C. L. R.

In these cases a question frequently arises how far the companions of the party who actually committed the offence participate in the guilt. The prisoners were charged with shooting James Mancey, with intent to murder. It appeared that the prisoners, each having a gun, were out at night in the grounds of C. for the purpose of shooting pheasants, and the prosecutor and his assistants going towards them for the purpose of apprehending them, they formed into two lines, and pointing their guns at the keepers, threatened to shoot them. A gun was fired, and the prosecutor was wounded. Some of the keepers were also severely beaten, but no other shot was fired. It was objected that as there was no common intent to commit any felony, Mancey alone could be convicted, but Vaughan, B., said, "I am of opinion that when this act of Parliament (57 Geo. 3, c. 90, repealed by 9 Geo. 4, c. 69) empowered certain parties to apprehend persons who were out at night armed for the destruction of game, it gave them the same protection in the execution of that power which the law affords to constables in the execution of their duty. With respect to the other point, it is rather a question of fact for the jury; still on this evidence it is quite clear what the common purpose was. They all draw up in lines, and point their

guns at the keepers, and they are all giving their countenance and assistance to the one who actually fires the gun. If it could be shown that either of them separated himself from the rest, and showed distinctly that he would have no hand in what they were doing, the objection would have much weight in it." R. v. Edmeads, 3 C. & P. 390: 14 E. C. L. R. So when two persons had been seized by a gamekeeper and his assistants, and while standing still in custody, called to another man, who coming up, rescued the two men, and beat and killed one of the keeper's party; Vaughan, B., ruled that all the three men were equally guilty, though, if the two had [*526] acquiesced *and remained passive, it would not have been so. R. v. Whithorne, 3 C. & P. 324: 14 E. C. L R.

If a person having only a right of shooting over land empowers keepers to apprehend parties trespassing in search of game, and these parties on an attempt being made to apprehend them, resist, no offence is committed under the 9 Geo. 4, c. 69, s, 2. R. v. Wood, 1 F. & F. 470. As to what persons are entitled to seize and apprehend under this section, see Chit. Stat. Cr. Law, p. 140.

By the game amendment act, 1 & 2 Wm. 4, c. 32, s. 31, trespassers in search of game may be required to quit the land, and to tell their names and abodes, and in case of refusal may be apprehended and taken before a justice. See R. v. Long, 7 C. & P. 314: 32 E. C. L. R.

See also as to apprehending generally offenders found committing offences in the night, 14 & 15 Vict. c. 19, s. 11, *ante*, p. 241.

[*527] *GAMING.

GAMING, says Hawkins, is permitted in England, upon every possible subject, excepting where it is accompanied by circumstances repugnant to morality or public policy, or where, in certain special cases, it is restrained by positive statutes: Hawk P. C. b. 1, c. 92, s. 1; but where the playing is from the magnitude of the stake excessive, and such as is now commonly understood by the term "gaming," it is considered by the law as an offence, being in its consequences most mischievous to society. 1 Russ. by Grea. 455.(1)

The principal statutory provisions against gaming were contained in the 9 Anne, c. 14 (E.); the 18 Geo. 2, c. 34 (E.); the 10 Wm. 3 (I.); and the 11 Anne (I.); but these statutes, with regard to the punishment of gaming, are repealed by the 8 & 9 Vict. c. 109, s. 15.

By the seventeenth section of the latter statute (E. & I.), which is entitled "An act to amend the law concerning games and wagers," "Every person who shall by any fraud or unlawful device or ill practice in playing at or with cards, dice, tables, or other game, or in bearing a part in the stakes, wagers, or adventures, or in betting on the sides or hands of them that do play, or in wagering on the event of any game, sport, pastime, or exercise, win from any other person to himself, or any other or others, any sum of money or valuable thing, shall be deemed guilty of obtaining such money or valuable thing from such other person by a false pretence, with intent to cheat or defraud such person of the same, and being convicted thereof shall be punished accordingly."

(1) The statute against gaming "at any faro bank or at any other table of the same or like kind under any denomination whatsoever," includes the game called "Thimble or Thimble and Balls." The State v. Red, 7 Richardson, 8.

It must be proved not only that the defendant won the money, but that he won it by some "fraud or unlawful device or ill practice." Reg. v. Rogier, 1 B. & C. 272: 8 E. C. L. R. It seems that it would not be necessary to state in the indictment the name of the person from whom the money was won. R. v. Moss, 1 Dear. & B. C. C. 205; S. C. 26 L. J. M. C. 9.

Keeping and maintaining a common gaming-house for lucre and gain, and causing and procuring idle and evil-disposed persons to come there and play for large sums of money, is an indictable offence at common law, and it seems that an indictment for such an offence merely charging the defendant with keeping a common gaming-house would be good. R. v. Rogier, *supra;* R. v. Taylor, 3 B. & C. 502: 10 E. C. L. R. And a betting-house would probably be considered to be a gaming-house. See *post*, tit. "Nuisance." As to what is a gaming-house, see 8 & 9 Vict. c. 109, s. 2. It is usual, however, to resort to a summary mode of procedure given as to betting-houses by the 16 & 17 Vict. c. 119; and as to gaming-houses generally by the 17 & 18 Vict. c. 38.

It has been doubted whether under the 8 & 9 Vict. c. 109, s. 17, it would be necessary to prove that the money was actually paid over, or whether it is not sufficient if the money be lost by one side and *won by the other. Per Bramwell, B., [*528] in R v. Moss, *ubi supra*. The statute, however, seems to contemplate actual payment by the use of the word "obtaining" in the latter part of the section. If the money were not actually paid over, the prisoner might be convicted of the attempt to commit the statutable misdemeanor. See the 14 & 15 Vict. c. 100, s. 9, *supra*, p. 284.

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*GRIEVOUS BODILY HARM. [*529]

In numerous instances the words "grievous bodily harm" occur in criminal statutes, which make either doing such harm, or intending to do it, or attempting to do it, an offence punishable in a particular way. Sometimes the words are slightly varied. By the 24 & 25 Vict. c. 100, s. 11, "whosoever shall cause grievous bodily harm with intent to murder," is guilty of felony. See *infra*, tit. Murder, Attempt to commit. By s. 18, whosoever shall "cause any grievous bodily harm to any person, or shoot at any person, or, by drawing a trigger, or in any other manner, attempt to discharge any kind of loaded arms at any person, with intent, in any of the cases aforesaid, to maim, disfigure, or disable, or to do any other kind of grievous bodily harm to any person," is made guilty of felony. *Supra*, p. 274. By s. 20, inflicting "grievous bodily harm upon any person, with or without any weapon or instrument," is made a misdemeanor. *Supra*, p. 274. By s. 23, administering poison so as to inflict "grievous bodily harm," is made a felony. *Infra*, tit. Poison. By s. 26, doing or causing to be done any "bodily harm" to apprentices and servants by neglect of masters, &c., is made a misdemeanor. *Infra*, p. 556. By s. 28, whosoever shall do any "grievous bodily harm" to any person by explosive substances, is made guilty of felony. *Infra*, p. 533. By s. 29, causing gunpowder to explode, or sending any explosive substance, or throwing any corrosive fluid, with intent to do any "grievous bodily harm," is made a felony. *Infra*, p. 533. By s. 30, placing any explosive substance near any building or vessel, with intent to do any "bodily injury," is made a felony. *Infra*, p. 533. By s. 31, setting spring guns, with intent to inflict "grievous bodily harm," is made a misdemeanor. *Infra*, tit. Spring Guns. By s. 35,

drivers of carriages by furious driving doing or causing to be done any "bodily harm," are made guilty of a misdemeanor. *Supra*, p. 517.

The prisoner was indicted, under the repealed statute of 7 Wm. 4 & 1 Vict. c. 85, s. 2, for causing a bodily injury dangerous to life, with intent to commit murder. It appeared at the trial that the prisoner, intending to cause the death of her infant child, exposed it in an open field on a cold wet day, where it was found after some hours nearly dead from congestion of the lungs and heart caused thereby. The court said that looking to the character of the other offences provided for by that section (poisoning, stabbing, &c.), and seeing that in this case there had been no lesion of any part of the body of the infant, the conviction for causing "a bodily injury" could not be supported. R. v. Gray, Dears. & B. C. C. 303; S. C. 26 L. J. M. C. 203. See 24 & 25 Vict. c. 100, s. 27, *supra*, p. 363.

It is not necessary to prove malice in the prisoner against the person injured; or, if the intent be punishable, that any grievous bodily harm was in fact inflicted. The prisoner having been apprehended by one Headley, in an attempt to break open his stable in the night, was taken into Headley's house, where he threatened him with [*530] *vengeance, and endeavored to carry his threats into execution with a knife, which lay before him; in so doing he cut the prosecutor, one of Headley's servants, who, with Headley, was trying to take away the knife. The jury, who found the prisoner guilty, said that the thrust was made with intent to do grievous bodily harm to anybody upon whom it might alight, though the particular cut was not calculated to do so. Upon the case being submitted to the consideration of the judges, they were of opinion, that general malice was sufficient under the statute, without particular malice against the person cut; and that if there was an intent to do grievous bodily harm, it was immaterial whether grievous bodily harm was done. R. v. Hunt, 1 Moo. C. C. 93. This case appears to have resolved the doubts expressed by Mr. Justice Bayley, in a case previously tried before him. R. v. Akenhead, Holt, N. P. C. 469: 3 E. C. L. R. The same construction with regard to general malice, was put upon the Coventry act. See R. v. Carroll, 1 East, P. C. 394, 396.

Where the prisoner, in attempting to commit a robbery, threw down the prosecutor, kicked him, and produced blood, Denman, C. J., left it to the jury to say, whether his intent was to *disable* the prosecutor, or to do him some grievous bodily harm; adding that nothing was more likely to accomplish the robbery which he had in view than the disabling which such violence would produce. R. v. Shadbolt, 5 C. & P. 504: 24 E. C. L. R.

The intent to do grievous bodily harm may be inferred, although the prisoner had also an intent to commit another felony. Thus where, on an indictment, charging the prisoner with cutting M. E. with intent to do her some grievous bodily harm, it appeared that the prisoner cut the private parts of a girl, ten years of age, Graham, B., told the jury, that they were to consider whether this was not a grievous bodily injury to the child, though eventually not dangerous. As to the intent, though it probably was the prisoner's intention to commit a rape, yet, if to effect the rape, he did that which the law makes a distinct crime, viz., intentionally did the child a grievous bodily harm, he was not the less guilty of that crime, because his principal object was another. He added, that the intention of the prisoner might be inferred from the act. The jury found the prisoner guilty, and on a case reserved, the judges held the conviction right. R. v. Cox, Russ. & Ry. 362. So where the prisoner was charged with shooting, with intent to do A. B. some grievous bodily harm, and the jury found that the prisoner's motive was to prevent his lawful apprehension, but that in order to effect that purpose, he had also the intention of doing A. B. some grievous bodily

harm; the prisoner being convicted, the judges held that if both the intents existed, it was immaterial which was the principal and which the subordinate, and that the conviction was right. R. v. Gillow, 1 Moo. C. C: 85.

If a person wound another in order to rob him, and thereby inflict grievous bodily harm, he may be convicted on a count charging him with intent to do grievous bodily harm. R. v. Bowen, Carr. & M. 149: 41 E. C. L. R. In this case, it was also held that even if the prisoner's was not the hand that inflicted the wound, he ought to be convicted on this indictment, if the jury was satisfied that he was one of two persons engaged in the common purpose of robbing the prosecutor, and that the other person's was the hand that inflicted the wound. So where upon an indictment for shooting at H. with intent to *murder H., it appeared that the prisoner intended to [*531] shoot at and kill L., but shot at H. by mistake, Littledale, J., left it to the jury to say, whether the prisoner intended to murder H., and upon their finding that he shot at H., intending to murder L., directed an acquittal. R. v. Holt, 7 C. & P. 518: 32 E. C. L. R; see R. v. Ryan, 2 Moo. & R. 213, *infra.*

A constable was employed to guard a copse from which wood had been stolen, and for this purpose carried a loaded gun; from this copse he saw the prosecutor come out, carrying wood which he was stealing, and called to him to stop; the prosecutor, however, running away, the constable, having no other means of bringing him to justice, fired, and wounded him in the leg. It appeared that the constable was not aware, at the time, that any felony had been committed by the prosecutor. The constable having been convicted upon an indictment charging him with assaulting the prosecutor, with intent to do him grievous bodily harm, the Court of Criminal Appeal held that the conviction was right, upon the ground that "the fact that the prosecutor was committing a felony, was not known at the time; he was therefore liable to be convicted, though the amount of punishment might deserve great consideration." R. v. Dadson, 2 Den. C. C. R. 35; S. C. 20 L. J. M. C. 57.

Where a party who is being assaulted, and who is entitled to defend himself, unnecessarily resorts to the use of a deadly weapon, he may be convicted of wounding, with intent to do grievous bodily harm. R. v. Adgar, 2 Moo. & R. 497.

If the proof of the intent to do grievous bodily harm fails, the defendant may be found guilty of unlawfully wounding. 14 & 15 Vict. c. 19, s. 5, *infra.*

See, as to the form of indictment, R. v. Cruse, *infra*, tit. Murder, Attempt to Commit.

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*GUNPOWDER AND OTHER EXPLOSIVE AND DANGEROUS SUBSTANCES. [*532]

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Blowing up dwelling-house, any person being therein.] By the 24 & 25 Vict. c 97, s. 9, "Whosoever shall unlawfully and maliciously, by the explosion of gunpowder or other explosive substance, destroy, throw down, or damage the whole or any part of any dwelling-house, any person being therein, or of any building whereby the

life of any person shall be endangered, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and if a a male under the age of sixteen years, with or without whipping."

Blowing up building, with intent to murder.] By the 24 & 25 Vict. c. 100, s. 12, "Whosoever, by the explosion of gunpowder or other explosive substance, shall destroy or damage any building, with intent to commit murder, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Placing gunpowder, &c., near any building, with intent to destroy.] By the 24 & 25 Vict. c. 97, s. 10, "Whosoever shall unlawfully and maliciously place or throw in, into, upon, under, against, or near any building, any gunpowder or other explosive substance, with intent to destroy or damage any building, or any engine, machinery, working tools, fixtures, goods, or chattels, shall, whether or not any explosion take place, and whether or not any damage be caused, be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and if a male under the age of sixteen years, with or without whipping."

[*533] **Placing gunpowder near any ship or vessel with intent to destroy it.*] By the 24 & 25 Vict. c. 97, s. 45, "Whosoever shall unlawfully and maliciously place or throw in, into, upon, against, or near any ship or vessel any gunpowder or other explosive substance, with intent to destroy or damage any ship or vessel, or any machinery, working tools, goods, or chattels, shall whether or not any explosion takes place, and whether or not any injury be effected, be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and if a male under the age of sixteen years with or without whipping."

Placing gunpowder near any ship or vessel with intent to do any bodily harm.] By the 24 & 25 Vict. c. 100, s. 30, "Whosoever shall unlawfully and maliciously place or throw in, into, upon, against, or near any building, ship, or vessel any gunpowder or other explosive substance with intent to do any bodily injury to any person, shall, whether or not any explosion take place, and whether or not any bodily injury be effected, be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and if a male under the age of sixteen years with or without whipping."

Injuries to person by gunpowder, &c.] By the 24 & 25 Vict. c. 100, s. 28, "Whosoever shall unlawfully and maliciously, by the explosion of gunpowder or other explosive substance, burn, maim, disfigure, disable, or do any grievous bodily harm to any person, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and if a male under the age of sixteen years with or without whipping."

Sending or throwing explosive or dangerous substances] By s. 29, "Whosoever shall unlawfully and maliciously cause any gunpowder or other explosive substance to explode, or send or deliver to, or cause to be taken or received by any person any explosive substance, or any other dangerous or noxious thing, or put or lay at any place, or cast or throw at or upon, or otherwise apply to any person any corrosive fluid, or any destructive or explosive substance, with intent in any of the cases aforesaid to burn, maim, disfigure, or disable any person, or to do some grievous bodily harm to any person, shall, whether any bodily injury be effected or not, be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and if a male under the age of sixteen years with or without whipping."

**Making or having possession of gunpowder, &c.*] By the 24 & 25 Vict. c. [*534] 97, s. 54, "Whosoever shall make or manufacture, or knowingly have in his possession any gunpowder or other explosive substance, or any dangerous or noxious thing, or any machine, engine, instrument or thing, with intent thereby or by means thereof to commit, or for the purpose of enabling any other person to commit, any of the felonies in this act mentioned, shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and if a male under the age of sixteen years with or without whipping."

A similar provision is contained in the 24 & 25 Vict. c. 100, s. 64.

See as to keeping large quantities of gunpowder or other explosive substances, *post*, tit. Nuisances.

Proof of malice.] As to malice against the owner of the property being unnecessary, see 24 & 25 Vict. c. 97, s. 58; *supra*, p. 264.

Injuries by persons in possession of property injured.] As to this see 24 & 25 Vict. c. 97, s. 59; *supra*, p. 264.

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NUISANCE TO HIGHWAYS.

Upon prosecutions for nuisance to a highway, the prosecutor must prove: 1st, that the way in question is a common highway; 2d, the obstructing of it, or other nuisance.

Proof of the way being a highway.] Every way which is common to the public is a highway. Thus a bridge may be a common highway. 2 Ld. Raym. 1174. So a footway: Logan v. Burton, 5 B. & C. 513; for it is a public highway for foot passengers. Allen v. Ormond, 8 East, 4. So a public bridle-way. R. v. Inhab. of Salop, 13 East, 95. So a towing-path, used only by horses employed in towing vessels, is a highway for that purpose. Per Bayley, J., R. v. Severn and Wye Railway Co, 2 B. & A. 648. And a railway made under the authority of an act of Parliament, which provides that the public shall have the beneficial enjoyment of it, is also a highway to be used in a particular manner. R. v. Severn and Wye Railway Co., 2 B. & A. 646. A river which is common to all the king's subjects has been frequently held to be a highway; and if its course change, the highway is diverted into the new channel. 1 Rol. Ab. 390; R. v. Hammond, 10 Mod. 382; Hawk. P. C. b. 1, c. 76, s. 1.

[*536] It must appear that the highway was a way common to all the *king's subjects; for, though numerous persons may be entitled to use it, yet if it be not common to all, it is not a public highway. Thus a private way, set out by commissioners under an inclosure act, for the use of the inhabitants of nine parishes, and directed to be repaired by them, does not concern the public, nor is it of a public nature, but merely concerns the individuals who have a right to use it. R. v. Richards, 8 T. R. 634. In general, the proof of any particular way being a highway, is from the use of it by the public as such for such a number of years as to afford evidence of a dedication by the owner of the soil to the public. The particular manner in which it has been used, says Mr. Starkie, as where it has been used for some public purpose, as conveying materials for the repairs of other highways (R. v. Wandsworth, 1 B. &

Ald. 63), or upon any occasion likely to attract notice, is very material; for such instances of user would naturally awaken the jealousy and opposition of any private owner, who was interested in preventing the acquisition of any right by the public; and consequently acquiescence affords a stronger presumption of right, than that which results from possession and user in ordinary cases. 2 Stark. Ev. 380, 2d ed. A road may be dedicated to the public for a certain time only, as by the provisions of an act of Parliament, and upon the expiring or repeal of the act, its character as a public highway will cease. R. v. Mellor, 1 B. & Ad. 32: 20 E. C. L. R. With reference to this case, however, Patteson, J., in giving judgment in R. v. Landsmere, 15 Q. B. 689: 69 E. C. L. R.; S. C. 19 L. J. M. C. 215, said, "At the trial I was pressed with R. v. Mellor, but I cannot help thinking that the court decided on the old doctrine of adoption by the parish through which the road passes, which has been now quite abandoned." In R. v. Landsmere, a turnpike road, made under a local act, which was to be in force for a limited time, and which had been used by the public both during that time and after its expiration, was held to be a highway which the parish was bound to repair. Where commissioners for setting out roads have exceeded their authority, in directing that certain private roads which they set out, shall be repaired by the township, if the public use such roads, it is a question for the jury whether they have not been dedicated to the public.(1) R. v. Wright, 3 B. & Ad. 681: 23 E. C. L. R. In the same case, Lord Tenterden held, that when a road runs through a space of fifty or sixty feet, between inclosures set out by act of Parliament, it is to be presumed that the whole of that space is public, though it may not all be used or kept in repair as a road. Acc. R. v. The United Kingdom Electric Telegraph Co., Norf. Spr. Ass. 1862, per Martin, B.

Unless there be some one who was capable of dedicating the road to the public, it seems that a use of it as a highway by them, and repairs done by the parish under a mistaken idea of their liability, will not create such liability, though it would be otherwise if the repairs were done with a full knowledge of the facts, and with an intention of taking upon themselves the burden. R. v. Edmonton, 1 Moo. & R. 24. Trustees in whom land is vested for public purposes, may dedicate the surface to the use of the public as a highway, provided such use be not inconsistent with the purposes for which the land is vested in them. R. v. Leake, 5 B. & Ad. 469: 24 E. C. L. R.; 2 Nev. & M. 583. See also Grand Surrey Canal v. Hall, *ante*, p. 314; and R. v. Eastmark, 11 Q. B. 877: 63 E. C. L. R.

In determining whether or not a way has been dedicated to the public, the proprietor's intention must be considered. If it appear *only that he has suffered [*537] a continual user, that may prove a dedication; but such proof may be rebutted by evidence of acts showing that he contemplated only a license resumable in a particular event. Thus where the owner of land agreed with an iron company, and with the inhabitants of a hamlet repairing its own roads, that a way over his land in such hamlet should be open to carriages, that the company should pay him 5*s.* a year, and find cinder to repair the way, and that the inhabitants of the hamlet should load and lay down the cinder, and the way was thereupon left open to all persons passing with carriages for nineteen years, at the end of which time a dispute arising, the passage was interrupted, and the interruption acquiesced in for five years, it was held that the evidence showed no dedication, but a license only, resumable on breach of the agree-

(1) Ward v. Folly, 2 Southard, 582; Galatian v. Gardiner, 7 Johns. 106; Todd v. Rome, 2 Greenl. 55; Georgetown v. Taylor, 2 Bay, 282; State v. Wilkinson, 2 Verm. 480. But see Hinckley v. Hastings, 2 Pick. 162; Commonwealth v. Low, 3 Id. 408; Odiorne v. Wade, 5 Id. 421.

ment. Barraclough v. Johnson, 8 A. & E. 99: 35 E. C. L. R.; and see R. v. Chorley, 12 Q. B. 515: 64 E. C. L. R.

Now, by the highway act, 5 & 6 Wm. 4, c. 50, s. 23, no road or occupation way, made or hereafter to be made by any individual or private person, body politic or corporate, nor any roads already set out, or to be hereafter set out as a private drift-way or horsepath, in any award of commissioners under an inclosure act, shall be deemed, &c., a highway which the inhabitants of any parish shall be liable to repair, unless the person, &c., proposing to dedicate such highway to the use of the public, shall give three months' notice in writing to the surveyor of the parish of his intention to dedicate such highway, describing its situation and extent, and shall have made the same in a substantial manner, and of the width required by the act, and to the satisfaction of the said surveyor, and of any two justices, &c., who, on receiving notice from such person, &c., are to view the same, and to certify that such highway has been made in a substantial manner, &c., which certificate shall be enrolled at the next quarter sessions, then and in such case, after the said highway shall have been used by the public, and duly repaired by the said person, &c., for twelve calendar months, such highway shall forever thereafter be kept in repair by the parish in which it is situate: provided that on receipt of such notice as aforesaid, the surveyor shall call a vestry meeting, and if such vestry shall deem such highway not to be of sufficient utility to justify its being kept in repair at the expense of the said parish, any one justice of the peace, on the application of the said surveyor, shall summon the party proposing to make the new highway, to appear before the justices at the next special sessions for the highways, and the question as to the utility of such highway shall be determined at the discretion of such justices. This section is not retrospective in respect of roads completely public by dedication at the passing of the act, but applies to roads then made and in progress of dedication. R. v. Westmark, 2 Moo. & R. 305.

Formerly, according to the opinions of some persons, a way was only a highway when it led directly from a market town, or from town to town. Hawk. P. C. b. 1, c. 76, s. 1. It is said by Lord Hale, that if a way lead to a market, and is a way for all travellers, *and communicates with a great road*, it is a highway; but if it lead only to a church, or to a private house, or to a village, then it is a private way; but it is a matter of fact, and much depends upon common reputation. R. v. Austin, 1 Vent. 189. But it was long since held to be sufficient if the way in question communicates at its *termini* with other highways. Thus on an indictment for obstructing a passage, [*538] which led from one part of a street, by a circuitous route, *to another part of the same street, and which had been opened to the public as far back as could be remembered, Lord Ellenborough held this to be a highway; though it was not in general of use to those walking up and down the street, but was only of convenience when the street was blocked up with a crowd. R. v. Lloyd, 1 Camp. 260. Whether a street which is not *a thoroughfare* can be deemed a highway, has been the subject of considerable discussion. In the case last cited, Lord Ellenborough said, "I think that, if places are lighted by public bodies, this is strong evidence of the public having a right of way over them; and to say that this right cannot exist, because a particular place does not lead conveniently from one street to another, would go to extinguish all highways where (as in Queen's Square) there is no thoroughfare." The same doctrine was recognized by Lord Kenyon, in the case of The Rugby Charity v. Merryweather, 11 East, 375 (*n*), where he says, "As to this not being a thoroughfare, that can make no difference. If it were otherwise, in such a great town as this, it would be a trap to make persons trespassers." The opinions of Lord Kenyon and

Lord Ellenborough on this point have, however, been questioned. In Woodyer v. Hadden, 5 Taunt. 125: 1 E. C. L. R., the court expressed their dissatisfaction with the *dictum* of Lord Kenyon in the Rugby Case; and in Wood v. Veal, 5 B. & A. 454: 7 E. C. L. R., Abbott, C. J., did the same.

There is now, however, no doubt that a way may be a highway, though it be what is commonly called a cul-de-sac. Bateman v. Bluck, 21 L. J. Q. B. 406; Campbell v. Lang, 1 Macq. H. L. Ca. 451; Young v. Cuthbertson, Id. 455.

Where justices in petty session have made an order for stopping a highway, under a local act giving a power of appeal, and the time for appeal has elapsed, it cannot be contended, on an indictment for obstructing such way, that the order was bad, because the justices were not properly summoned to the petty session. But an order made under the 55 Geo. 3, c. 68, s. 2, which enacts, "that where it shall appear upon the view of any two or more justices" that a highway is unnecessary, the same may be stopped by order of such justices; the order is not valid if it state only that the justices *having viewed* the public roads, &c., within the parish, &c. (in which the road lies), *and being satisfied* that certain roads are unnecessary, do order the same to be stopped up; and the objection may be taken at the trial of such indictment. R. v. Marquis of Downshire, 4 A. & E. 698: 31 E. C. L. R. And see further as to stopping highways, R. v. Cambridgeshire, Id. 111.

By an act for inclosing lands in several parishes and townships, it was directed that the allotments to be made in respect of certain messuages, &c., should be deemed part and parcel of the townships respectively in which the messuages, &c., were situate. And the commissioners under the act were directed in their award to make such orders as they should think necessary and proper concerning all public roads, "and in what townships and parish the same are respectively situate," and by whom they ought to be repaired. The commissioners by their award directed that there should be certain roads. One of these, called the Sandtoft Road, passed between two allotments. The road was ancient. The part of the common over which it ran before the award, was in the township of H., and the road was still in that township, unless its situation was changed by the local act and the award. The new allotments on each side *were declared by the award to be in other townships than H. The [*539] award did not say in what townships the road was situate, nor by whom it was repairable. It was held, that the act, by changing the local situation of the allotments, did not, as a consequence, change that of the adjoining portions of roads, and, therefore, that the road in question continued to be in H. It was also held by Lord Denman, C. J., that where the herbage of a road becomes vested by the general inclosure act (41 Geo. 3, c. 109, s. 11) in the proprietors of allotments on each side, no presumption arises that the soil itself belongs to such proprietors. R. v. Hatfield, 4 A. & E. 156.

By the highway act, 5 & 6 Wm. 4, c. 50, ss. 88, 89, persons aggrieved by the decision of the justices in stopping or diverting highways, may appeal to the sessions, where a jury is to determine whether the highways stopped, &c., are unnecessary, or more commodious, &c.

By sect. 92, where a highway is turned or diverted, the parish, or other party liable to repair the old highway, shall repair the new highway, without any reference whatever to its parochial locality.

Where on an indictment for obstructing a highway, a principal question was, whether the way was public or private, and evidence was offered that a person since deceased had planted a willow on a spot adjoining the road, on ground of which he was tenant, saying at the same time, that he planted it to show where the boundary

of the road was when he was a boy; it was held that such declaration was not evidence, either as showing reputation, as a statement accompanying an act, or as the admission of an occupier against his own interest. R. v. Bliss, 7 A. & E. 550: 34 E. C. L. R.

But on an indictment against a township for non-repair of a road, an indictment against an adjoining township for non-repair of a portion of highway in continuation of the road in question, either submitted to, or prosecuted to conviction, is admissible as evidence to prove the road in question to be a highway. R. v. Brightside Bierlow, 13 Q. B. 933: 66 E. C. L. R.; S. C. 19 L. J. M. C. 50.

Proof of the highway as set forth.] The highway in question must be proved as set forth in the indictment; but if the description be too general and indefinite, advantage must be taken of that defect by plea in abatement, and not under the general issue. R. v. Hammersmith, 1 Stark. N. P. C. 357: 2 E. C. L. R.; and see R. v. Waverton, 2 Den. C. C. R 340; S. C. 21 L. J. M. C. 7. But an indictment describing a way as from A. towards and unto B. is satisfied by proof of a public way leading from A. to B., though it turns backward between A. and B. at an acute angle, and though the part from A. to the angle be an immemorial way, and the part from the angle to B. be recently dedicated. B. was a church: the path from A., after passing the point at which the obstruction took place, reached the churchyard, but not the church, before reaching the angle; it was held by Lord Denman, C. J., and *semble*, per Coleridge, J., that this proof would not have supported an indictment describing the whole as an immemorial way. R. v. Marchioness of Downshire, 4 A. & E. 232: 31 E. C. L. R.

An indictment for obstructing a highway (by placing a gate across it), stated the way to be "from the town of C." to a place called H., and charged the obstruction to be "between the town of C." and H. By a local paving act, the limits of [*540] the town of C. were defined, and *the *locus in quo* was within these limits, and the prosecutors relied on the local turnpike acts, which prohibited the erection of gates within the town. It was held by Patteson, J., that there was a variance, and the indictment could not be sustained, as the terms "from" and "between" excluded the town; and according to the limits defined by the local paving act, on which the prosecutors relied as bringing the obstruction within the other local acts, the obstruction was shown to be in the town. R. v. Fisher, 8 C. & P. 612: 34 E. C. L. R. So where it appeared on a similar indictment which described the highway as "leading from the township of D. in, &c., unto the town of C.," that the gate was put up in the township of D.; Coleridge, J., held, that the defendant must be acquitted, as the words "from" and "unto" excluded the *termini*. R. v. Botfield, Carr. & M. 151: 41 E. C. L. R.; see also R. v. Steventon, 1 C. & K. 55: 47 E. C. L. R. Where the way was stated to be "for all the liege subjects, &c., to go, &c., with their horses, coaches, carts, and carriages," and the evidence was that carts of a particular description, and loaded in a particular manner, could not pass along the way, it was held to be no variance. R. v. Lyon, Ry. & Moo. N. P. C. 151: 21 E. C. L. R. Where the way is stated to be a pack and prime way, and appears to be a carriage-way, the variance is fatal. R. v. Inhab. of St. Weonard's, 6 C. & P 582: 25 E. C. L. R. But where the indictment alleged an immemorial way, and the evidence proved that the way had been made within legal memory, the variance was held to be immaterial. Reg. v. Norweston, 16 Q. B. 109: 71 E. C. L. R.; S. C. 20 L. J. M. C. 46; and now see 14 & 15 Vict. c. 100, s. 1, as to the power of amendment in cases of variance between the indictment and the proof.

Proof of the highway as set forth—with regard to the termini.] Although it is unnecessary to state the *termini* of the highway, yet if stated they should be proved as laid. R. v. Upton-on-Severn, 6 C. & P. 133: 25 E. C. L. R. See also R. v. Norweston, *supra*.

Proof of changing.] An ancient highway cannot be changed without the king's license first obtained, upon a writ of *ad quod damnum* and inquisition thereon found, that such a change will not be prejudicial to the public; but it is said that the inhabitants are not bound to watch such new way, or to make amends for a robbery committed therein, or to repair it. 1 Hawk. P. C. b. 1, c. 76, s. 3. A private act of Parliament for inclosing lands, and vesting a power in commissioners to set out a new road, is equally strong, as to these consequences, with the writ of *ad quod damnum*. 1 Burr. 465. An owner of land over which there is an open road, may inclose it of his own authority; but he is bound to leave sufficient space and room for the road, and he is obliged to repair it till he throws up the inclosure. Ibid.

The power of widening and changing highways was given to justices of the peace by the 13 Geo. 3, c. 78, and 55 Geo. 3, c. 68, and is continued to them, under certain modifications, by the recent highway act, 5 & 6 Wm. 4, c. 50.

A statute giving authority to make a new course for a navigable river, along which there is a towing-path, will not take away the right of the public to use that path, without express words for that purpose. R. v. Tippett, 1 Russ. by Grea. 347.

Proof of the nuisance—what acts amount to.] There is no doubt *but [*541] that all injuries whatever to any highway, as by digging a ditch or making a hedge across it, or laying logs of timber on it, or doing any act which will render it less commodious to the public, are nuisances at common law; and it is no excuse that the logs are only laid here and there, so that people may have a passage by winding and turning through them. Hawk. P. C. b. 1, c. 76, ss. 144, 145. So erecting a gate across a highway is a nuisance; for it not only interrupts the public in their free and open passage, but it may in time become evidence in favor of the owner of the soil. Id. c. 75, s. 9. It is also a nuisance to suffer the ditches adjoining a highway to be foul, by reason of which the way is impaired; or to suffer the boughs of trees growing near the highway to hang over the road in such a manner as to incommode the passage. Id. c. 76, s. 147; and see 5 & 6 Wm. 4, c. 50. There can be no doubt, that every contracting or narrowing of a public highway is a nuisance: it is frequently, however, difficult to determine how far in breadth a highway extends, as where it runs across a common, or where there is a hedge only on one side of the way, or where, though there are hedges on both sides, the space between them is much larger than what is necessary for the use of the public; in these cases it would be for a jury to determine how far the road extended. It seems that in ordinary cases, where a road runs between fences, not only the part which is maintained as solid road, but the whole space between the fences is to be considered as highway. 1 Russ. by Grea. 350; Brownlow v. Tomlinson, 1 M. & Gr. 484: 39 E. C. L. R.; R. v. Wright, 3 B. & Ad. 681: 23 E. C. L. R.; R. v. Birmingham Railway, 1 Railw. C. 317; R. v. The United Kingdom Electric Telegraph Co., Norf. Spr. Ass. 1862, per Martin, B. Where a wagoner occupied one side of a public street in a city, before his warehouses, in loading and unloading his wagons, for several hours at a time, by night and by day, having one wagon at least usually standing before his warehouses, so that no wagon could pass on that side of the street; this was held to be a nuisance, although there was room for two carriages to pass on the oppo-

site side. R. v. Russell, 6 East, 427. So keeping coaches at a stand in a street, plying for passengers, is a nuisance. R. v. Cross, 3 Camp. 226. So exhibiting effigies at a window, and thereby attracting a crowd. R. v. Carlisle, 6 C. & P. 637: 25 E. C. L. R. Ploughing up a footpath is a nuisance: R. v. Griesley, 1 Vent. 4; Wellbeloved on Highways, 443; both on the ground of inconvenience to the public, and of injuring the evidence of their title. Where at the trial it appeared, that the defendants were a company, established by deed, for the purpose of lighting the streets of a town with gas, and had obtained a certificate of complete registration under the 7 & 8 Vict. c. 110; that they had opened a trench in one of the streets for the purpose of laying down their mains along the middle of the street; that they had obtained the permission of the highway board as well as of the commissioners for lighting the town appointed under a local act for so doing; and it was admitted that they had used reasonable despatch in laying down the pipes and restoring the road, but during the execution of the works the street was impassable: it was held, that inasmuch as the acts of the defendants were in no respect done in the necessary or proper use of the highway, they were guilty of a nuisance in obstructing the use of it. Ellis v. Sheffield Gas Consumers' Company, 2 E. & B. 767; S. C. 18 Jur. 146. The question was again much considered in R. v. Longton Gas Company, 29 [*542] L. J. M. C. *118, and a similar decision was come to. See also R. v. Train, Q B., E. T., 1862, *acc.*

The obstruction of a navigable river is likewise a public nuisance, as by diverting part of the water, whereby the current is weakened, and made unable to carry vessels of the same burden as before. Hawk. P. C. b. 1, c. 75, s. 11. The building of a bridge partly in the bed of a navigable river, will be a nuisance, if it obstruct the navigation, but not otherwise. R. v. Betts, 16 Q. B. 1022: 71 E. C. L. R.; see also York & North Midland Railway Comp. v. Reg. (in error), 7 Railw. Cas. 459. In R. v. Russell, 2 El. & Bl. 942: 75 E. C. L. R.; S. C. 23 L. J. 173, the jury found that the obstruction, "although a nuisance, was not sufficiently so as to render the defendant criminally liable," upon which the judge directed a verdict of acquittal, and the Court of Queen's Bench held, that the jury must be understood as finding that the obstruction in question was so insignificant as not to constitute a nuisance, and refused to disturb the verdict. But if a vessel sink by accident in a navigable river, the owner is not indictable as for a nuisance in not removing it. R. v. Watt, 3 Esp. 675. And where a staith was erected stretching into the river Tyne, and used in shipping coals, whereby the public had a better and cheaper supply of that article, it was held to be no nuisance; *diss.* Lord Tenterden, R. v. Russell, 6 B. & C. 566: 13 E. C. L. R.; 9 D. & R. 566; but see R. v. Ward, *post.* In R. v. Russell, it was said by Mr. Justice Bayley, in his summing up to the jury, that where a great public benefit accrues from that which occasions the abridgment of the right of passage, that abridgment is not a nuisance, but proper and beneficial; and he directed the jury to find a verdict for the defendants, if they thought the abridgment of the right of passage was for a public purpose, and produced a public benefit, and if it was in a reasonable situation, and if a reasonable space was left for the passage of vessels navigating the river Tyne. On a motion for a new trial, the Court of King's Bench, with the exception of Lord Tenterden, held this direction right. Lord Tenterden said, "Admitting there was some public benefit both from the price and condition of the coals, still I must own that I do not think those points could be properly taken into consideration in the question raised by this indictment. That question I take properly to have been, whether the navigation and passage of the vessels on the public navigable river was injured by these erections." Where the lessee of the corporation of Lon-

don, the conservators of the river Thames erected a wharf between high and low water mark, extending for a considerable space along the river, upon an indictment for a nuisance, it was contended, that as claiming under the corporation the party had a right to make the wharf. But Abbott, C. J., said, "Will you contend that you have a right to narrow the river Thames, so long as you have space sufficient for the purposes of navigation?" The argument that the wharf was a public benefit, was then advanced; but the Chief Justice said, "Much evidence has been adduced on the part of the defendant for the purpose of showing that the alteration affords greater facility and convenience for loading and unloading; but the question is, not whether any private advantage had resulted from the alterations to any particular individual, but whether the convenience of the public at large, or of that portion of it which is interested in the navigation of the river Thames, has been affected or diminished by this alteration."(1) R. v. Lord Grosvenor, 2 Stark. 511: 3 E. C. L. R. But R. v. Russell has been overruled *by later decisions. On an indictment for a [*543] nuisance in a navigable river and common king's highway, called the harbor of C., by erecting an embankment in the water-way, the jury found that the embankment was a nuisance, but was counterbalanced by the public benefit arising from the alteration. It was held by the Court of King's Bench, that this finding amounted to a verdict of guilty, and that it is no defence to such an indictment that, although the work be, in some degree, a hindrance to navigation, it is advantageous, in a greater degree, to other uses of the port. R. v. Ward, 4 A. & E. 384: 31 E. C. L. R.; and see R. v. Morris, 1 B. & Ad. 441: 20 E. C. L. R.; and R. v. Randall, Car. & M. 496: 41 E. C. L. R. Where, on the trial of an indictment for a nuisance by erecting and continuing piles and planking in a harbor, and thereby obstructing it and rendering it insecure, a special verdict was found, that by the defendant's works the harbor was in some extreme cases rendered less secure, it was held, that the defendant was not responsible criminally for consequences so slight, uncertain, and rare, and that a verdict of not guilty must be entered. R. v. Tindall, 6 A. & E. 143: 33 E. C. L. R. Where the crown has no right to obstruct the whole passage of a navigable river, it has no right to erect a weir to obstruct a part, except subject to the rights of the public, and therefore the weir would become illegal if those rights are interfered with. R. v. Wilcock, 8 A. & E. 314: 35 E. C. L. R.; see R. v. The United Kingdom Electric Telegraph Co., and R. v. Train, *supra*.

Proof of the nuisance—authorized by an act of Parliament.] By an act reciting that a railway between certain points would be of great public utility, and would materially assist the agricultural interest and the general traffic of the country, power was given to a company to make such railway according to a plan deposited with the clerk of the peace, from which they were not to deviate more than one hundred yards. By a subsequent act, the company of persons authorized by them were empowered to use locomotive engines upon the railway. The railway was made parallel and adjacent to an ancient highway, and in some cases came within five yards of it. It did not appear whether or not the line could have been made in those instances to pass at a greater distance. The locomotive engines on the railway frightened the horses of persons using the highway as a carriage-road. On an indictment against the company for a nuisance, it was held, that this interference with the rights of the public must be taken to have been contemplated and sanctioned by the legislature, since the words of the statute authorizing the use of the engines were unqualified;

(1) Resp. v. Caldwell, 1 Dall. 150; Angell on Tide Waters, c. 8; Commonwealth v. Wright, 3 American Jurist, 185.

and the public benefit derived from the railway, whether it would have excused the alleged nuisance at common law or not (see R. v. Ward, *supra*), showed at least that there was nothing unreasonable in a clause of an act of Parliament giving such unqualified authority. R. v. Pease, 4 B. & Ad. 30: 24 E. C. L. R.

But where a railway company is authorized by act of Parliament to obstruct public or private roads only on condition which they have not performed, it may be indicted for a nuisance on the old highway. R. v. Scott, 3 Q. B. 543: 43 E. C. L. R.; and see R. v. Rigby, 14 Q. B. 687: 68 E. C. L. R.

Proof of the nuisance—whether justifiable from necessity.] It not unfrequently becomes a question whether the obstruction complained of is justifiable by reason of the necessity of the case, as when it occurs in the usual and necessary course of the [*544] party's *lawful business. The defendant, a timber merchant, occupied a small timber-yard close to the street; and, from the smallness of his premises, he was obliged to deposit the long pieces of timber in the street, and to have them sawed up there, before they could be carried into the yard. It was argued that this was necessary for his trade, and that it occasioned no more inconvenience than draymen letting down hogsheads of beer into the cellar of a publican. But Lord Ellenborough said, "If an unreasonable time is occupied in the operation of delivering beer from a brewer's dray into the cellar of a publican, this is certainly a nuisance. A cart or wagon may be unloaded at a gateway, but this must be done with promptness. So as to the repairing of a house: the public must submit to the inconvenience occasioned necessarily in repairing the house; but if this inconvenience be prolonged for an unreasonable time, the public have a right to complain, and the party may be indicted for a nuisance. The defendant is not to eke out the inconvenience of his own premises, by taking the public highway into his timber-yard; and if the street be narrow, he must remove to a more commodious situation for carrying on his business." R. v. Jones, 3 Campb. 230. So, although a person who is rebuilding a house is justified in erecting a *hoard* in the street, which serves as a protection to the public, yet, if it encroach unnecessarily upon the highway, it is a nuisance.(1) See Bush v. Steinmann, 1 Bos. & Pul. 407; R. v. Russell, 6 East, 427, *ante*, p. 542. See this point discussed in R. v. Longton Gas Co., 29 L. J. M. C. 118.

Judgment and sentence.] Where a defendant indicted for a nuisance to a navigable river allowed judgment to go by default, and was under no recognizances to appear in the Court of Queen's Bench for judgment, the court would not, in his absence, give judgment that the nuisance should be abated, although notice had been left at his residence of the intention of the crown to pray for judgment, the proper course being to sue out a writ of *capias*, and proceed to outlawry. R. v. Chichester, 2 Den. C. C. R. 458.

Abatement of nuisances.] As to the abatement of nuisances, see 11 & 12 Vict. c. 123, and 12 & 13 Vict. c. 111.

NOT REPAIRING HIGHWAYS.

Upon an indictment for not repairing a highway, to which the general issue is pleaded, the prosecutor must prove: 1st, that the way in question is a public highway (*vide ante*, p. 535 *et seq.*), and that it agrees with the description of the way

(1) The Commonwealth v. Passmore, 1 Serg. & Rawle, 217.

in the indictment (*ante*, p 539); 2dly, that it is within the parish or other district charged; 3dly, that it is out of repair; and 4thly, where the charge is not upon the parish, but against common right, as upon an individual *ratione tenuræ*, the liability of the party to make the repairs.

Proof of liability to repair—parish.] Parishes of common right are bound to repair their highways, and by prescription one parish may be bound to repair the way in another parish. Per Holt, C. J., R. v. Ragley, 12 Mod. 409; Hawk. P. C. b. 1, c. 76; R. v. Midville, 4 Q. B. 240: 45 E. C. L. R. No agreement with any person whatever can take off this charge. 1 Ventr. 90. The parish generally, and not *the overseers, are liable; and an indictment against the latter was quashed. [*545] R. v. Dixon, 12 Mod. 198. If particular persons are made liable by statute to repair, and become insolvent, the parish again becomes liable. 1 Ld. Raym. 725. And where a township, which has been accustomed to repair its own ways, is exempted by act of Parliament from the repair of a certain road, the liability reverts to the parish. R. v. Sheffield, 2 T. R. 106. The parish will remain liable, though the duty of repairing may likewise be imposed upon others. Thus, where a statute enacted that the paving of a particular street should be under the care of commissioners, and provided a fund to be applied to that purpose, and another statute, which was passed for paving the streets of the parish, contained a clause that it should not extend to the particular street, it was held, that the inhabitants of the parish were not exempted from their common law liability to keep the street in repair, and that the parish was under the obligation, in the first instance, of seeing that the street was properly repaired, and might seek a remedy over against the commissioners. R. v. St. George's, Hanover Square, 3 Campb. 222. By a navigation act, the proprietors of the navigation were required to keep a road in repair, and were declared to be liable to indictment if it was out of repair. Coleridge, J., held that this did not relieve the township from their common law liability. R. v. Brightside Bierlow, 13 Q. B. 933: 66 E. C. L. R.; S. C. 19 L. J. M. C. 50. So where the trustees of a turnpike road are required by statute to make the repairs, the parish, or other district, is not exonerated, but is liable to be indicted. In such cases, the tolls granted by the act are only an auxiliary and subordinate fund, and the persons whom the public have a right to look to, are the inhabitants of the district, who may apply for relief under the 23d section of the General Turnpike Act. R. v. Netherthong, 2 B. & A. 179; see also R. v. Oxfordshire, 4 B. & C. 194; R. v. Preston, 2 Lew. C. C. 193; R. v. Landsmere, *supra*, p. 536. Nor can other parties render themselves liable to an indictment for not repairing by *agreement*. Thus, an indictment against the corporation of Liverpool, stating that they were liable to repair a certain highway, by reason of an agreement with the owners of houses alongside of it, was held bad, because the inhabitants of the parish, who are *primâ facie* bound to repair all ways within their boundaries, cannot be discharged from their liability by an agreement with others. R. v. Mayor, &c., of Liverpool, 3 East, 86.

If the repairs are done by a parishioner, under an agreement with the parish, in consideration of his being excused his statute duty, that is virtually a repair by the parish. Per Lord Ellenborough, R. v. Wandsworth, 1 B. & Ald. 66.

Where by act of Parliament trustees are authorized to make a road from one point to another, the making of the entire road is a condition precedent to any part of it becoming a highway repairable by the public. An indictment charged a township with the non-repair of a highway; and it appeared in evidence, that the road in question was begun six years before, under a local turnpike act; that the trustees had

finished it all but about 300 yards at one end of the line, and one mile at the other (both out of the township), fenced what they had made, put up two turnpike-gates, and taken toll; that the road was convenient, much used by the public, and leading at each end [*546] into old, open and public highways; but it was *held by Hullock, B., that the indictment was premature, the trustees not having finished their road according to the act of Parliament, and consequently that it was no public highway. R. v. Hepworth, cited 3 B. & Adol. 110; 1 Lewin, C. C. 160. So where trustees, empowered by act of Parliament to make a road from A. to B. (being in length twelve miles), completed eleven miles and a half of such road to a point where it intersected a public highway; it was held, that the district in which the part so completed lay, was not bound to repair it R. v. Cumberworth, 3 B. & Ad. 108: 23 E. C. L. R., and see R. v. Paddington Vestry, 9 B. & C. 460: 17 E. C. L. R.; R. v. Hatfield, 4 A. & E. 156: 31 E. C. L. R.; R. v. Edge Lane, Id. 723; R. v. Cumberworth, Id. 731.

It was for some time a matter of doubt whether, where an individual dedicated a way to the public, and the public used such way, the parish in which it was situated was bound to repair it, without any adoption of it on their part. In the case of R. v. St. Benedict, 4 B. & Ald. 450: 6 E. C. L. R., an opinion was expressed by Bayley, J., that the parish was not liable; but this doctrine was denied in a late case, and it was held, that no distinct act of adoption was necessary, in order to make a parish liable to repair a public road; but that, if the road is public, the parish is of common right bound to repair it. R. v. Leake, 5 B. & Ad. 469: 27 E. C. L. R.; 2 Nev. & M. 583; R. v. Landsmere, 15 Q. B. 689: 69 E. C. L. R.; S. C. 19 L. J. M. C. 215, *supra*, p. 536; see also R. v. The Paddington Vestry, 9 B. & C. 456: 38 E. C. L. R. See now *ante*, p. 537.

Where a parish is situated partly in one county and partly in another, and a highway, lying in one of those parts, is out of repair, the indictment must be against the whole parish, and must be preferred in that county in which the ruinous part lies. R. v. Clifton, 5 T. R. 498. By the 5 & 6 Wm. 4, c. 50, s. 58, where a highway lies in two parishes, justices of the peace are to determine what parts shall be repaired by each; and by s. 59, parishes are bound to repair the part allotted to them. The same proceeding may be adopted in the case of highways repairable by bodies politic or corporate, or private persons, *ratione tenuræ*.

Where a question arises as to the road being within the boundaries of the parish, it is sometimes necessary to prove those boundaries, by giving in evidence the award of commissioners appointed to set them out. In such case, it must be shown that the award of the commissioners pursues their authority. By an inclosure act, commissioners were directed to fix the boundaries of a parish, and to advertise in a provincial newspaper such boundaries. The boundaries were also to be inserted in the award of the commissioners, and to be conclusive. The boundaries in the award varying from those in the newspaper, it was held, that the commissioners had not pursued their authority, and the award was not binding as to the boundaries of the parish. R. v. Washbrook, 4 B. & C. 732: 10 E. C. L. R. By a similar act, commissioners had power to settle the boundaries of certain parishes, upon giving certain previous notices to the parishes to be affected by the award. The highway in question never having been required by the parish to which it was allotted, the judge refused to admit the award in evidence, until the requisite notices were proved to have been given; and upon an application for a new trial, it was refused. R. v. Hastingfield, 2 M. & S. 558. Where two parishes are separated by a river, the *medium filum* is the boundary. R. v. Landulph, 1 Moo. & R. 393.

[*547] On the trial of an indictment for the non-repair of a highway, a *map of

the parish produced from the parish chest, which map was made under an inclosure act (which was a private act not printed), is not receivable in evidence to show the boundaries of the parish, without proof of the inclosure act. Per Erskine, J., R. v. Inhab. of Milton, 1 C. & K. 58 : 47 E. C. L. R. In that case it was proved by the surveyor, who made the map thirty-four years before the trial, that he laid down the boundaries of the parish from the information of an old man, then about sixty, who went round and showed them to him. The learned judge held, that the map would have been receivable as evidence of reputation, if it had been also proved that the old man was dead, but that, without proof of his death, it was not admissible.

Where a highway crosses the bed of a river which washes over it and leaves a deposit of mud, it seems the parish is not bound to repair that part. R. v. Landulph, 1 Moo. & R. 393. On an indictment for the non-repair of a highway, in the ordinary form, a parish cannot be convicted for not rebuildiog a sea-wall washed away by the sea, over the top of which the alleged way used to pass. R. v. Paul, 2 Moo. & R. 307.

Upon an indictment for non-repair of a public highway, it appeared that the way was an ancient highway. Eighteen years before the indicted parish wherein the road was situate was inclosed under the 6 & 7 Wm. 4, c. 115. Before the award the commissioners made an alteration in the original road by straightening and widening it, but the whole of the original road was comprehended in the existiog road as set out in the award. Both before and since the award, the parish had repaired the road, but no steps had ever been taken by the commissioners for putting the road into complete repair (see 41 Geo. 3, c. 109, ss. 8 & 9); nor was there any declaration by justices that it had been fully completed and repaired, and no proceedings had been taken under 5 & 6 Wm. 4, c. 50, s. 3, *supra*. The road passed through allotable land on both sides, except as to a small portion on one side, which was an old inclosure. It was held that the parish was not liable to repair this road. R. v. Inhab. of East Hagbourne, 1 Bell, C. C. 135; S. C. 28 L. J. M. C. 71.

Evidence that a parish did not put guard fences at the side of a road, is not receivable on an indictment which charges that the king's subjects could not pass as "they were wont to do," if no such fences existed before. R. v. Whitney, 7 C. & P. 208 : 32 E. C. L. R.

An indictment for non-repair of a highway, describing the way as immemorial, is not supported by proof of a highway extinguished as such sixty years before by an inclosure act, but since used by the public and repaired by the district charged. R. v. Westmark, 2 Moo. & R. 305.

Proof of liability to repair—inclosure.] Where the owner of lands not inclosed, next adjoining to a highway, incloses his land on both sides of the way, he is bound to make the road *a perfect good way*, and shall not be excused by making it as good as it was before the inclosure, if it were then defective; because, before the inclosure, the public used, where the road was bad, to go, for their better passage, over the fields adjoining, which liberty is taken away. And if the owner inclose on one side only, he is bound to repair the whole, if there be an ancient inclosure on the other side; but if there be not such an ancient inclosure, he is bound only to repair half; and upon *laying open the inclosure, he is freed, as seems, altogether from the [*548] liability to repair. Hawk. P. C. b. 1, c. 76, ss. 6, 7, 8; 3 Bac. Ab. Highways (F.); 1 Russ. by Grea. 358; Wellbeloved on Highways, 90; 2 Wm. Saund. 160 a, n. (12); Woolrych on Ways, 80. But where a highway is inclosed under the directions of an act of Parliament for dividing and inclosing common fields, the party in-

closing the way is not bound to repair R. v. Flecknow, 1 Burr. 461. And so also with regard to a road made in pursuance of a writ of *ad quod damnum*. Ex parte Venner, 3 Atk. 772; Hawk. P. C. b. 1, c. 76, s. 7.

As to the liability of an individual to repair a highway *ratione clausuræ*, see R. v. Sir J. W. Ramsden, 27 L. J. M. C. 296, where it was held that the liability fell upon the owner and not upon the occupier. It seems also that it only arises in the case of land inclosed abutting on an immemorial highway, and which but for the inclosure might have been used as a highway.

Proof of liability to repair—particular districts by custom.] Although *prima facie* the parish is bound to repair all the ways within the boundaries, yet other bodies or individuals may be liable to such repairs, to the exoneration of the parish. Thus a township, or other particular district, may, by custom, be liable to repair; and it is sufficient to state in the indictment, that the township has been used and accustomed to repair, and of right ought to repair. R. v. Ecclesfield, 1 B. & A. 348; R. v. West Riding of Yorkshire, 4 B. & A. 623: 6 E. C. L. R.; R. v. Heap, 2 Q. B. 128: 42 E. C. L. R. But where an indictment charged that the inhabitants of the townships of Bondgate in Auckland, Newgate in Auckland, and the borough of Auckland, in the parish of St. Andrew, Auckland, were immemorially liable to repair a highway in the town of Bishop Auckland in the parish of St. Andrew, Auckland, and no consideration was laid for such liability; the indictment was held bad in arrest of judgment, as not showing that the highway was within the defendant's district. But it was held to be no objection that the inhabitants of the three townships were charged conjointly. R. v. Inhab. of Auckland, 1 A. & E. 744: 28 E. C. L. R.

Where it appears that a township has been used immemorially to repair all roads within it, such township is placed, as to repairs, in the same situation as a parish, and cannot discharge itself from its liability without showing that some other persons, in certainty, are liable to the repairs. R. v. Hatfield, 4 B. & A. 75: 6 E. C. L. R. Where a new way is made within the limits of the township, and which, had the parish been bound to repair, must have been repaired by the parish, such way must be repaired by the township. R. v. Ecclesfield, 1 B. & A. 338; R. v. Netherthong, 2 B. & A. 179. It appears that the liability of a township, or other district, has its origin in *custom* rather than in *prescription;* a prescription being alleged in the person, a custom in the land or place; and the obligation to repair is of a local, and not of a personal nature. R v. Ecclesfield, 1 B. & A. 348. So it is said by Bayley, J., that a parish cannot be bound by prescription; for individuals in a parish cannot bind their successors. R. v. St. Giles, Cambridge, 5 M. & S. 260. The inhabitants of a township, or other district, cannot be charged to repair *ratione tenuræ;* for unincorporated inhabitants cannot, as inhabitants, hold lands. R. v. Machynlleth, 2 B. & C. 166: 9 E. C. L. R.

[*549] *To charge a township with liability by custom to repair all highways within it, which would otherwise be repairable by the parish comprising such township, it is necessary to prove that there are, or have been, ancient highways in the township. Without such proof, a jury may infer the custom from other evidence. As that the parish consists of five townships, one of which is the township in question; that four have always repaired their own highways; that no surveyor has ever been appointed for the parish, and that the township in question has repaired a highway lately formed within it. R. v. Barnoldswick, 4 Q. B. 449: 45 E. C. L. R. See also R. v. Midville, Ibid. 240.

Upon an indictment against the inhabitants of the township of H., for the non-

repair of a highway, a prior judgment of quarter sessions upon a presentment by a justice under the 13 Geo. 3, c. 78, for non-repair of the same highway by H., and which presentment alleged that the highway was in H., and that H. was liable to repair it,—it appearing by the judgment that two of the inhabitants of H. had appeared and pleaded guilty, and that a fine was imposed,—was held to be conclusive evidence that the highway was in H., and that H. was liable to repair it. R. v. Haughton, 1 El. & Bl. 501 : 72 E. C. L. R. ; S. C. 22 L. J. M. C. 89. Upon an appeal against the appointment of a surveyor of the highways for the township of K. N., the sessions found that the parish of M. consisted of two townships; that surveyors had been appointed for each; but latterly, to save expense, there had been two surveyors appointed for the parish at large. They likewise found that each acted as surveyor in his own township; that distinct rates had been made for each township, and applied distinctly to the repairs of the highways in each; and the surveyors kept distinct accounts (which were examined by the general vestry), and that the occupiers of lands had been rated, in respect of their occupation, to the repair of the highways of that township in which the houses they resided in were situate. Lord Tenterden said, that if there had been an indictment against either township, and an allegation that each township had immemorially repaired the roads within it, these facts would be sufficient evidence to support the averment. R. v. King's Newton, 1 B. & Ad. 826. On an issue, whether or not certain land, in a district repairing its own roads, was a common highway, it is admissible evidence of reputation (though slight), that the inhabitants held a public meeting to consider of repairing such way, and that several of them, since dead, signed a paper on that occasion, stating that the land was not a public highway; there being at the time no litigation on the subject. Barraclough v. Johnson, 8 A. & E. 99 : 35 E. C. L. R.; *ante*, p. 537.

It seems that the inhabitants of a district, not included within any parish, cannot be bound to repair the highways within such district. This point arose, but was not decided in the case of R. v. Kingsmoor, 2 B. & C. 190 : 9 E C. L. R., which was an indictment against an extra-parochial hamlet. The court held that it should have been shown on the face of the indictment that the hamlet neither formed part of, nor was connected with, any other larger district, the inhabitants of which were liable to the repair of the road in question. Upon this point, the judgment for the crown was reversed; but Best, J., observed, "I can find no authority for saying that anything but a parish can be charged. If the law authorizes no charge except upon parishes, places that are extra-parochial are not, by the general rule *of law, [*550] liable." See the observations on this case in Wellbeloved on Highways, 81.

Proof of liability to repair—corporations.] A corporation, sole or aggregate, may be bound by prescription or usage to repair a highway, without showing that it is in respect either of tenure or of any other consideration. Hawk. P. C. b. 1, c. 76, s. 8; R. v. St. Giles, Cambridge, 5 M. & S. 260. A corporation may be indicted in its corporate name for non-repair of a highway. R. v. Mayor, &c., of Liverpool, 3 East, 86; R. v. Birmingham & Gloucester Railway Co., 3 Q. B. 223 : 43 E. C. L. R.

Proof of liability to repair—private individuals] A private individual cannot be bound to repair a highway, except in respect of some consideration, and not merely by a general prescription; because no one, it is said, is bound to do what his ancestors have done, except for some special reason, as the having lands descending from such ancestors, which are held by such service, &c. Hawk. P. C. b. 1, c. 76, s. 8; 13 Rep. 33; R v. St. Giles, Cambridge, 5 M. & S. 260; Nichol v. Allen, 31 L. J.

Q. B. 43. Yet an indictment, charging a tenant in fee simple with being liable to repair, by *reason of the tenure of his land*, is sufficiently certain, without adding that his ancestors, whose estate he has, have always so done, which is implied in the above allegation. Hawk. P. C. b. 1, c. 76, s. 8. In order to exempt a parish, by showing that a private person is bound to repair, it must be shown that the burden is cast upon such other person, under an obligation equally durable with that which would have bound the parish, and which obligation must arise in respect of some consideration of a nature as durable as the burden. Per Lord Ellenborough, R. v. St. Giles, Cambridge, 5 M. & S. 260. Where lands, chargeable with the repairs of a bridge or highway, are conveyed to different persons, each of such persons is liable to the charge of all the repairs, and may have contribution from the others; for the law will not suffer the owner to apportion the charge, and thus to render the remedy for the public more difficult. Therefore, where a manor, thus charged, was conveyed to several persons, it was held that a tenant of any parcel, either of the demesnes, or of the services, was liable to the whole repairs. And the grantees are chargeable with the repairs, though the grantor should convey the lands discharged from the burden, in which case the grantee has his remedy over against the grantor. R. v. Duchess of Buccleugh, 1 Salk. 358; R. v. Buckeridge, 4 Mod. 48; 2 Saund. 159 (*n*); 1 Russ. by Grea. 358. Where a navigation company was bound under an act of Parliament to repair a highway, on an indictment for non-repair, a count alleging the liability to repair *ratione tenuræ* was held bad; but one alleging their liability under the act was held good. R. v. Sheffield Canal Comp. 13 Q. B. 913: 66 E. C. L. R; S. C. 19 L. J. M. C. 44.

Repairing a highway for a length of time will be evidence of a liability to repair *ratione tenuræ*. Thus, if a person charged as being bound to repair *ratione tenuræ*, pleads that the liability to repair arose from an encroachment which has been removed, and it appears that the road has been repaired by the defendant twenty-five years since the removal of the alleged encroachment, that is presumptive evidence that the defendant repaired *ratione tenuræ* generally, and renders it necessary for him to show [*551] the time when the encroachment was made. *R. v. Skinner, 5 Esp. 219; 1 Russ. by Grea. 359. In determining whether the act of repairing a way is evidence to prove a liability to repair *ratione tenuræ*, the nature of the repairs must be regarded. Thus it is said by Hullock, B., that an adjoining occupier, occasionally doing repairs for his own convenience to go and come, is no more like that sort of repair which makes a man liable *ratione tenuræ*, than the repair by an individual of a road close to his door, is to the repair of the road outside his gate. R. v. Allanson, 1 Lewin, C. C. 158. In R. v. Blackemore, 2 Den. C. C. R. 410; S. C. 21 L. J. M. C. 60, evidence was given of the conviction of a former owner and occupier of the lands in respect of which the liability was said to arise, for the non-repair of the same highway, which showed that he had pleaded guilty to a presentment against him, alleging his liability to repair the highway. Repairs by occupiers of the same lands subsequently to this conviction were are also proved; and evidence was given, that the defendant purchased these lands after public notice of the liability to repair the highway, and that he was the owner and occupier of the same; it was held that there was evidence to go to the jury of immemorial usage and liability *ratione tenuræ*. An indictment for the non-repair of a highway in the parish of A., alleging the liability by reason of the tenure of certain lands in the said parish, is not supported by proof of a liability to repair a road extending through A. and other parishes by reason of the tenure of a farm made up of land in A. and the other parishes. R. v. Mizen, 2 Moo. & R. 382.

By the 5 & 6 Wm. 4, c. 50, s. 62, highways repaired by parties *ratione tenuræ*, may be made parish highways on payment of an annual sum, to be fixed by the justices.

Proof of the defence—parish.] Upon an indictment against a parish for not repairing, the defendants may show, under the plea of not guilty, either that the way in question is not a highway, or that it does not lie within the parish, or that it is not out of repair; for all these are facts which the prosecutor must allege in the indictment, and prove under the plea of not guilty. 2 Saund. 158 n. (3); 1 Russ. by Grea. 366. But where a parish seeks to discharge itself from its liability by imposing the burden of repair upon others, this defence must be specially pleaded, and cannot be given in evidence under the general issue. In such special plea, the parish must show with certainty who is liable to the repairs. R. v. St. Andrews, 1 Mod. 112; 3 Salk. 183; 1 Vent. 256; R. v. Harnsey, Carth. 212; Fort. 254; Hawk. P. C. b. 1, c. 76, s. 9; see also R. v. Eastington, 5 A. & E. 765, where a plea alleging that a particular township had been accustomed to repair all roads within it, "which otherwise would be repaired by the parish at large," was held bad, in arrest of judgment, because it did not aver that the highway was one which, but for the custom, would be repairable by the parish at large, and did not show what party other than the defendants was liable to repair. But where the burden of repairs was transferred from the parish by act of Parliament, Lord Ellenborough held that this might be shown under a plea of not guilty. R. v. St. George, 3 Campb. 222. Where the parish pleads specially that others are bound to repair, the plea admits the way to be a highway, and the defendants cannot, under such plea, give evidence that it is not a highway. R. v. Brown, 11 Mod. 273. In order to prove the *liability of a parish [*552] to repair, when denied under a special plea, the prosecutor may give in evidence a conviction obtained against the same parish upon another indictment for not repairing, and whether such judgment was after verdict or by default, it will be conclusive evidence of the liability of the whole parish to repair. R. v. St. Pancras, Peake, 219; R. v. Whitney, 7 C. & P. 208: 32 E. C. L. R. But *fraud* will be an answer to such evidence. Peake, 219. A record of *acquittal* is not admissible as evidence of the non-liability of the parish acquitted, for it might have proceeded upon other grounds than the non-liability of the parish to repair. Ibid. But where an indictment has been preferred against a parish consisting of several townships, and a conviction has been obtained, but it appears that the defence was made and conducted entirely by the district in which the way lay, without the privity or consent of the other districts, the indictment will be considered as in substance an indictment against that district only, and the others will be permitted to plead the prescription to a subsequent indictment for not repairing the highways in that parish. 2 Saund. 158, c. (*n*); R. v. Townsend, Doug. 421. On an indictment for not repairing, against the parish of Eardisland, consisting of three townships, Eardisland, Burton, and Hardwicke, where there was a plea on the part of the township of Burton, that each of the three townships had immemorially repaired its own highways separately, it was held, that the records of indictments against the parish generally, for not repairing highways situate in the township of Eardisland and the township of Hardwicke, with general pleas of not guilty, and convictions thereupon, were *primâ facie* evidence to disprove the custom for each township to repair separately, but that evidence was admissible to show that these pleas of not guilty were pleaded only by the inhabitants of the townships of Eardisland and Hardwicke, without the privity of Burton. R. v. Eardisland, 2 Campb. 494.

Proof for the defence—district or private individual.] Where a particular district, not being a parish, or where a private individual, by reason of tenure, is indicted for not repairing a highway, as the prosecutor is bound to prove the special ground of their liability, viz., custom or tenure, under the plea of not guilty, so the defendants are at liberty, under that plea, to show that no special grounds exist. In such case, it is not necessary for the defendants, after disproving their own liability, to go further, and prove the liability of others. But if, as in the case of a parish, they choose, though unnecessarily, to plead the special matter, it has been held that it is not sufficient to traverse their own liability, but that they must show in particular who is bound to repair. R. v. Yarnton, 1 Sid. 140; R. v. Hornsey, Carth. 213; 2 Saund. 159 a, n. (1); 1 Russ. by Grea. 367. Where charged *ratione tenuræ*, the defendant may show that the tenure originated within the time of memory. R. v. Hayman, M. & M. 401: 22 E. C. L. R. It has been held by Maule, J., that evidence of reputation is not admissible to show a liability in the occupiers of land to repair a road *ratione tenuræ*. R. v. Wavertree, 2 Moo. & R. 353. But this case must be considered as overruled by R. v. Bedford, 24 L. J. Q. B. 81, *supra*, p. 318. Where the land over which the road passed was washed away by the sea, the liability [*553] of the defendant, *charged *ratione tenuræ*, was held to have ceased. R. v. Bamber, 5 Q. B. 279.

Particulars of the highways obstructed, &c.] On an indictment for obstructing divers horse and carriage ways, and footpaths, Parke, B., upon the production of an affidavit from the attorney for the defendant, that he was unable to understand all the precise tracks indicted, made an order for the delivery of particulars of the ways in question, which were nine in number, seven described generally as highways, and two described as footways. R. v. Marquis of Downshire, 4 A. & E. 699: 31 E. C. L. R.; see *supra*, p. 178.

Costs, &c.] By the 5 & 6 Wm. 4, c. 50, s. 98, the court before whom any indictment for not repairing highways is preferred may award costs to the prosecutor, to be paid by the person so indicted, if it shall appear to the said court that the defence made to such indictment was frivolous and vexatious. By sec. 99, presentments on account of highways or turnpike roads being out of repair, are abolished. See, as to costs, Reg. v. Inhab. of Hickling, 7 Q. B. 890: 53 E. C. L. R.; S. C. 15 L. J. M. C. 23; Reg. v. Down Holland, 15 L. J. M. C. 25; R. v. Clarke, 5 Q. B. 887: 48 E. C. L. R.; see Reg. v. Inhab. of Yorkhill, 9 C. & P. 218: 38 E. C. L. R.; Reg. v. Inhab. of Chedworth, 9 C. & P. 285, and 1 Russ. by Grea. 374 (*n*); Reg. v. Inhab. of Preston, 1 C. & K. 137: 47 E. C. L. R.; Reg. v. Merionethshire, 6 Q. B. 343: 51 E. C. L. R.; Reg. v. Inhab. of Heanor, 6 Q. B. 745; Reg. v. Inhab. of Pembridge, 3 Q. B. 901: 43 E. C. L. R.; 3 G. & D. 5; Reg. v. Inhab. of Paul, 2 Moo. & R. 307, and Reg. v. Inhab. of Chilicombe, therein cited, p. 311; Reg. v. Inhab. of Great Broughton, 2 Moo. & R. 444. See further, title Bridges.

The amount of costs must be ascertained and ordered by the same sessions; the sessions cannot refer the costs to be taxed by their officer after the sessions. R. v. Lambeth, 3 C. L. R. 35.

In Ireland, the 8 Anne, c. 5, s. 4, made perpetual by 4 Geo. 3, c. 9, provides that if any indictment or presentment be against any person or persons for not repairing any highways, causeways, pavements, or bridges, and the right and title to repair the same shall come in question, upon a suggestion to that effect and an affidavit made of the truth thereof, a *certiorari* may be granted to remove the same into the Court of

Queen's Bench, provided that the party or parties prosecuting such *certiorari* shall find two manucaptors, to be bound in a recognizance with condition as aforesaid.

The statutes in Ireland which authorize the making and repairing of roads and bridges at the expense of the respective counties, are the 19 & 20 Geo. 3, c. 41; 36 Geo. 3, cc. 36, 55; 37 Geo. 3, c. 35; 45 Geo. 3, c. 43; 46 Geo. 3, c. 96; 49 Geo. 3, c. 84; 50 Geo. 3, c. 29; 53 Geo. 3, cc. 77, 146; 59 Geo. 3, c. 84; 6 Geo. 4, c. 101; 1 & 2 Wm. 4, c. 33; 3 & 4 Wm. 4, c. 78. See also, on the subject of highways in Ireland, Gabbett's Crim. Law of I., Book 1, c. 39.

New trial.] It is now conclusively settled on an indictment for nuisance to a highway, that inasmuch as if there had been a verdict of *guilty*, the defendant would have been liable to fine and imprisonment, *and the right is not bound, the court [*554] will not grant a new trial. R. v. Russell, 3 El. & Bl. 943: 77 E. C. L. R.; S. C. 23 L. J. M. C. 173; R. v. Johnson, 29 L. J. M. C. 133.

It has, however, long been the practice on an indictment against parishes for the non-repair of highways, in which the consequences are not penal in the sense that proceedings against an individual are penal, to suspend the judgment, upon an application on the part of the prosecution, R. v. Sutton, 5 Barn. & Ad. 52: 27 E. C. L. R., if it is considered necessary that a new indictment should be preferred. And the present practice is, instead of resorting to this indirect method, to grant a new trial in similar cases. See R. v. Russell, *supra*. In one case, R. v. Chorley, 12 Q. B. 515: 64 E. C. L. R., a new trial was granted after an acquittal on an indictment for a nuisance, but that decision is explained in R. v. Russell, as resting on the consideration that there the matter had resolved into a pure question of civil right. Perhaps it can scarcely now be considered as an authority. *Vide supra*, p. 215.

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*HOMICIDE. [*555]

THOSE homicides which are felonies, viz., murder and manslaughter, will, for the convenience of reference, be treated of under separate heads; but as the shades between the various kinds of homicide are in many cases very faint, and require the circumstances to be stated at large, it has been thought better to collect all the decisions under one head, viz., that of *Murder*, in order to avoid repetition, and to this part of the work, therefore, the reader is referred on the subject of homicide in general. It will be useful, however, in this place, to distinguish the nature of the different kinds of homicide, not amounting to felony.

Homicides not felonious may be divided into three classes, justifiable homicide, excusable homicide, and homicide by misadventure.

Justifiable homicide is where the killing is in consequence of an imperious duty prescribed by law, or is owing to some unavoidable necessity induced by the act of the party killed, without any manner of fault in the party killing. 1 East, P. C. 219; Hawk. P. C. b. 1, c. 28, ss. 1, 22.

Excusable homicide is where the party killing is not altogether free from blame, but the necessity which renders it excusable, may be said to be partly induced by his own act. Formerly in this case it was the practice for the jury to find the fact specially, and upon certifying the record into chancery, a pardon issued, of course, under the statute of Gloucester, c. 9, and the forfeiture was thereby saved. But latterly it was usual for the jury to find the prisoner not guilty. 1 East, P. C. 220.

And now by the 24 & 25 Vict. c. 100, s. 7, "no punishment or forfeiture shall be incurred by any person who shall kill another by misfortune or in his own defence, or in any other manner without felony."

Homicide by *misadventure* is where a man doing a lawful act, without any intention of bodily harm, and after using proper precautions to prevent danger, unfortunately kills another person. The act upon which the death ensues, must be lawful in itself, for if it be *malum in se*, the case will amount to felony, either murder or manslaughter, according to the circumstances. If it be merely *malum prohibitum*, as (formerly) the shooting at game by an unqualified person, that will not vary the degree of the offence. The usual examples under this head, are—1, where death ensues from innocent recreations; 2, from moderate and lawful correction *in foro domestico;* and 3, from acts lawful or indifferent in themselves, done with proper and ordinary caution. Homicide by *chance-medley* is strictly where death ensues from a combat between the parties upon a sudden quarrel; but it is frequently confounded with misadventure or accident. 1 East, P. C. 221.

HOUSEBREAKING, *see* DWELLING-HOUSE.

[*556] *ILL-TREATING APPRENTICES, SERVANTS, AND HELPLESS PERSONS.

In case of apprentices or servants, 24 & 25 Vict. c. 100, ... 556
children of tender years, ... 557
Lunatics, &c., ... 558

In cases of apprentices or servants.] THE 24 & 25 Vict. c. 100, s. 26, replacing the 14 & 15 Vict. c. 11, s. 1, enacts, that "Whosoever, being legally liable either as a master or a mistress to provide for any apprentice or servant, necessary food, clothing, or lodging, shall wilfully and without lawful excuse refuse or neglect to provide the same, or shall unlawfully or maliciously do or cause to be done any bodily harm to any such apprentice or servant, so that the life of such apprentice or servant shall be endangered, or the health of such apprentice or servant shall have been or shall be likely to be permanently injured, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labor.

See as to costs, 24 & 25 Vict. c. 100, ss. 74, 75, and 77, *supra*, p. 221.

By sect. 73 of the same act, "Where any complaint shall be made of an offence against s. 26 of this act, or of any bodily injury inflicted upon any person under the age of sixteen years, for which the party committing it is liable to be indicted, and the circumstances of which offence amount in point of law to a felony, or an attempt to commit a felony, or an assault with intent to commit a felony, and two justices of the peace, before whom such complaint is heard, shall certify under their hands, that it is necessary for the purposes of public justice, that the prosecution should be conducted by the guardians of the union or place, or where there are no guardians, by the overseers of the poor of the place, in which the offence shall be charged to have been committed, such guardians or overseers, as the case may be, upon personal ser-

vice of such certificate, or a duplicate thereof, upon the clerk of such guardians, or upon any one of such overseers, shall conduct the prosecution, and shall pay the costs, reasonably and properly incurred by them therein, so far as the same shall not be allowed to them under any order of any court, out of the common fund of the union, or out of the funds in the hands of the guardians or overseers, as the case may be; and when there is a board of guardians, the clerk or some other officer of the union or place, and where there is no board of guardians, one of the overseers of the poor, may, if such justices think it necessary for the purposes of public justice, be bound over to prosecute."

It has been held, that a master is not bound by law to furnish medical advice for his servant; but that it is otherwise in the case *of an apprentice, and [*557] that a master is bound, during the illness of his apprentice, to furnish him with proper medicines.

In cases of children of tender years.] If a person be under an obligation to support a child, an indictment charging a breach of such duty must aver that an injury was done to the child thereby. This rule was laid down by Parke, B., as that to be gathered from the authorities, in R. v. Hogan, 2 Den. C. C. R. 277; S. C. 20 L. J. M. C. 219. In R. v. Philpott, 1 Dears. C. C. R. 179; S. C. 22 L. J. M. C. 113, this rule was acted upon by the Court of Criminal Appeal. The indictment in that case was against the mother of the child, and stated that "she did unlawfully and wilfully neglect to support and maintain the said infant child or to furnish the said infant child with necessary and proper food and clothing, and did then unlawfully and wilfully desert and abandon the said infant child, and did leave the said infant child without proper food or clothing, &c., by reason of which said unlawful and wilful neglect, desertion, and abandonment, the said infant child then became and was *greatly injured and weakened.*" It was held, that these latter words were material, and that they were not sufficiently proved by evidence; "that the child had suffered injury, but not to any serious extent." In delivering the judgment of the court, Jervis, C. J., said, "In order to make out the offence, there must be an averment and proof that injury was done to the child's health. . . . The evidence shows that the witness was of opinion that the child had suffered some injury, but not to any serious extent. The court are of opinion that a degree of injury, 'to some, but not to any serious extent,' is not sufficient to constitute an offence of this description. We think we may adopt the language of the judges in R. v. Friend (Russ. & Ry. 20), that in order to constitute an offence indictable as a misdemeanor, it is necessary to state a breach of duty or contract in refusing or neglecting to provide for an infant of tender years unable to provide for itself, and that the health of the infant has been injured by the neglect. The legislature has, to a certain extent, given a guide to the amount of injury necessary to constitute the offence in the statute 14 & 15 Vict. c. 11. In section 1, it makes indictable as a misdemeanor the offence of not finding apprentices and young persons with proper food, clothing, and lodging, 'whereby the health of such person shall have been or shall be likely to be permanently injured;' making the offence then to depend on the permanent injury, or on the injury to the health." See 24 & 25 Vict. c. 100, s. 26, *supra;* and see also R. v. Pellam, 8 Q. B. 959: 55 E. C. L. R.; S. C. 15 L. J. M. C. 105, and R. v. Renshaw, 11 Jur. 615.

The point whether a person is indictable for abandoning a child of tender years, so that such child thereby becomes chargeable to a parish, has been brought before the Court of Criminal Appeal in two cases: R. v. Cooper, 1 Den. C. C. R. 459; S. C. 18 L. J. M. C. 168, and R. v. Hogan, 2 Den. C. C. R. 277; S. C. 20 L. J. M. C. 219;

but in the former case the indictment did not allege that the child was not legally settled in the parish in which it had been left by its mother; and in the latter, it was held to be a fatal objection to the indictment, that it did not contain an averment that the prisoner had the means of supporting the child.

A single woman, the mother of an infant child, was indicted for neglecting to fur- [*558] nish it with food, the indictment alleging that she *was able and had the means to do so. There was no evidence of the actual possession of means by the mother; but it was proved that she could have applied to the relieving officer of the union, and that if she had so applied she would have been entitled to and would have received relief, adequate to the due support and maintenance of herself and child. The prisoner having been convicted, the Court of Criminal Appeal quashed the conviction. The case was not argued by counsel, but the court in giving judgment said, "The allegation in the indictment is, that the prisoner being able and having the means neglected to maintain her child. We are of opinion that there was no evidence that she had the means of supporting it, and therefore that the allegation is not made out. To show that she might by possibility have obtained the necessary means is not sufficient."

See also as to aggravated assaults on women and children, 24 & 25 Vict. c. 100, s. 43.

Lunatics, &c.] The 16 & 17 Vict. c. 96, s. 9, enacts that "If any superintendent, officer, nurse, attendant, servant, or other person employed in any registered hospital, or licensed house, or any person having the care or charge of any single patient, in any way abuse, or ill-treat, or wilfully neglect, any patient in such hospital, or house, or such single patient; or if any person detaining, or taking, or having the care or charge, or concerned in taking part in the custody, care, or treatment, of any lunatic or person alleged to be a lunatic, in any way abuse, ill-treat, or wilfully neglect such lunatic, or alleged lunatic, he shall be guilty of a misdemeanor, and shall be subject to indictment for every such offence, or to forfeit for every such offence, on a summary conviction thereof, before two justices, any sum not exceeding 20*l.*"

A husband having been tried and convicted under this statute, for that he, having the care and charge of his wife, a lunatic, did abuse and ill-treat her; upon a case reserved, the court held that he was not a person having the care and charge of a lunatic within the meaning of the statute, which was not intended to apply to persons whose care or charge arose from natural duty. R. v. Rundle, 1 Dears. C. C. R. 432; S. C. 24 L. J. M. C. 129.

[*559] *INCITING TO MUTINY.

By 37 Geo. 3, c. 70, s. 1 (E.), and the 37 Geo. 3, c. 40, s. 1 (I.), (which acts were revised and made perpetual by the 57 Geo. 3, c. 7, U. K.), after reciting that divers wicked and evil-disposed persons, by the publication of written or printed papers, and by malicious and advised speaking, had of late industriously endeavored to seduce persons serving in his majesty's forces, by sea and land, from their duty and allegiance to his majesty, and to incite them to mutiny and disobedience, it is enacted, "That any person who shall maliciously and advisedly endeavor to seduce any person or persons serving in his majesty's forces, by sea or land, from his or their duty and

allegiance to his majesty, or to incite or stir up any such person or persons to commit any act of mutiny, or to make, or endeavor to make, any mutinous assembly, or to commit any traitorous or mutinous practice whatsoever, shall, on being legally convicted of such offence, be adjudged guilty of felony [and shall suffer death, as in case of felony, without benefit of clergy]."

Sec. 2 provides and enacts, "That any offence committed against this act, whether committed on the high seas or within that part of Great Britain called England, shall and may be prosecuted and tried before any court of oyer and terminer, or gaol delivery, for any county of that part of Great Britain called England, in such manner and form as if the said offence had been therein committed."

By the 7 Wm. 4 and 1 Vict. c. 91 (U. K.), s. 1, after reciting (*inter alia*) the above statutes, it is enacted, "That if any person shall, after the commencement of this act, be convicted of any of the offences hereinbefore mentioned, such person shall not suffer death, or have sentence of death awarded against him or her for the same, but shall be liable, at the discretion of the court, to be transported beyond the seas for the term of the natural life of such persons, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years."

By s. 2, hard labor and solitary confinement may be awarded in cases of imprisonment.

The annual mutiny acts make it a misdemeanor for every person who shall, in any part of her majesty's dominions, directly or indirectly persuade any soldier to desert.

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*LARCENY. [*560]

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Interpretation of terms.] By the 24 & 25 Vict. c. 96, s. 1, "In the interpretation of this act, the term 'document of title to goods,' shall include any bill of lading, India warrant, dock warrant, warehouse-keeper's certificate, warrant or order for the delivery or transfer of any goods or valuable thing bought and sold, note or any other document used in the ordinary course of business, as proof of the possession or control of goods, or authorizing or purporting to authorize, either by indorsement or by delivery, the possessor of such documents to transfer or receive any goods thereby represented or therein mentioned or referred to.

"The term 'document of title to lands,' shall include any deed, map, paper, or parchment, written or printed, or partly written and partly printed, being or containing evidence of the title, or any part of the title, to any real estate or to any interest in or out of any real estate.

"The term 'valuable security,' shall include any order, exchequer acquittance, or other security whatsoever entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of the United Kingdom, or of Great Britain, or of Ireland, or of any foreign state, or in any fund of any body corporate, company, or society, whether within the United Kingdom, or in any foreign state or country, or to any deposit in any bank, and shall also include any debenture, deed, bond, bill, note, warrant, order, or other security whatsoever for money or for payment of money, whether of the United Kingdom, or of Great Britain, or of Ireland, or of any foreign state, and any document of title to lands or goods as hereinbefore defined.

"The term 'property,' shall include every description of real and personal property, money, debts, and legacies, and all deeds and instruments relating to or evidencing the title or right to any property, or giving a right to recover or receive any money or goods, and shall also include not only such property as shall have been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise.

"For the purpose of this act, the night shall be deemed to commence at nine of the clock in the evening of each day, and to conclude at six of the clock in the morning of the next succeeding day."

Distinction between grand and petit larceny abolished.] By s. 2, "Every larceny, [*562] whatever be the value of the property stolen, shall be *deemed to be of the same nature, and shall be subject to the same incidents in all respects as grand larceny was before the twenty-first day of June, one thousand eight hundred and

twenty-seven; and every court whose power as to the trial of larceny was before that time limited to petty larceny, shall have power to try every case of larceny, the punishment of which cannot exceed the punishment hereinafter mentioned for simple larceny, and also to try all accessories to such larceny."

Bailees fraudulently converting property.] By s. 3, "Whosoever, being a bailee of any chattel, money, or valuable security, shall fraudulently take or convert the same to his own use or the use of any person other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, shall be guilty of larceny, and may be convicted thereof upon an indictment for larceny; but this section shall not extend to any offence punishable on summary conviction."

Punishment for simple larceny.] By s. 4, "Whosoever shall be convicted of simple larceny, or of any felony hereby made punishable like simple larceny, shall (except in the cases hereinafter otherwise provided for) be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping."

Three larcenies within six months may be charged in one indictment.] By s. 5, "It shall be lawful to insert several counts in the same indictment against the same person for any number of distinct acts of stealing, not exceeding three, which may have been committed by him against the same person within the space of six months from the first to the last of such acts, and to proceed thereon for all or any of them."

Election.] By s. 6, "If, upon the trial of any indictment for larceny, it shall appear that the property alleged in such indictment to have been stolen at one time was taken at different times, the prosecutor shall not by reason thereof be required to elect upon which taking he will proceed, unless it shall appear that there were more than three takings, or that more than the space of six months elapsed between the first and the last of such takings; and in either of such last-mentioned cases the prosecutor shall be required to elect to proceed for such number of takings, not exceeding three, as appear to have taken place within the period of six months from the first to the last of such takings."

Larceny after a previous conviction for felony.] By s. 7, "Whosoever shall commit the offence of simple larceny after a previous conviction for felony, whether such conviction shall have taken place upon an indictment or under the provisions of the act passed in the session held in the 18 & 19 years of Queen Victoria, chapter one hundred and twenty-six, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding ten years, and not less than three years,—or to be imprisoned for any *term not exceeding two years, with or without [*563] hard labor, and with or without solitary confinement, and, if under the age of sixteen years, with or without whipping."

Larceny after a conviction for misdemeanor.] By s. 8, "Whosoever shall commit the offence of simple larceny, or any offence hereby made punishable like simple larceny, after having been previously convicted of any indictable misdemeanor punishable under this act, shall be liable, at the discretion of the court, to be kept in

penal servitude for any term not exceeding seven years, and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and if a male under the age of sixteen years, with or without whipping."

Larceny after two summary convictions.] By s. 9, "Whosoever shall commit the offence of simple larceny, or any offence hereby made punishable like simple larceny, after having been twice summarily convicted of any of the offences punishable upon summary conviction, under the provisions contained in the act of the session held in the seventh and eighth years of King George the Fourth, chapter twenty-nine, or the act of the same sessions, chapter thirty, or the act of the ninth year of King George the Fourth, chapter fifty-five, or the act of the same year, chapter fifty-six, or the act of the sessions held in the tenth and eleventh years of Queen Victoria, chapter eighty-two, or of the act of the session held in the eleventh and twelfth years of Queen Victoria, chapter fifty-nine, or in sections three, four, five, and six of the act of the sessions held in the fourteenth and fifteenth years of Queen Victoria, chapter ninety-two, or in this act, or the act of this session, intituled an act to consolidate and amend the statute law of England and Ireland relating to malicious injuries to property (whether each of the convictions shall have been in respect of an offence of the same description or not, and whether such convictions or either of them shall have been or shall be before or after the passing of this act), shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping."

Larceny by servant.] By s. 67, "Whosoever, being a clerk or servant, or being employed for the purpose or in the capacity of a clerk or servant, shall steal any chattel, money, or valuable security belonging to or in the possession or power of his master or employer, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping."

Larceny by persons in the Queen's service or in the police.] By s. 69, "Whosoever being employed in the public service of her majesty, or being a constable or other [*564] person employed in the police *of any county, city, borough, district, or place whatsoever, shall steal any chattel, money, or valuable security belonging to or in the possession or power of her majesty, or intrusted to or received or taken into possession by him by virtue of his employment, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the *court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Conviction for larceny on indictment for embezzlement, and vice versâ.] By s. 72, "If upon the trial of any person indicted for embezzlement, or fraudulent application

or disposition as aforesaid, it shall be proved that he took the property in question in any such manner as to amount in law to larceny, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person is not guilty of embezzlement, or fraudulent application or disposition, but is guilty of simple larceny, or of larceny as a clerk, servant, or person employed for the purpose or in the capacity of a clerk or servant, or as a person employed in the public service, or in the police, as the case may be; and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such larceny; and if upon the trial of any person indicted for larceny it shall be proved that he took the property in question in any such manner as to amount in law to embezzlement, or fraudulent application or disposition as aforesaid, he shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that such person is not guilty of larceny, but is guilty of embezzlement, or fraudulent application or disposition, as the case may be, and thereupon such person shall be liable to be punished in the same manner as if he had been convicted upon an indictment for such embezzlement, fraudulent application or disposition; and no person so tried for embezzlement, fraudulent application or disposition, or larceny as aforesaid, shall be liable to be afterwards prosecuted for larceny, fraudulent application or disposition, or embezzlement, upon the same facts."

Venue.] By s. 114, "If any person shall have in his possession in any one part of the United Kingdom any chattel, money, valuable security, or other property whatsoever, which he shall have stolen or otherwise feloniously taken in any other part of the United Kingdom, he may be dealt with, indicted, tried, and punished for larceny or theft in that part of the United Kingdom where he shall so have such property, in the same manner as if he had actually stolen or taken it in that part; and if any person in any one part of the United Kingdom shall receive or have any chattel, money, or valuable security, or other property whatsoever which shall have been stolen or otherwise feloniously taken in any other part of the United Kingdom, such person knowing such property to have been stolen or otherwise feloniously taken, he may be dealt with, indicted, tried, and punished for such offence in that part of the United Kingdom where he shall so receive or have such property, in the same manner as if it had been originally stolen or taken in that part."

**Larceny of property of partners, &c.*] By the 7 Geo. 4, c. 64, s. 14, [*565] (the 9 Geo. 4, c. 54, s. 28, I.), in order to remove the difficulty of stating the names of all the owners of property in the case of partners and other joint owners, it is enacted, that, "in any indictment or information for any felony or misdemeanor, wherein it shall be requisite to state the ownership of any property whatsoever, whether real or personal, which shall belong to or be in the possession of more than one person, whether such persons be partners in trade, joint-tenants, parceners, or tenants in common, it shall be sufficient to name one of such persons, and to state such property to belong to the person so named, and another or others, as the case may be; and whenever, in any indictment or information for any felony or misdemeanor, it shall be necessary to mention, for any purpose whatsoever, any partners, joint-tenants, parceners, or tenants in common, it shall be sufficient to describe them in the manner aforesaid; and the provision shall be construed to extend to all joint-stock companies and trustees."

Under a statute of the same session, the 7 Geo. 4, c. 46, s. 9, in indictments or informations by or on behalf of joint-stock banking copartnerships, for stealing or

embezzling money, goods, effects, bills, notes, securities, or other property belonging to them, or for any fraud, forgery, crime, or offence committed against or with intent to injure or defraud such copartnership, the money, &c., may be stated to be the property of, and the intent may be laid to defraud any one of the public officers of such copartnership, and the name of any one of their public officers may be used in all indictments or informations, where it otherwise would be necessary to name the person forming the company.

The 7 Geo. 4, c. 46, was amended and continued by the 1 & 2 Vict. c. 96, which was made perpetual by the 5 & 6 Vict. c. 85, and under which a shareholder in a joint-stock banking company may be indicted for stealing or embezzling the goods or money of the company, it being laid as the property of a public officer of the company, duly appointed and registered under the acts.

Larceny of property of counties, &c.] By the 7 Geo. 4, c. 64, s. 15, "In any indictment or information for any felony or misdemeanor committed in, upon, or with respect to any bridge, court, gaol, house of correction, infirmary, asylum, or other building, erected or maintained in whole, or in part, at the expense of any county, riding, or division, or on or with respect to any goods or chattels whatsoever, provided for or at the expense of any county, riding, or division, to be used for making, altering, or repairing any bridge, or any highway, at the ends thereof, or any court or other such building as aforesaid, or to be used in or with any such court or other building, it shall be sufficient to state any such property, real or personal, to belong to the inhabitants of such county, riding, or division; and it shall not be necessary to specify the names of any of such inhabitants." The 9 Geo. 4, c. 54, s. 29 (I.), contains a somewhat similar enactment.

Larceny of goods for the use of the poor.] By the 7 Geo. 4, c. 64, s. 16, with respect to the property of parishes, townships, and hamlets, it is enacted, that, "In any indictment or information for any felony or misdemeanor committed in, upon, or [*566] with respect to *any workhouse, or poorhouse, or on or with respect to any goods or chattels whatsoever, provided for the use of the poor of any parish or parishes, township or townships, hamlet or hamlets, place or places, or to be used in any workhouse or poorhouse in or belonging to the same, or by the master or mistress of such workhouse or poorhouse, or by any workmen or servants employed therein, it shall be sufficient to state any such property to belong to the overseers of the poor for the time being of such parish or parishes, township or townships, hamlet or hamlets, place or places, and it shall not be necessary to specify the names of all or any of such overseers; and in any indictment or information for any felony or misdemeanor committed on, or with respect to any materials, tools, or implements provided for making, altering, or repairing any highway within the parish, township, hamlet, or place, otherwise than by the trustees or commissioners of any turnpike-road, it shall be sufficient to aver that any such things are the property of the surveyor or surveyors of the highways for the time being of such parish, township, hamlet, or place, and it shall not be necessary to specify the name or names of any such surveyor or surveyors.

By the 12 & 13 Vict. c. 103, s. 15, it is provided, that, "in respect of any indictment or other criminal proceeding every collector or assistant overseer appointed under the authority of any order of the poor law commissioners or the poor law board, shall be deemed and taken to be the servant of the inhabitants of the parish whose money or other property he shall be charged to have embezzled or stolen, and shall

be so described; and it shall be sufficient to state such money or property to belong to the inhabitants of such parish, without the names of any such inhabitants being specified."

Larceny of property of trustees of turnpikes.] By the 7 Geo. 4, c. 64, s. 17, with respect to property under turnpike trusts, it is enacted, that, "in any indictment or information for any felony or misdemeanor committed on or with respect to any house, building, gate, machine, lamp, board, stone, post, fence, or other thing erected or provided in pursuance of any act of Parliament for making any turnpike road, or any of the conveniences or appurtenances thereunto respectively belonging, or any materials, tools, or implements provided for making, altering, or repairing any such road, it shall be sufficient to state any such property to belong to the trustees or commissioners of such road, and it shall not be necessary to specify the names of any such trustees or commissioners."

Larceny of property of commissioners of sewers.] By the 7 Geo. 4, c. 64, s. 18, with respect to property under commissioners of sewers, it is enacted, that "in any indictment or information for any felony or misdemeanor committed on or with respect to any sewer or other matter within or under the view, cognizance, or management of any commissioners of sewers, it shall be sufficient to state any such property to belong to the commissioners of sewers within or under whose view, cognizance, or management, any such things shall be, and it shall not be necessary to specify the names of any of such commissioners."

Larceny of property of friendly societies, &c.] By the 18 & 19 *Vict. c. [*567] 63, s. 18, the moneys, goods, chattels, securities for money, and all other effects whatever, belonging to any friendly society, may be described to be the property of the trustees of the society for the time being, in their proper names, without further description. So by the 9 Geo. 4, c. 92, s. 8, the moneys, goods, chattels, and effects and securities for money, or other obligatory instruments and evidences or muniments belonging to any savings bank may be stated to be the property of the trustee or trustees of such institution for the time being, in his, her, or their proper names, without further description. So by the 4 & 5 Wm. 4, c. 23, for the establishment of loan societies in England and Wales (s. 4), the moneys, goods, chattels, and effects belonging to any such institution, may be stated to be the property of the trustee or trustees thereof for the time being, in his or their proper name, without further description.

Definition of larceny.] The definitions of larceny to be found in the various books are mostly derived from Bracton, lib. iii, c. 32, p. 150; "*furtum est tractatio rei alienæ fraudulenta, animo furandi, invito illo cujus illa res fuerit.*" This is evidently derived from the definition of *furtum* given by the Roman law, Inst. lib. iv, tit. 1, s. 1; "*furtum est contractatio fraudulosa lucri faciendi causâ vel ipsius rei, vel etiam usus ejus possessionisve.*" The latter, however, is not the definition of a crime, but of a civil trespass, giving rise to the *actio furti.* The words *animo furandi* in the former and *lucri causâ* in the latter have a somewhat similar signification. The corresponding phrase of modern law is "with a felonious intent;" thus Mr. East defines larceny to be "the wrongful or fraudulent taking and carrying away by one person of the mere personal goods of another with a felonious intent to convey to his (the taker's) own use, and make them his own property, without the consent

of the owner."(1) 2 East, P. C. 553. In R. v. Holloway, 1 Den. C. C. 375, Parke, B., cited this definition with approbation, but seemed to think it did not state quite sufficiently that the taking must be without any claim of right; but perhaps that is sufficiently expressed by the word *felonious*. It is erroneous in other respects. Eyre, C. B., in the definition given by him retained the words *lucri causâ;* thus in R. v. Pears, 2 East, P. C. 685, he says "larceny is the wrongful taking of goods with intent to spoil the owner of them *lucri causâ*." And Blackstone says "the taking must be felonious, that is, done *animo furandi*, or, as the civil law expresses it, *lucri causâ;*" 4 Com. 232. The point aimed at by these two expressions, *animo furandi*, and *lucri causâ*, the meaning of which has been much discussed, seems to be this: that the goods must be taken into the *possession* of the thief with the intention of depriving the owner of his *property* in them.

It may be remarked here, once for all, that everything in larceny, and the kindred offences of embezzlement and obtaining by false pretences, depends on a clear appreciation of the difference between *possession* and *property*. Whether or no a thing is in our possession is altogether a question of fact; but it is nevertheless a question, the decision of which is regulated by the law. The rules laid down on this subject by the law are, as in all such cases they necessarily must be, arbitrary to this extent, namely, that there are cases on both sides of the line which is drawn, in which the application of the rule is unsatisfactory. But this inconvenience is balanced by the advantage of having a settled line.

[*568] *Possession, in the sense in which it is used in English law, extends not only to those things of which we have manual prehension, but those which are in our house, on our land, or in the possession of those under our control, as our servants, children, &c.: see R. v. Wright, *infra*, p. 588, and R. v. Reid, id.

Property is the right to the possession, coupled with an ability to exercise that right. Bearing this in mind we may perhaps safely define larceny as follows: the wrongful taking *possession* of the goods of another with intent to deprive the owner of his *property* in them. It is not necessary to add to this definition the words "without any claim of right by the taker;" as that is excluded by the latter branch of the definition relating to the intent. Nor is it necessary to say that the taking must be "against the will of the owner," because that is included in the word "wrongful."

It will be seen that most of the decided cases accord with this view. Thus it has been held that though in taking possession of the article the intention of the taker is to destroy it, and that he never contemplated any acquisition of property himself, it is still larceny, because he intends to deprive the owner of his property. As in R. v. Cabbage, Russ. & Ry. 292, where the prisoner was charged with stealing a horse. He went to the stable, took out the horse, led it to a coal pit, and backed it into the shaft, and this was held to be larceny. Upon this case it is observed in the report of the criminal law commissioners (p. 17) that where the removal is merely nominal, and the motive is that of injury to the owner, the offence is scarcely distinguishable from that of malicious mischief. This may sometimes be so, but there is at the same time a very clear distinction between depriving a person of his property, and injuring his property without depriving him of it. A similar case was that of R. v. Jones, 1 Den. C. C. 193, where a servant, after her discharge, applied at the post-office and received her master's letters; she delivered all but one to her master, and that one she destroyed, with a view of suppressing inquiries with reference to her

(1) 1 Wheeler's C. C. 165, 536; 3 Ibid. 511.

character. This was held to be larceny. So where the prisoners were indicted for stealing their master's corn, and the jury found that the prisoners "took the oats with the intent of giving them to their master's horses, and without any intent of applying them to their private benefit." This was held to be larceny, in accordance with several previous decisions, because the taking the oats was known by the prisoners to be wrongful, and their intention was *to deprive the owner of his property in them.* It is true that some of the judges concurred in this decision, because they considered themselves bound by the previous decisions, and Erle, J., and Platt, B., differed from it. But the judgment of the dissentient judges distinctly acknowledged the principle, that the intention to deprive the owner of the property in the goods is the gist of the offence, which intention they thought *could not exist* in this case. R. v. Privett, 1 Den. C. C. 193, *infra*, p. 591.

On the other hand it is clearly laid down that although the party may wrongfully take possession of the goods, yet unless he intend to deprive the owner of his property therein, this is a trespass only and not larceny; as in the numerous cases where the evidence clearly shows that the prisoner merely intended to borrow the goods for a short time, and then return them. These cases are collected, *infra*, p. 590.

An unauthorized gift by a servant of his master's goods is as much *a [*569] felony as if he had sold or pawned them. Per Erskine, J., R. v. White, 9 C. & P. 344: 38 E. C. L. R.

The distinction between grand and petit larceny was abolished by the 7 & 8 Geo. 4, c. 29, s. 2. See 24 & 25 Vict. c. 96, s. 2, *supra*, p. 561.

Proof of the taking.] The following is the definition of a felonious taking given by the criminal law commissioners: "The taking and carrying away are felonious, where the goods are taken against the will of the owner, either in his absence, or in a clandestine manner, or where possession is obtained either by force or surprise, or by any trick, device, or fraudulent expedient, the owner not voluntarily parting with his entire interest in the goods; and where the taker intends in any such case fraudulently to deprive the owner of the entire interest in the property against his will." 1st Rep. p. 16.

Where goods are once taken with a felonious intent, the offence cannot be purged by a restoration of them to the owner. Thus the prisoner having robbed the prosecutor of a purse, returned it to him again, saying, if you value the purse take it, and give me the contents, but before the prosecutor could do this the prisoner was apprehended; the offence was held to be complete by the first taking. R. v. Peat, 2 East, P. C. 557; see also R. v. Wright, 2 Russ. by Grea. 7, and 9 C. & P. 554 (*n*); and R. v. Phetheon, 9 C. & P. 552. See R. v. Trebilcock, *infra*, p. 592.

Proof of the taking—what manual taking is required.] In order to constitute the offence of larceny, there must be an actual taking possession by the thief, and this is what is meant by saying that every larceny includes a trespass; though, as we shall see presently, the trespass is sometimes constructive only. Thus, A. owing money to the prosecutor, the prisoner said he could settle the debt on A.'s behalf, and taking a receipt from his pocket put it on the table, and then took out some silver in his hand. The prosecutor wrote a receipt for the sum mentioned on the stamped paper, and the prisoner took it up and went out of the room. On being asked for the money he said, "It is all right," but never paid it. It was held, that this was not a larceny, as the prosecutor never had such a possession as would enable him to maintain trespass. R. v. Smith, 2 Den. C. C. 449; S. C. 21 L. J. M. C. 111. So

where the prisoner assigned his goods to trustees for the benefit of his creditors, but before the trustees had taken possession he removed the goods, intending to deprive his creditors of them, it was held that he was not guilty of larceny. R. v. Pratt, 1 Dears. C. C. 360; R. v. Smith, 2 Den. C. C. R. 449; S. C. 31 L. J. M. C. 111. The change of possession need not be by the very hand of the party accused. For if he fraudulently procure another, who is himself innocent of any felonious intent, to take the goods for him, it will be the same as if he had taken them himself; as if one procure an infant, within the age of discretion, to steal the goods for him. 2 East, P. C. 555; 2 Russ. by Grea. 5. See also R. v. Williams, 1 C. & K. 195: 47 E. C. L. R.

The least removing of the thing taken from the place where it was before is sufficient;(1) indeed the words, "take and carry away," ordinarily used in an indictment for larceny, seem to mean no more than the word "take" alone; thus a guest, [*570] who had taken the *sheets from his bed with an intent to steal them, and carried them into the hall, where he was apprehended, was adjudged guilty of larceny. Hawk. P. C. b. 1, c. 35, s. 25; 3 Inst. 108; 2 East, P. C. 555; 1 Leach, 323; see also R. v. Samways, 1 Dears. C. C. R. 371. So where a person takes a horse in a close, with intent to steal him, and is apprehended before he can get him out of the close, 3 Inst. 109; see further as to cattle, R. v. Williams, 1 Moo. C. C. 107, *ante*, p. 351. The prisoner got into a wagon, and taking a parcel of goods which lay in the forepart, had removed it to near the tail of the wagon, when he was apprehended. The twelve judges were unanimously of opinion, that as the prisoner had removed the property from the spot where it was originally placed, with an intent to steal, it was a sufficient *taking* and *carrying away* to constitute the offence.(2) R. v. Coslet, 1 Leach, 236; 2 East, P. C. 556. But where the prisoner had set up a parcel containing linen, which was lying lengthways in a wagon, on one end, for the greater convenience of taking the linen out, and cut the wrapper all the way down for that purpose, but was apprehended before he had taken anything, all the judges agreed that this was no larceny, although the intention to steal was manifest. For a carrying away, in order to constitute felony, must be a removal of the goods from the place where they were, and the felon must, for the instant at least, have the entire and absolute possession of them. R. v. Cherry, 2 East, P. C. 256; 1 Leach, 536 (*n*). The following case, though nearly resembling the latter, is distinguished by the circumstance that every part of the property was removed. The prisoner, sitting upon a coach-box, took hold of the upper part of a bag which was in the front boot, and lifted it up from the bottom of the boot on which it rested. He handed the upper part of the bag to a person who stood beside the wheel, and both holding it endeavored to pull it out, but were prevented by the guard. The prisoner, being found guilty, the judges, on a case reserved, were of opinion that the conviction was right, thinking that there was a complete *asportavit* of the bag. R. v. Walsh, 1 Moo. C. C. 14. The prisoner was indicted for robbing the prosecutrix of a diamond ear-ring. It appeared that as she was coming out of the opera-house the prisoner snatched at her ear-ring, and tore it from her ear, which bled, and she was much hurt. The ear-ring fell into her hair, where it was found on her return home. On a case reserved, the judges were of opinion that this was a sufficient taking to constitute robbery; it being in the possession of the prisoner for a moment, separated from the owner's person, was sufficient, though he could not retain it, but probably lost it again the same instant that it was taken. R. v. Lapier, 2 East, P. C. 557; 1 Leach, 320.

(1) Case of Scott et al., 5 Rogers's Rec. 169.

(2) The State v. Wilson, 1 Coxe, 441.

Where a servant *animo furandi* took his master's hay from his stable, and put it in his master's wagon, it was held to be larceny. R. v. Gruncell, 9 C. & P. 365: 38 E. C. L. R. There must, however, be a possession by the party charged, however temporary.(1) The prisoner stopped the prosecutor as he was carrying a feather bed on his shoulders, and told him to lay it down, or he would shoot him. The prosecutor laid the bed down; but before the prisoner could take it up he was apprehended. The judges were of opinion that the offence was not completed. R. v. Farrel, 2 East, P. C. 557.

There must be a severance of the goods from the possession of the owner. The prisoner took a purse out of the pocket of the owner, *but the purse being [*571] tied to a bunch of keys, and the keys remaining in his pocket, and the party being apprehended while they remained in his pocket, it was held no larceny, on the ground that the owner still remained in possession of his purse; and that there was no *asportavit*. R. v. Wilkinson, 1 Hale, P. C. 508. So where goods in a shop were tied to a string, which was fastened to one end of the bottom of the counter, and the prisoner took up the goods and carried them towards the door as far as the string would permit, and was then stopped, Eyre, B., ruled that there was no severance, and consequently no felony.(2) Anon., cited in R. v. Cheery, 2 East, P. C. 556; 1 Leach, 321 (*n*).

The prisoner was indicted for stealing five thousand cubic feet of gas. The gas company had contracted to supply him with gas to be paid for by meter. The gas was received from the company's main into an entrance pipe belonging to the prisoner, and passed through the meter which the prisoner had hired of the company into another pipe, the property of the prisoner, called the exit-pipe, which fed the burners. The prisoner fraudulently, by fixing a pipe connecting the entrance and exit-pipes, made a passage through which the gas rose to the burners without passing through the meter, which consequently did not show all the gas consumed. The jury found that the prisoner had not by contract any interest in or control over the gas until it passed the meter. It was held, that the prisoner, by opening the stopcock of the connecting-pipe, and letting the gas from out of the entrance-pipe into it, sufficiently secured a portion of the gas to constitute an *asportavit*, and that he was guilty of larceny of the gas. R. v. White, 1 Dears. C. C. R. 203; S. C. 22 L. J. M. C. 123.

Proof of taking—possession obtained by mistake.] The proof that the goods were taken with a felonious intent may be rebutted, by showing that the party charged with the larceny took them by mistake. Thus if the sheep of A. strayed from his flock into that of B., and the latter by mistake drives them with his own flock, or shears them, that is not felony; but if he knows the sheep to be another's and marks them with his own mark, it is said that would be evidence of a felony. 1 Hale, P. C. 507. *Sed qu.* And where the prisoner by mistake drove away with his flock of sheep one of the prosecutor's lambs, and afterwards on finding out that he had the lamb, immediately sold it as his own; it was held, that as the original taking was not rightful, but was an act of trespass, the subsequent appropriation was larceny. R. v. Riley, 1 Dears. C. C. R. 149; S. C. 22 L. J. M. C. 48. So if he appears desirous of concealing the property, or of preventing the inspection of it, by the owner, or by any other who might make the discovery, or if, being asked, he deny the having them, although the knowledge be proved: these likewise are circumstances tending to show the felonious intent. 2 East, P. C. 661.

(1) Kemp v. The State, 13 Humphrey, 39.

(2) Phillips's Case, 4 Rogers's Rec. 117.

But there is a distinction between things *taken* by mistake, and things *delivered* by mistake. In the latter case no subsequent appropriation of the goods will amount to larceny, so long as the lawful possession continues. Thus, where a letter containing a bill of exchange was by mistake delivered to another person of the same name as the person to whom it was addressed, and the person to whom it was so delivered, fraudulently appropriated it; being convicted of larceny, the judges held the conviction wrong. R. v. Mucklow, 1 Moo. C. C. 160. So where by mistake a letter was [*572] *delivered at the post-office to J. S., which was intended for another J. S., and which contained a post-office order for money; whereupon J. S., not being able to read, took the letter to W. D., who discovered the mistake; but, notwithstanding this, they got the order cashed and appropriated the proceeds; this was held not to be larceny. R. v. Davis, 25 L. J. M. C. 91. See, as to provisions to meet these cases, *post*, tit. Post-Office.

Proof of the taking possession obtained by fraud.] It is clear that if the possession of goods be obtained by fraud, this is a taking possession of the goods so as to constitute larceny. The difficulty in these cases has arisen in discovering what was the intention of the prisoner at the time that he obtained the possession; as the question, whether or not he was guilty of larceny, turned formerly entirely on this point. If his intention was originally fraudulent then it was larceny; if it was originally innocent then he was merely a bailee, and a subsequent fraudulent appropriation was not necessarily larceny.(1) Now, however, inasmuch as every fraudulent appropriation by a bailee is, in consequence of the provisions of the 24 & 25 Vict. c. 100, s. 3, *supra*, p. 362, a larceny, and the prisoner in this case would be, at least, a bailee, the distinction is of less importance; but it is not desirable to lose sight entirely of the decisions on the point, the principal of which are here given. Thus, where the prisoner hired a mare for a day to go to L., and said he should return the same evening, and gave a false reference. In the afternoon of the same day he sold the mare in Smithfield; this was held to be larceny. R. v. Pears, 2 East, P. C. 684; Lea, 212. A postboy applied to the prosecutor, a livery-stable keeper, for a horse, in the name of Mr. Ely, saying that there was a chaise going to Barnet, and that Mr. Ely wanted a horse for his servant to accompany the chaise, and return with it. The horse was delivered by the prosecutor's servant to the prisoner, who mounted him, and, on leaving the yard, said he was going no farther than Barnet. He only proceeded a short way on the road to Barnet, and on the same day sold the horse in Goodman's Fields for a guinea and a half, including saddle and bridle. The court observed that the judges, in R. v. Pears, had determined, that if a person, at the time he obtained another's property, meant to convert it to his own use, it was felony: that there was a distinction, however, to be observed in this case; for if they thought that the prisoner, at the time of hiring the horse for the purpose of going to Barnet, really intended to go there, but finding himself in possession of the horse, afterwards

(1) When a party, fraudulently and with intent to steal, obtains possession of a chattel with the consent and by the delivery of the owner, under pretence of borrowing, and converts the chattel to his own use, he is guilty of larceny. Starker v. The Commonwealth, 7 Leigh, 752; White v. The State, 11 Texas, 769.

When one obtains possession of goods by false representation, intending to convert them to his own use, and afterwards does convert them, entirely or partially, the owner not having parted with the right of property, it is larceny. The State v. Lindenthall, 5 Richardson, 237; The Commonwealth v. Wilde, 5 Gray, 83.

When a bank bill is delivered to a party to procure change, and he appropriates it, it is larceny; and it is no defence that the owner of the bill owed him a certain sum, which he intended to pay him out of the proceeds of that particular bill. Farrell v. The People, 16 Illinois, 506.

determined to convert it to his own use, instead of proceeding to the place, it would not amount to a felonious taking. R. v. Charlewood, 2 East, P. C. 689; 1 Leach, 409. Major Semple's case was also decided upon the point of the prisoner's intention. Under the name of Major Harrold, he had been in the habit of hiring carriages from the prosecutor, a coachmaker, and on the 1st of Sept., 1786, he hired the chaise in question, saying, he should want it for three weeks or a month, as he was going a tour round the north. It was agreed that he should pay at the rate of 5*s.* a day during that time, and a price of fifty guineas was talked about, in case he should purchase it on his return to London, which was suggested by the prisoner, but no agreement took place as to the purchase. A few days afterwards the prisoner took the chaise with his own horses from London to Uxbridge, *where he ordered [*573] a pair of horses, went to Bulstrode, returned to Uxbridge, and got fresh horses. Where he afterwards went did not appear. He was apprehended a year afterwards on another charge. Being indicted for stealing the chaise, it was argued for him, that he had obtained the chaise under a contract which was not proved to be broken, and that this distinguished it from R. v. Pears, *supra*, and R. v. Aickles, *post;* that the chaise was hired generally, and not to go to any particular place; that he had therefore a legal possession, and that the act was a tortious conversion, and not a felony. It was also argued, that there was no evidence of a tortious conversion; for *non constat*, that the prisoner had disposed of the chaise. The court, however, said, that it was now settled, that the question of intention was for the jury, and if they were satisfied that the original taking of the chaise was with a felonious intent, and the hiring a mere pretence to give effect to that design, without intention to restore or pay for it, it would fall precisely within R. v. Pears, and the other decisions, and the taking would amount to felony. R. v. Semple, 2 East, P. C. 691; 1 Leach, 420.

The prisoner, J. H. Aickles, was indicted for stealing a bill of exchange, the property of S. Edwards. The prosecutor wanting the bill discounted, the prisoner, who was a stranger to him, called at his lodgings and left his address, in consequence of which Edwards called on him, and the prisoner informed him that he was in the discounting line. Three weeks afterwards the prosecutor sent his clerk to the prisoner, to know whether he could discount the bill in question. The prisoner went with the clerk to the acceptor's house, where he agreed with the prosecutor to discount the bill on certain terms. After some conversation, the prisoner said, that "if Edwards would go with him to Pulteney Street, he should have the cash." Edwards replied, that his clerk should attend him, and pay him the 25*s.* and the discount on receiving the money. On his departure, Edwards whispered to his clerk not to leave the prisoner without receiving the money, and not to lose sight of him. The clerk went with the prisoner to his lodgings, in Pulteney Street, where the prisoner showed him a room, and desired him to wait, saying, he should be back again in a quarter of an hour. The clerk, however, followed him down Pulteney Street, but, in turning a corner, missed him. The prosecutor and his clerk waited at the prisoner's lodgings three days and nights in vain. Being apprehended at another place, he expressed his sorrow, and promised to return the bill. The bill was seen in the hands of a person who received a *subpœna duces tecum*, but he did not appear, and it was not produced. It was objected, 1st, that the bill ought to be produced, and 2dly, that the facts, if proved, did not amount to felony. It was left to the jury to consider whether the prisoner had a preconcerted design to get the bill into his possession, with intent to steal it; and next, whether the prosecutor intended to part with the bill to the prisoner, without having the money first paid. Upon the first point, the jury found in

the affirmative, and on the second, in the negative, and they found the prisoner guilty. Upon a reference to the judges, they held the conviction to be proper, as against both objections. R. v. Aickles, 2 East, P. C. 675; 1 Leach, 294.

The following observations are made by Mr. East on this case: "From the whole [*574] transaction, it appeared that Edwards never gave *credit to the prisoner. It is true that he put the bill into his hands, after they had agreed upon the terms upon which it was to be discounted, that by showing it to the acceptor he might satisfy himself that it was a genuine acceptance. But besides, that this was an equivocal act of delivery in itself, it seems sufficiently explained by the subsequent acts: for Edwards, or his clerk, by his direction, continued with the prisoner until he ran away, for the very reason because they would not trust him with the bill." 2 East, P. C. 677.

The prisoner was indicted for stealing a quantity of stockings. Meeting the prosecutor's apprentice on Ludgate Hill, he asked him if he was going to Mr. Heath, a hosier in Milk Street. The apprentice had at that time under his arm two parcels, directed to Mr. Heath, containing the articles in question; and, having answered in the affirmative, the prisoner told him that he knew his master, and owed him for the parcels; and he then gave the lad a parcel, which was afterwards found to be of no value, telling him to take it to his master directly, that it might be forwarded to a Mr. Brown; and then, with the consent of the apprentice, he took from him the parcels in question. The boy then left the prisoner, but returned and asked him if he was Mr. Heath. The prisoner replied that he was, on which the boy again left him. The jury found the prisoner guilty; but the recorder, doubting whether the facts amounted to felony, referred the case to the judges, who were of opinion that the conviction was proper. Mr. Justice Gould, in stating the reasons of the judgment, laid down the following rules as clearly settled: That the possession of personal chattels follows the right of property in them; that the possession of the servant was the possession of the master, which could not be divested by a tortious taking from the servant; that this rule held in all cases where servants had not the absolute dominion over the property, but were only intrusted with the care or custody of it for a particular purpose. R. v. Wilkins, 2 East, P. C. 673; 1 Leach, 520.

The prisoner went into a shop, and asked a boy to give him change for half a crown; the boy gave him two shillings and six pennyworth of copper. The prisoner held out half a crown, which the boy caught hold of by the edge, but did not get it. The prisoner then ran away. Park, J., held this to be a larceny of the 2*s.* and the coppers; but said, if the prisoner had been charged only with stealing the half crown, he should have had great doubt. R. v. Williams, 6 C. & P. 390: 25 E. C. L. R.

On an indictment for stealing a receipt, it appeared that a landlord went to his tenant (who had removed all his goods) to demand his rent, amounting to 12*l.* 10*s.*, taking with him a receipt, ready written and signed. The tenant gave him 2*l.*, and asked to look at the receipt. On its being handed to him he refused to return it or to pay the remainder of the rent. The landlord, at the time he gave the prisoner the receipt, thought the prisoner was going to pay him the rent, and would not have parted with the receipt unless he had been paid all the rent; but when he put the receipt into the prisoner's hands, he never expected to have it again, and did not want it again, but wanted his rent paid. Coleridge, J., held that it was a larceny of the receipt, and that the fact of the prisoner paying the 2*l.* made no difference. R. v. Rodway, 9 C. & P. 784: 38 E. C. L. R.

As to the two last cases, see the remarks in page 577.

[*575] *So obtaining money or goods by *ring-dropping, &c.*, has been held to be

larceny. The prisoner, with some accomplices, being in company with the prosecutor, pretended to find a valuable ring wrapped up in a paper, appearing to be a jeweller's receipt "for a rich brilliant diamond ring." They offered to share the value of it with the prosecutor, if he would deposit some money and his watch as a security. The prosecutor, having accordingly laid down his watch and money on a table, was beckoned out of the room by one of the confederates, while the others took away his watch and money. This was held to amount to larceny. R. v. Patch, 1 Leach, 238; 2 East, P. C. 678. So where, under similar circumstances, the prisoner procured from the prosecutor twenty guineas, promising to return them the next morning, and leaving the false jewel with him: this was also held to be larceny. R. v. Moore, 1 Leach, 314; 2 East, P. C. 679. To the same effect is R. v. Watson, 2 Leach, 640; 2 East, P. C. 680. So where the prosecutor was induced, by a preconcerted scheme, to deposit his money with one of the defendants, as a deposit upon a pretended bet, and the stakeholder afterwards, upon pretence that one of his confederates had won the wager, handed over the money to him; and it was left to the jury to say whether, at the time the money was taken, there was not a plan that it should be kept, under the false color of winning the bet, and the jury found there was; this was held to be larceny. R v. Robson, R. & R. 413.

Proof of the taking—possession obtained by fraud—property as well as possession parted with.] It must be borne in mind that if the owner of the goods part with the property as well as the possession, the offence is not larceny. The prisoner was indicted for stealing two silver cream-ewers from the prosecutor, a silversmith. He was formerly servant to a gentleman, who dealt with the prosecutor, and some time after he had left him, he called at the prosecutor's shop, and said that his master (meaning the gentleman whose service he had left) wanted some silver cream-ewers, and desired the prosecutor to give him one, and to put it down to his master's account. The prosecutor gave him two ewers, in order that his master might select the one he liked best. The prisoner took both, sold them, and absconded. At the trial the prosecutor swore that he did not charge the master (his customer) with the cream-ewers, nor did he intend to charge him with either, until he had first ascertained which of them he had selected. It was objected for the prisoner, that this amounted merely to obtaining goods under false pretences; but Bayley, J., held, that as the prosecutor intended to part with the possession only, and not with the right of property, the offence was larceny, but that if he had sent only *one* cream-ewer, and had charged the customer with it, the offence would have been otherwise. R. v. Davenport, Newcastle Spring Assizes, 1826; Archbold's Peel's Acts, 5.

In some of the following cases the decisions are somewhat difficult to reconcile with established principles, and with later cases on the same point. Thus, when the prisoner having bargained for some oxen, of which he agreed to become the purchaser, went to the place where they were in the care of a boy, took them away, and drove them off. By the custom of the trade, the oxen ought not to have been taken away till the purchase-money was paid. Garrow, B., *left it to the jury to [*576] say, whether, though the beasts had been delivered to the prisoner under a contract, they thought he originally got possession of them without intending to pay for them, making the bargain the pretext for obtaining them, for the purpose of stealing them. The jury having found in the affirmative, the judges, in a case reserved, were unanimously of opinion that the offence amounted to felony. R. v. Gilbert, Gow, N. P. C. 225 (*n*): 5 E. C. L. R; 1 Moody, C. C. 185. The prisoner called at the shop of the prosecutor, and selected a quantity of trinkets, desiring they might be sent the

next day to the inn where he lodged. An invoice was made out, and the prosecutor next day carried the articles to the inn. He was prevailed upon by the prisoner to leave them there, under a promise that he should be paid for them by a friend that evening. The prisoner and the prosecutor desired they might be taken care of. Half an hour afterwards the prisoner returned, and took the articles away. There were other circumstances showing a fraudulent intent, and the judge directed the jury, that if they were satisfied that the prisoner, when he first called on the prosecutor, had no intention of buying and paying for the goods, but gave the order for the purpose of getting them out of his possession, and afterwards clandestinely removing and converting them to his own use, they should find him guilty, which they did; and the judges, on a case reserved, held the direction and conviction right. R. v. Campbell, 1 Moody, C. C. 179. This case was soon afterwards followed by another, to the same effect. The prisoner bargained for four casks of butter, to be paid for on delivery, and was told he could not have them on any other terms. The prosecutor's clerk at last consented that the prisoner should take away the goods, on the express condition that they should be paid for at the door of his house. The prisoner never took the goods to his house, but lodged them elsewhere. The prisoner was indicted for stealing the goods. The jury found that he had no intention to buy the goods, but to get them by fraud from the owner. A case being reserved, the judges were unanimously of opinion that the felony was complete, and the conviction good, the jury having found that the prisoner never meant to buy, but to defraud the owner.(1) R. v. Pratt, 1 Moody, C. C. 250. So where the prisoner, bargaining with the prosecutor for some waistcoats, agreed to pay a certain price for them, but upon their being put into his gig, drove off without paying for them; and the jury found that "the waistcoats were parted with conditionally that the money was to be paid at the time, and that the prisoner took them with a felonious intent;" it was held to be larceny. R. v. Cohen, 2 Den. C. C. R. 249. See also R. v. Morgan, 1 Dears. C. C. R. 395.

The prisoner by false pretences induced the prosecutor to send him by his servant, to a particular house, goods to the value of 2*s*. 10*d*., with change for a crown piece. On the way he met the servant, and induced him to part with the goods and change, giving him a crown piece, which proved to be bad. Both the prosecutor and his servant swore that the latter had no authority to part with the goods or change without receiving the crown piece in payment, but the former admitted that he intended to sell the goods, and never expected them back again. Mr. Serjeant Arabin told the jury that if they thought the servant had an uncontrolled authority to part with the cheese and the change, they ought to find the prisoner not guilty, but if they [*577] should be of a contrary opinion, then, *in his judgment, it amounted to larceny. He further stated, that he had submitted the depositions to Parke, B., and Patteson, J., who had agreed with the opinion he had formed. The learned Serjeant afterwards said to the jury, "if you think it was a preconcerted scheme to get possession of the property, without giving anything for it, and that the servant had the limited authority only, then you will find the prisoner guilty." The prisoner was convicted. R. v. Small, 8 C. & P. 46: 34 E. C. L. R.

A. received goods of B. (who was the servant of C.), under color of a pretended sale. Coltman, J., held that the fact of A.'s having received such goods, with the knowledge that B. had no authority to sell, and that he was in fact defrauding his master, was sufficient evidence to support an indictment for larceny against A. jointly with B. R. v. Hornby, 1 C. & K. 305: 47 E. C. L. R.

(1) Valentine's Case, 4 Rogers's Rec. 33; Bowen's Case, Ibid. 46; Blunt v. The Commonwealth, 4 Leigh, 689.

In all the above cases, as well as in those at p. 574, the principle of the decisions, whether strictly applied or not, is that the owner had no intention of parting with the property in the goods. The doctrine is clearly established that, if the owner intends to part with the property in the goods, and, in pursuance of such intention, delivers the goods to the prisoner, who takes them away, this is not larceny, even though the prisoner had from the first a fraudulent intention in obtaining the goods.(1) This is what constitutes the offence of obtaining by false pretences; and as that is now an offence as easily and as fully punishable as larceny, there is no reason whatever why the acknowledged principle should not be strictly applied. In some of the cases, as in R. v. Campbell, and in R. v. Pratt, *supra*, the doctrine appears to have been strained, by reasoning not very satisfactory; and, indeed, these cases are hardly consistent with R. v. Parkes, *infra*.

The following are instances in which the offence has been held not to amount to larceny: One of the defendants, in the presence of the prosecutor, picked up a purse containing a watch, a chain, and two seals, which a confederate represented to be gold, and worth 18*l.*; upon which the prosecutor purchased the share of the party who picked up the purse, for 7*l.* Coleridge, J., held that this was not larceny. R. v. Wilson, 8 C. & P. 111: 34 E. C. L. R. Compare this case with R. v. Patch, *supra*, where the prisoner had only deposited his money. The prisoner was indicted for horse-stealing, and it appeared in evidence that he met the prosecutor at a fair, with a horse, which the latter had brought there for sale. The prisoner being known to him, proposed to become the purchaser. On a view of the horse, the prosecutor told the prisoner he should have it for 8*l.*, and calling his servant, ordered him to deliver it to the prisoner, who immediately mounted the horse, telling the prosecutor that he would return immediately and pay him. The prosecutor replied, "Very well;" and the prisoner rode away, and never returned. Gould, J., ordered an acquittal, for here was a complete contract of sale and delivery: the property as well as possession was entirely parted with. R. v. Harvey, 2 East, P. C. 669; 1 Leach, 467. In this case, it was observed by the judge, that the prosecutor's only remedy was by action. 1 Leach, 467. Had any false pretences been used, the prisoner might have been indicted under the 30 Geo. 2, c. 24.

Parkes was indicted for stealing a piece of silk, the property of Thomas Wilson. The prisoner called at Wilson's warehouse, and having looked at several pieces of silk, selected the one in question. He said his name was John Williams, that he lived at No. 6 Arabella *Row, and if Wilson would send it that evening he [*578] would pay him for it. Wilson accordingly sent his shopman with it, who, as he was taking the goods, met the prisoner. The latter took him into a room at No. 6 Arabella Row, examined the bill of parcels, and gave the servant bills drawn by Freeth & Co., at Bradford, on Taylor & Co., in London. The bills were for more than the price of the goods. The servant could not give the change, but the prisoner said he wanted more goods, and should call the following day, which he did not do. Taylor & Co. said the notes were good for nothing, and that they had no correspondent at Bradford. Before the goods were sent from Wilson's they were entered in a memorandum-book, and the prisoner was made debtor for them, which was the practice where goods were not paid for immediately. It was left to the jury to consider whether there was, from the beginning, a premeditated plan on the part of the prisoner to obtain the goods without paying value for them, and whether this was a sale by Wilson, and a delivery of the goods with intent to part with the property, he

(1) Lewer v. The Commonwealth, 15 Serg. & Rawle, 93; 8 Cowen, 242.

having received bad bills in payment, through the medium of his servant. The jury found that, from the beginning, it was the prisoner's intention to defraud Wilson, and that it was not Wilson's intention to give him credit; and they found him guilty. But the judges were of opinion that the conviction was wrong, the *property*, as well as the possession, having been parted with, upon receiving that which was accepted as payment by the prosecutor's servant, though the bill afterwards turned out to be of no value. R. v. Parkes, 2 East, P. C. 617; 2 Leach, 614; see R. v. Small, *ante*, p. 577.

The prisoner was a servant in the employment of grocers, who were in the habit of purchasing "kitchen stuff." It was his duty to receive and weigh it, and if the chief clerk was in the counting-house, to give the seller a ticket, specifying the weight and price of the article, and the name of the seller, which ticket was signed with the initials of the prisoner. The seller, on taking the ticket to the chief clerk, received the price of the "kitchen stuff." In the absence of the chief clerk, the prisoner had himself authority to pay the seller, and afterwards, on producing the ticket to the chief clerk, was repaid. The prisoner had, on the day mentioned in the indictment, presented a ticket to the chief clerk, purporting to contain all the usual specifications, and marked with the prisoner's initials, and demanded the sum of 2*s.* 3*d.*, which he alleged that he had paid for "kitchen stuff" He received the money, and appropriated it to his own use; and it was afterwards discovered that no such person as was described in the ticket had ever sold any such article to the prosecutors, but that the ticket was fraudulently made out and presented by the prisoner. The court held that this was a case of false pretences, and that an indictment for larceny could not be sustained, "as the clerk delivered the money to the prisoner with the intent of parting with it wholly to him." R. v. Barnes, 2 Den. C. C. R. 59.

Where the goods have been purchased *by a third person*, and the prisoner obtains possession of them in that person's name, by false pretences, as the owner intends to part with the property, though not to the prisoner, it has been held not to amount to felony. The prisoner was indicted for stealing a hat, in one count laid to be the property of Robert Beer, in another of John Paul. The prisoner bought a hat of Beer, a hat-maker at Islington, but was told he could not have it without paying for it. [*579] While in *the shop, he saw a hat which had been made for Paul, and saying that he lived next door to him, asked when Paul was to come for his hat. He was told in half an hour or an hour. Having left the shop, he met a boy, asked him if he knew Beer, saying, that Paul had sent him to Beer's for his hat, but that as he owed Beer for a hat himself, which he had not money to pay, he did not like to go. He asked the boy (to whom he promised something for his trouble) to carry the message to Beer's, and bring Paul's hat to him (the prisoner). He also told the boy not to go into Beer's shop if Paul, whom he described, should be there. The boy went, and delivered the message, and received the hat, which, after carrying part of the way, by the prisoner's desire, he delivered to him, the prisoner saying he would take it himself to Paul. The prisoner was apprehended with the hat in his possession. It was objected for him, that this was not larceny, but an obtaining goods under false pretences. The prisoner being found guilty, the question was reserved for the opinion of the judges, who decided that the offence did not amount to a felony, the owner having parted with his property in the hat. R. v. Adam, 2 Russ. by Grea. 28; see also R. v. Box, 9 C. & P. 126: 38 E. C. L. R.; but see R. v. Kay, *infra*, tit. Post-office.

A case of frequent occurrence is the following. The prisoner being the prosecutor's servant, it was his duty to receive and pay moneys for the prosecutor, and make

entries of such receipts and payments in a book which was examined by the prosecutor from time to time. On one occasion the prisoner showed a balance of 2*l.* in his favor, by taking credit for payments falsely entered in his book as having been made by him, when in fact they had not been so made, and thereupon was paid by his master the 2*l.* as a balance due to him. The prisoner having been convicted of larceny, the Court of Criminal Appeal held the conviction wrong, but several judges expressed an opinion that an indictment for obtaining money by false pretences might have been sustained. R. v. Green, 1 Dears. C. C. 323.

The prisoners, Nicholson, Jones, and Chappel, were indicted for stealing two bank post bills and seven guineas. The prisoner Nicholson introduced himself to the prosecutor, at the appartments of the latter, in the Charter House, under pretence of inquiring what the rules of the charity were. Discovering that the prosecutor had some money, he desired to walk with him, and having been joined by the prisoner Chappel, they went to a public house. The prisoner Jones then came into the room, and said that he had come from the country to receive 1400*l.*, and produced a quantity of notes. Chappel said to him, "I suppose you think that no one has any money but you." Jones answered, "I'll lay 10*l.* that neither of you can show 40*l.* in two hours." They then all went out, Nicholson and Chappel said that they should go to the Spotted Horse, and they both asked the prosecutor if he could show 40*l.* He answered, he believed he could. Nicholson accompanied the prosecutor home, when the latter took out of his desk the two bank post bills and five guineas. Nicholson advised him to take a guinea or two more, and he accordingly took two guineas more. They then went to the Spotted Horse, where Jones and Chappel were, in a back room. Jones put down a 10*l.* note for each who could show 40*l.* The prosecutor showed his 40*l.* by laying down the notes and guineas, but did not recollect whether he took up the 10*l.* given to him. Jones then wrote four letters with chalk upon the table, and going to the end of the room, *turned his back and said that [*580] he would bet them a guinea apiece that he would name another letter which should be made and a basin put over it. Another letter was made and covered with a basin. Jones guessed wrongly, and the others won a guinea each. Chappel and Nicholson then said, "We may as well have some of Jones's money, for he is sure to lose, and we may as well make it more, for we are sure to win." The prosecutor then staked his two notes and the seven guineas. Jones guessed right, and the notes lying on the table, he swept them all off and went to the other end of the room, the other prisoners sitting still. A constable immediately came and apprehended the prisoners. The prosecutor, on cross-examination, said that he did not know whether the 10*l.* note given to him by Jones on showing 40*l.* was a real one or not. That having won the first wager, if the matter had ended there, he should have kept the guinea. That he did not object to Jones taking his 40*l.* when he lost, and would have taken the 40*l.* if he had won. The officers found on the prisoners many pieces of paper having numbers, such as 100, 50, &c., something in the manner of bank notes, the bodies of the notes being advertisements of different kinds. No good notes were found upon them, but about eight guineas in cash. A lump of paper was put into the prosecutor's hands by Jones, when the officers came in, which was afterwards found to contain the two post bills. On the part of the prisoners it was contended, that this was a mere gaming transaction, or at most only a cheat, and not a felony. A doubt being entertained by the bench, on the latter point, it was left to the jury to consider whether this was a gaming transaction, or a preconcerted scheme by the prisoners, or any of them, to get from the prosecutor the post bills and cash. The jury were of opinion that it was a preconcerted scheme in all of them for that purpose, and found

them guilty; but the judges held the conviction wrong, for in this case the property as well as possession had been parted with by the prosecutor, under the idea that it had been fairly won. R. v. Nicholson, 2 East, P. C. 669; 2 Leach, 610.

The prisoner, who had previously pawned certain articles at the shop of the prosecutor, brought a packet of diamonds, which he also offered to pawn, receiving back the former articles. The prosecutor's servant who had authority to act in his business, after looking at the diamonds, delivered them back to the prisoner to seal up, when the prisoner substituted another parcel of false stones. He then received from the prosecutor's servant, the articles previously pledged, and carried them away. Being indicted for stealing these articles, Arabin, Serjt., before whom he was tried, thought that, inasmuch as the property was parted with by the pawnbroker's servant absolutely, under the impression that the prisoner had returned the parcel containing the diamonds, the offence did not amount to felony; and upon a case reserved, the judges resolved unanimously that the case was not larceny, because the servant, who had a general authority from his master, parted with the property, and not merely with the possession. R. v. Jackson, 1 Moody, C. C. 119. See R. v. Longstreeth, Id. 137.

Proof of the taking—possession obtained by false process of law.] Where the possession of goods is obtained from the owner by means of the fraudulent abuse of legal process, the offence will amount to larceny. Thus it is laid down by Lord Hale [*581] that if A. has a design *to steal the horse of B., and enters a plaint of replevin in the sheriff's court for the horse, and gets him delivered to him and rides him away, this is a taking and stealing, because done *in fraudem legis*. So where A., having a mind privately to get the goods of B. into his possession, brings an action of ejectment, and obtains judgment against the casual ejector, and thereby gets possession and takes the goods, if it be done *animo furandi*, it is larceny. 1 Hale, P. C. 507; 2 East, P. C. 660; 2 Russ. by Grea. 54.

Proof of the taking—possession obtained by bailees.] It was formerly said that, inasmuch as to constitute larceny there must be such a taking as would either actually or constructively amount to a trespass, if a party obtained the possession of goods lawfully, as upon a bailment for or on account of the owner, he could not afterwards, so long as that bailment continued, be guilty of larceny in appropriating the goods in any way whatsoever, as the wrongful change of possession, a necessary ingredient in larceny, had never taken place. Thus where, upon an indictment for stealing, it appeared that the prosecutor's shop (containing the articles mentioned in the indictment) being on fire, his neighbors assisted in removing his goods for their security. The prisoner probably had removed all the articles which she was charged with stealing when the prosecutor's other neighbors were thus employed. She removed some of the articles in the presence of the prosecutor, and under his observation, though not by his desire. Upon the prosecutor applying to her next morning, she denied that she had any of the things belonging to him, but they were found concealed in her house. The jury found her guilty, but said that, in their opinion, when she first took the goods from the shop she had no evil intention, but that such evil intention came upon her afterwards; and upon reference to the judges, they all held the conviction wrong, for if the original taking was not with intent to steal, the subsequent conversion was no felony, but a breach of trust. R. v. Leigh, 2 East, P. C. 694; 1 Leach, 411 (*n*). This case is thus explained by Parke, B., in R. v. Riley, *ante*, p. 571: "In R. v. Leigh the taking was with the consent of the owner; it was, there-

fore, the same thing as if the owner had intrusted the prisoner with the goods originally; and, if so, the subsequent appropriation could not be a larceny."

So if goods are delivered to a carrier to be conveyed, and he steals them on the journey, it is no felony. 1 Hale, P. C. 504. So where a man deliver his watch to the prisoner to be repaired, who instead of repairing sold it, this was ruled to be no felony. R. v. Levy, 4 C. & P. 241: 19 E. C. L. R. See also R. v. Thistle, 1 Den. C. C. R 502. So where the prosecutor had delivered a horse to the prisoner, to be agisted at 1s. 6*d*. per week, and the latter, after keeping the animal for one week, for which he received payment, sold it in the course of the second week; the prisoner having been convicted of larceny, the judges held the conviction wrong. R. v. Charles Smith, 1 Moo. C. C. 474.

So where a drover employed by the prosecutor to drive pigs, and paid the expenses of driving them, being paid wages by the day, but having the liberty to drive the cattle of any other person, at the end of his journey sold the pigs and converted the proceeds to his own use; this was held not to be larceny, as at the time he received the pigs into his custody he had no intention of appropriating *them to his [*582] own use; and that he was merely a bailee and not a servant. R. v. Hay, 1 Den. C. C. R. 602. In R. v. Cornish, 1 Dears. C. C. R. 425, the prisoner was a common carrier, and was employed by the prosecutor to carry a cargo of coals from a ship to a coal-yard, and thence to another yard belonging to the prosecutor. The prisoner carted the coals to the first-mentioned coal-yard, and was engaged for several days in carting them from thence to the prosecutor's other yard. He left the first-mentioned coal-yard on one of these days with two carts and a wagon, all laden with coals; but before he arrived at the other yard he delivered the two cart-loads to a third person on his own account, but he duly delivered the wagon-load at the prosecutor's other yard; it was held that there was no larceny.

Upon the principle that it is not felony in a bailee to convert to his own use the goods bailed to him, a distinction has been ingrafted which can only be understood by a close consideration of the doctrine of possession. He who possesses a thing as the servant, agent, or bailee of another, is, so far as the *fact* of possession is concerned, in the same position as he who possesses a thing in his own behalf. But possession, legally speaking, consists of a *fact* coupled with *intention;* and the intention of a person who possesses on behalf of another is altogether different from the intention of a person who possesses on his own behalf. And if a servant, agent, or bailee, possessing goods on behalf of another, appropriate them to himself, there is, though no change in the fact, a change in the intention; and, therefore, in some sense at least a wrongful change of possession, which is the ingredient in larceny we are considering.

Now as, except by the prisoner's confession, there can be no other evidence of intention than outward and visible acts, it is impossible, unless some unequivocal act has been performed by the prisoner indicating the necessary change in intention, if he denies his guilt, that he can be convicted. But those acts which indicate the wrongful intent do not constitute the crime, any more than the prisoner's confession constitutes it; they are only evidence of it. Thus a man delivers the goods in a box to a carrier, and he opens the box, and disposes of the goods; this is held to be larceny, because the carrier has broken bulk. But the breaking bulk is not larceny; taken alone, it is not even evidence of it. If, however, it is followed by an appropriation of the goods it is a very reasonable inference that when the carrier opened

the box he intended no longer to hold the goods as a bailee, that he assumed the possession for himself, and so caused a wrongful change of possession.(1)

However the judges have held that this breaking bulk, as it is called, was a necessary ingredient to larceny by a bailee, which must have been owing to the want of a full appreciation of the difference between the offence and the evidence of it, because if they had considered that it was only evidence, they would scarcely have refused to hold that any other circumstances, equally unequivocal, would be sufficient proof of the felonious intent of the bailee. It is true that judges sometimes, as well as the legislature in the provision below, have spoken of breaking bulk *or some other* determination of the bailment; but breaking bulk is, practically speaking, the evidence of determination always hitherto required.(2)

[*583] These considerations are important, because, if they are correct, *they have a strong bearing on the interpretation of the 3d section of the 24 & 25 Vict. c. 96, which enacts, that "Whosoever being a bailee of any chattel, money, or valuable security, shall fraudulently take or convert the same to his own use, or the use of any other person, other than the owner thereof, although he shall not break bulk or otherwise determine the bailment, he shall be guilty of larceny." The most useful interpretation of this provision would be that the narrow construction formerly put upon the law of larceny by bailees is removed, and that it reverts to its natural position; namely, that an intention on the part of the bailee to hold the goods no longer for the benefit of the real owner, but to assume the possession of them exclusively for himself, will constitute larceny; and that this intention may be inferred by the jury from any unequivocal acts indicative thereof.

As, however, the above new provision has been as yet but little discussed, and it is uncertain what construction may be put upon it, it is still necessary to keep in view the previous decisions of larceny by bailees. Most of them turn upon the consideration of what constitutes a breaking bulk. Thus the captain of a vessel having on board a number of casks of butter belonging to the prosecutor, and having occasion to pay a debt in the course of his voyage, delivered thirteen of the casks to his creditor in payment of the debt. Graham, B., held that the severance of a part of the casks from the rest was sufficient, and the prisoner was convicted. But the judges held the conviction wrong. R. v. Madon, Russ. & Ry. 92. So where the prosecutor sent three trusses of hay consigned to a third person by the prisoner's cart, and the prisoner took away one of the trusses, which was found in his possession, but not broken up, Parke, J., held this to be no larceny, because the truss was not broken. R. v. Pratley, 6 C. & P. 533: 25 E. C. L. R.; and the same was held in R. v. Fletcher, 4 C. & P. 545: 19 E. C. L. R.; and R. v. Cornish, *supra*.

On the other hand, where a farmer sent forty bags of wheat to the prisoner, who was a warehouseman, for safe custody. The prisoner took eight of the bags, and shooting the wheat out on the floor, mixed it with four bags of inferior wheat, and sold the whole twelve for his own benefit. He replaced the wheat thus taken from

(1) The Commonwealth v. Brown, 4 Mass. 580; The Commonwealth v. James, 1 Pick. 375.

(2) An indictment, which charges a larceny or embezzlement of the printed sheets of a certain publication, is not supported by evidence that those sheets were delivered to the defendant by the owner to be bound, and that the defendant after he had folded, stitched, bound, and trimmed them, embezzled and fraudulently converted them to his own use. In such case the indictment should charge a larceny or embezzlement of books. Commonwealth v. Merrifield, 4 Metcalf, 468.

Where a letter is given to deliver to another, breaking it open and taking out money is larceny. Cheudle v. Buell, 6 Ohio, 67. See State v. White, 2 Tyler, 352; Welsh v. The People, 17 Illinois, 339; Ennis v. The State, 3 Iowa, 67; The State v. Watson, 41 N. Hamp. 533; The State v. Humphrey, 32 Vermont, 569; Nicholls v. The People, 3 Smith, 114; The State v. Fairclough, 29 Conn. 47; The People v. Poggi, 19 California, 600.

the prosecutor with inferior wheat of his own. It did not appear that there was any severing of part of the wheat in any one bag, from the residue of the wheat in the *same* bag. The prisoner being convicted of larceny, the judges were unanimously of opinion that the conviction was right, that the taking of the whole of the wheat out of any one bag was no less a larceny than if the prisoner had severed a part from the residue of the wheat in the same bag, and had taken only that part, leaving the remainder of the wheat in the same bag. R. v. Brazier, Russ. & Ry. 237.

The prisoner was employed by a tailor to sell clothes for him about the county of L.; the price of each article was fixed, and the clothes given to the prisoner on the arrangement that he was to sell them at the price fixed, he receiving 3*s.* in the pound upon the amount obtained, and being bound to bring back the unsold clothes. The prisoner received a quantity of clothes on these terms, but, instead of selling them, he fraudulently pawned a portion of them, and retained the remainder for his own use. It was held that, as there was but one bailment of the whole, the separation of a portion of the clothes and pawning them amounted to larceny. R. v. Poyser, 2 Den. C. C. 223; S. C. *20 L. J. M. C. 191. This is hardly consistent with the [*584] cases of R. v. Madon, and R. v. Pratley, *supra*.

A woman intrusted a porter to carry a bundle for her to Wapping, and went with him. In going to the place the porter ran away with the bundle, which was lost. Being indicted for felony, Holt, C. J., told the jury, that if they thought the porter opened the bundle and took out the goods it was felony: and he thought that the fact as above stated was evidence of it. Anon, 2 East, P. C. 697; 1 Leach, 415 (*n*). Upon this case Mr. East observes, with submission to so high an authority, it may be fairly doubted whether there was sufficient evidence before the jury on this statement to warrant them in finding that the porter opened the bundle and took out the goods. A different ground for the determination, he continues, is suggested in another MS. (2 MS. Sum. 233) viz., that all the circumstances of the case showed that the porter took the bundle at first, with an intent to steal it. 2 East, P. C. 597. Where A. asked the prisoner, who was not her servant, but only a casual acquaintance, to put a letter in the post, telling her it contained money, and the prisoner broke the seal and abstracted the money before she put it in the post, Mirehouse, C. S., after consulting Gaselee, J., held that she was guilty of larceny. R. v. Mary Jones, 7 C. & P. 151: 32 E. C. L. R. So where the prosecutor gave the prisoner, who was not his servant, a parcel to take to a coach-office, and the prisoner broke open the parcel and abstracted several notes from it before he delivered it. Gurney B., with the assent of Bosanquet, J., who was present, held this to be larceny. R. v. Jenkins, 9 C. & P. 38: 38 E. C. L. R. The prisoner, who was the owner of a boat, was employed by the prosecutor, the captain of a ship, to carry a number of wooden staves ashore in his boat. The prosecutor's men were put into the boat, but were under the control of the prisoner, who did not deliver all the staves, but took one of them away to the house of his mother. Patteson, J., held that this was a bailment, and not a charge, the prosecutor's servant being under the prisoner's control, and that a mere non-delivery of the staves would not have been a larceny; but that if the prisoner separated one of the staves from the rest, and carried it to a place different from that of its destination, with intent to appropriate it to his own use, that was equivalent to a breaking of bulk, and would be sufficient to constitute larceny. R. v. Howell, 7 C. & P. 325: 32 E. C. L. R.

It appears from these cases that the judges have lately been willing to press the doctrine of breaking bulk to its utmost limits; holding as they have done in the recent cases (see R. v. Poyser, and R. v. Howell), that a separation of part of the

goods, even where they are in loose bulk, is sufficient. Indeed in some of the cases they seem to have been on the point of holding that any determination of the bailment was sufficient. See especially the remarks of some of the judges in R. v. Poyser, *ubi supra*; but they seem never to have been inclined to hold that an appropriation of the goods to the bailee's own purposes was in itself a determination of the bailment, or, as we should say, looking to the definition of larceny, a wrongful change of possession. Indeed, whenever this point has directly arisen it has always been ruled in favor of the prisoner. Thus, the prisoner borrowed a horse for the purpose of carrying a child to a neighboring surgeon; whether he carried the child there or not did not appear, but the day following he took the horse in another direc- [*585] tion and sold it. It was held by the judges that, if the prisoner *had not a felonious intention when he originally took the horse, his subsequent withholding and disposing of it did not constitute a taking so as to make him guilty of larceny. R. v. Brook, Russ. & Ry. 441; 2 Russ. by Grea. 56. The opinions expressed in 2 East, P. C. 690, and 2 Russ. 1089 (1st ed.), were remarks as in this case, and said not to be correct. From this and another passage (2 East, P. C. 685) Mr. East seems to have been inclined to take a wider view of the law of larceny by bailees than the judges have thought fit to follow, and to think that any act evidencing a determination to hold the goods no longer as bailee was sufficient. The cases of R. v. Banks, Russ. & Ry. 441, and R. v. Stear, 1 Den. C. C. 349, are in accordance with the above decision in R. v. Brooks.

It was held on the 20 & 21 Vict. c. 54, s. 4, which is similar to the 24 & 25 Vict. c. 96, s. 3, that unless there is an understanding at the time of delivery that the specific thing delivered is to be returned, this section does not apply, as there is, in that case, no bailment. R. v. Hassall, L. & C. 58. And this understanding rarely exists where money is delivered. This decision entirely turns on the meaning of the word "bailee" in the act. There does not seem any reason why a person to whom *money* is intrusted should not be held criminally responsible if he fraudulently misappropriates it, as well as a person who is intrusted with *goods*. No such distinction is made in the case of servants, and there seems no reason why bailees should not be put upon the same footing; but this would require an alteration in the terms of the act, unless the depositary could be treated as a trustee under s. 80; *infra*, tit. "Trustees."

Proof of the taking—possession obtained by servants.] There has never been the same difficulty made about finding servants guilty of larceny as about bailees; probably because the necessity of protecting masters from the depredations of their servants was more apparent than that of protecting them from the dishonesty of bailees. Yet so far as possession is concerned, the position of a servant, who is not a slave, cannot be distinguished on principle from that of a bailee. But, however this may be, it has been long settled, that if a servant have possession of his master's goods, and appropriate them to himself, he is guilty of larceny; and this intention to appropriate may be proved by any unequivocal act or acts indicative of such an intention. This, like larceny from a bailee, comes within the definition of larceny given above (p. 567); the wrongful change of possession taking place by the servant ceasing to hold the goods for the benefit of his master, and assuming to hold them for himself.(1) See p. 582.

(1) United States v. Clew, 4 Wash. C. C. Rep. 700; The State v. Self, 1 Bay, 242; The Commonwealth v. Brown, 4 Mass. 580; Dame v. Baldwin, 8 Mass. 518; McClure's Case, 3 Rogers's Rec. 154; The Commonwealth v. King, 9 Cushing, 284; The People v. Wood, 2 Parker, C. R. 22.

In consequence of the difference in the law as applied to bailees and servants it has become very important to distinguish (at least it was so before passing the 20 & 21 Vict. c. 54, s. 4) between these two classes of persons. Thus it is said by Lord Hale that it is larceny if the butler who has the charge of his master's plate, or the shepherd who has the charge of his master's sheep, appropriates them, and so it is of an apprentice that feloniously embezzles his master's goods. 1 Hale, 506; 2 East, P. C. 554. So where a carter goes away with his master's cart. R. v. Robinson, 2 East, P. C. 565; R. v. Reid, 1 Dears. C. C. R. 257; S. C. 23 L. J. M. C. 25. The prisoner was a drover, and had been employed by the prosecutor as such, off and on, for nearly five years. Being employed by him to drive a number of sheep to a fair, he sold several of them, and applied the *money to his own purposes. He [*586] was found guilty of larceny; but the jury also found that he did not intend to steal the sheep at the time he took them into his possession. On a case reserved, the judges who met were of opinion, that as the owner parted with the custody only, and not with the possession, the prisoner's possession was the owner's, and that the conviction was right. R. v. McNamee, 1 Moo. C. C. 368. *Aliter* if the evidence show that the drover was not the servant of the prosecutor. R. v. Hey, 1 Den. C. C. R. 602. In this case, Parke, B., in delivering the judgment of the court, said, "After the full consideration which this subject has undergone, we doubt whether the case of R. v. McNamee would be now decided in the same way." The doubt being as to the propriety in that case of considering the prisoner as in the service of the prosecutor. The prisoner was employed by the prosecutor as his foreman and bookkeeper, but did not live in his house. The prosecutor delivered a bill of exchange to him, with orders to take it to the post, that it might be transmitted to London. The prisoner got cash for the bill, with which he absconded. It was objected that by the delivery the prosecutor had parted with the possession of the bill, and the case was likened to that of a carrier intrusted with goods; but the judges held it larceny, on the principle that the possession still remained in the master. R. v. Paradice, 2 East, P. C. 565, cited 1 Leach, 523, 524. The prisoner was employed as a porter by the prosecutor, who delivered to him a parcel to carry to a customer. While carrying it he met two men, who persuaded him to dispose of the goods, which he did, taking them out of the parcel and receiving part of the money. All the judges held this to be larceny, as the possession still remained in the master. R. v. Bass, 2 East, P. C. 566; 1 Leach, 251, 523.

So where the prosecutor delivered to his servant a sum of money to carry to a person, who was to give him a bill for it, and the servant appropriated it to his own use, the judges were of opinion that this was not a mere breach of trust but a felony. R. v. Lavender, 2 East, P. C. 566; 2 Russ. by Grea. 160; see also R. v. Heath, 2 Moo. C. C. 33. A. employed B. to take his barge from one particular place to another, and paid him his wages in advance, and gave him a separate sum of three sovereigns to pay the tonnage dues. B. took the barge 16 miles, and paid tonnage dues to an amount rather under 2*l.* and appropriated the remaining sovereign to his own use. Patteson, J., held this to be a larceny. R. v. Goode, Carr. & M. 582: 41 E. C. L. R. See also R. v. Beaman, Carr. & M. 595. Where the servant of the prosecutor went to her master's wife, and told her she was acquainted with a person who could give her ten guineas' worth of silver, and the prosecutor's wife gave her ten guineas for that purpose, which she ran away with, she was found guilty of the larceny. R. v. Atkinson, 1 Leach, 302 (*n*); 2 Russ. by Grea. 161.

In order to render the offence larceny, where there is an appropriation by a servant, who is already in possession, it must appear that the goods were at the time in

the constructive possession of the master. They will be considered in the constructive possession of the master if they have been once in the possession of the master, and have been delivered by the master, or by his orders, to the servant. But if the money or goods have come to the possession of the servant from a third person, and have never been in the hands of the master, they will not be considered to be in the constructive possession of the master for the purposes of larceny. This is the dis-[*587] tinction which *gave rise to the passing of the 39 Geo. 3, c. 85, creating the offence of embezzlement. See p. 414. The rule has never been doubted, but not unfrequently judges, while professing to recognize it, have given decisions with which it is scarcely reconcilable. The origin of these decisions is to be found in the unsatisfactory state of the criminal law (see an analogous case at p. 577), which before the passing of the last-mentioned statute left a large class of offences unprovided for. This remark applies to some of the following cases.

Where a clerk or servant took a bill of exchange belonging to his master, got it discounted, and converted the proceeds to his own use, this was held to be a larceny of the bill, though the clerk had authority to discount bills. It was contended, on behalf of the prisoner, that the bill having come legally into his possession, like any other bill of the prosecutor's over which he had a disposing power, he had a right to receive, though not to convert the money to his own use, which was, however, only a breach of trust. But Heath, J., was clearly of opinion that it was felony, the bill having been once decidedly in the possession of the prosecutor, by the clerk who got it accepted putting it amongst the other bills in the prosecutor's desk, and the prisoner having feloniously taken it away out of that possession. R. v. Chipchase, 2 East, P. C. 567; 2 Leach, 699: 2 Russ. by Grea. 162.

An insurance company had a drawing account with Glyn & Co., and used to send their pass-book on Tuesday in every week to be written up, and their messenger went on the following morning to bring it back, when it was returned, together with the checks, &c., of the preceding week. The prisoner was a salaried clerk in the office of the company; it was his duty to receive the pass-book and vouchers from the messenger, and to preserve the vouchers for the use of the company. On the 27th February, Glyn & Co. delivered the company's pass-book, containing, amongst other things, a certain cashed check for 1400*l.*, to the messenger of the company, who delivered the book and check to the prisoner in the usual way, and he thereupon fraudulently destroyed it. It was held, that the prisoner had been rightly convicted of larceny as a servant, inasmuch as the check, when delivered into his custody in the usual course of business, was constructively in the possession of the directors, who, under the circumstances, were his masters. R. v. Watt, 2 Den. C. C. R. 14; S. C. 19 L. J. M. C. 193; R. v. Manay, 1 Moo. C. C. 276, and R. v. Masters, 1 Den. C. C. R. 332, applied and distinguished the one from the other.

But if the money or goods be deposited in some receptacle which is itself in the actual or constructive possession of the master, then the constructive possession of the master extends to the goods so deposited, so that a subsequent appropriation of them by the servant will be larceny. Thus the prisoner was ordered by his masters, the prosecutors, to go with their barge to one Wilson, a corn-meter, for as much corn as the barge would carry, and which was to be brought in loose bulk. The prisoner received 230 quarters in loose bulk, and five other quarters, which he ordered to be put in sacks, and afterwards appropriated. The question reserved for the opinion of the judges was, whether this was felony, the corn never having been in the possession of the prosecutors, or whether it was not like the case of a servant receiving charge of or buying a thing for his master, but never delivering it; but they held

that this was *larceny in the servant, for it was a taking from the actual possession of the owner as much as if the corn had been in his granary. R. v. Spears, 2 East, P. C. 568; 2 Leach, 826; 2 Russ. by Grea. 155. In a similar case, where the prisoner, a servant of the prosecutors, came alongside a vessel, in which there was a quantity of corn, which had been purchased by the prosecutors, and procured a portion, to be put into sacks, which he carried away and sold, never having been employed to sell corn by his masters: on a case reserved, the judges held this to be larceny. The property of the prosecutors in the corn, observes Mr. East, was complete before the delivery to the prisoner, and after the purchase of it in the vessel, they had a lawful and exclusive possession of it against all the world, but the owner of the vessel. R. v. Abrahat, 2 East, P. C. 569; 2 Leach, 824; 2 Russ. by Grea. 156. These authorities were considered and supported in R. v. Johnson, 2 Den. C. C. R. 310; S. C. 21 L. J. M. C. 32.

When the prisoner was sent with his master's cart for some coals which were delivered to him and deposited in the cart, and the price charged to his master's account, and on the road home the prisoner disposed fraudulently of a portion of the coals, it was held that this was larceny, and not an embezzlement, the coals being constructively in the possession of the master when deposited in the cart. R. v. Reid, Dear. C. C. 257; S. C. 23 L. J. M. C. 25.

A very similar case to that of R. v. Reid was that of R. v. Wright, Dear. & B. C. C. 431. The prisoner was employed by a banking company to conduct a branch bank, and the whole of the duties of that branch were conducted by him alone. His salary not only included payment for his services, but also for providing an office in his own house, where he carried on another business, for the purposes of the bank. In this office was an iron safe, provided by the bank, into which it was the duty of the prisoner to put at night money which had been received during the day, and which had not been required for the purposes of the bank. The manager of the bank kept a key of this box as well as the prisoner. The prisoner furnished weekly accounts of moneys received and paid by him, showing the balance in his hands, and of what notes, cash, or securities, that balance consisted. In September, 1855, the prisoner's accounts were audited, and his cash examined and found correct; but for the two years following, though the weekly accounts were furnished as usual, the cash balance was not examined. In September, 1857, the manager having come to examine the cash balance, the prisoner said he was 3000*l.* short, and handed over to the manager 755*l.* 10*s.*, which he said was all the cash he had left, and which sum he took from a drawer in the counter, and not from the safe. The jury found the prisoner guilty of larceny as a clerk, and the Court of Criminal Appeal held that there was evidence that the prisoner, as his duty was, placed in the safe the money which he had received from the customers; that he thereby determined his own exclusive possession of the money, and that by taking some of such money out of the safe *animo furandi*, he was guilty of larceny.

A. had agreed to buy straw of B., and sent his servant, C., to fetch it. C. did so, and put down the whole quantity of straw at the door of A.'s stable, which was in a courtyard of A., and then went to A. and asked him to send some one with the key of the hayloft, which was over the stable, which A. did, and C. put part of the straw into the hayloft, and carried the rest away to a public house and sold it. *Tin- [*589] dal, C. J., held, that this carrying away of the straw by C., if done with a felonious intent, was a larceny, and not an embezzlement, as the delivery of the straw to A. was complete when it was put down at the stable-door. R. v. Hayward, 1 C. & K. 518: 47 E. C. L. R.

The following are cases in which the master or employer has been held not to have such a possession as is necessary in order that the servant may be guilty of larceny.

The prisoner, a cashier at the Bank of England, was indicted for stealing certain India bonds, laid as the property of the bank in one count, and in another, of a person unknown. The bonds were paid into the bank by order of the Court of Chancery, and according to the course of business, ought to have been deposited in a chest in the cellars. The prisoner who received them from the Court of Chancery, put them in his own desk, and afterwards sold them. The court before which the prisoner was tried, was of opinion, that this was not larceny; that the possession of the bonds was always in the prisoner, and that the bank had no possession which was not his possession until the bonds were deposited in the cellars as usual; and one of the judges took the distinction between a possession sufficient to maintain a civil action, and a possession whereon to found a criminal prosecution. R. v. Waite, 2 East, P. C. 570. Money, in cash and bank-notes, was paid into a bank to a clerk there, whose duty it was to receive and give discharges for money, and to place the bank-notes in a drawer; he gave an acknowledgment for the sum in question, but kept back a 100*l.* bank-note, and never put it in the drawer. On a case reserved, some doubt was at first entertained amongst the judges, but at last all assembled agreed that this was no felony, inasmuch as the note was never in the possession of the bankers, distinct from the possession of the prisoner, though it would have been otherwise if the prisoner had deposited it in the drawer, and had afterwards taken it. They thought that this was not to be distinguished from the cases of R. v. Waite, *supra*, and R. v. Bull, *infra*, which turned on this consideration, that the thing was not taken by the prisoner out of the possession of the owner, and here it was delivered into the possession of the prisoner. They said, that though to many purposes the note was in the possession of the masters, yet it was also in the actual possession of the servant, and that possession not to be impeached, for it was a lawful one. Eyre, C. J., also observed that the cases ran into one another very much, and were hardly to be distinguished; and that in R. v. Spears, *ante*, p. 587, the corn was in the possession of the master, under the care of the servant. R. v. Bazeley, 2 East, P. C. 571; 2 Leach, 835; 2 Russ. by Grea. 164. It was in consequence of this case, the statute 39 Geo. 3, c. 85, against embezzlements by clerks and servants, was passed. 2 Leach, 849. The prosecutor suspecting that he was robbed by the prisoner, his servant, who attended the shop, employed a customer to come to his shop on pretence of purchasing, and gave him some marked silver of his own, with which the customer came to the shop in the absence of the owner, and bought goods of the prisoner. Soon after, the master coming in, examined the till, in which the prisoner ought to have deposited the money when received, and not finding it there, procured him to be arrested, and, on search, the marked money was found upon him. On a case reserved, the judges were of opinion that the prisoner was not guilty of felony, but only of a breach of [*590] trust, the money never having *been put into the till; and, therefore, not having been in the possession of the master as against the defendant. R. v. Bull, cited in R. v. Bazeley, 2 East, P. C. 572; 2 Leach, 841; 2 Russ. by Grea. 163. So where a servant was sent by his master to get change of a 5*l.* note, which he did, saying it was for his master, but never returned, being convicted of stealing the change, the judges, on a case reserved, held this to be no larceny, because the master never had possession of the change except by the hands of the prisoner. R. v. Sullen, 1 Moody, C. C. 129. So where A. owed the prosecutor 5*l.* and paid it to the prisoner, who was the prosecutor's servant, supposing him authorized to receive

it, which he was not, and the prisoner never accounted for the money to his master; Alderson, B., held that this was neither embezzlement nor larceny. R. v. Hawtin, 7 C. & P. 281: 32 E. C. L. R.

Proof of the intent to deprive the owner of his property.] We now come to the other ingredient which is necessary to constitute larceny; the intent to deprive the owner of his property. This, like every other intent, is to be inferred from the mode in which the party charged deals with the property. It will, however, be a general presumption that where a party takes wrongful possession of the goods of another, that his intention is to steal them, and the onus will lie upon him to prove the contrary. If a man carries away the goods of another openly, though wrongfully, before his face, this carries with it evidence of being a trespass only. 1 Hale, P. C. 509. A servant taking his master's horse to ride on his own business is not guilty of larceny. Ibid. The prisoners were charged with stealing two horses. It appeared that they went in the night to an inn kept by the prosecutor, and took a horse and mare from the stable, and rode about thirty-three miles to a place where they left them in the care of the hostler, stating that they should return. They were apprehended on the same day about fourteen miles from the place. The jury found the prisoners guilty, but added that they were of opinion that the prisoners merely meant to ride the horses to the place where they left them, and to leave them there; and that they had no intention either of returning them or making any further use of them. The judges (Grose, J., diss., and Lord Alvanley not giving any express opinion) held that, upon this finding it was a trespass only, and not a larceny. They all agreed that it was a question for the jury, and that, if the jury had found a general verdict of guilty on this evidence, it could not be questioned. R. v. Phillips, 2 East, P. B. 662. So where upon an indictment for stealing a horse, two saddles, &c., it appeared the prisoner got into the prosecutor's stables and took away the horse and other articles all together; but that, when he had got some distance he turned the horse loose, and proceeded on foot with the saddles; Garrow, B., left it to the jury to say, whether the prisoner had any intention of stealing the *horse;* for that if he intended to steal the other articles, and only used the horse as a mode of carrying off the plunder more conveniently, he would not be guilty of larceny of the horse. R. v. Crump, 1 C. & P. 658: 11 E. C. L. R. Upon the same principle the following case was decided. The prisoner was indicted for stealing a straw bonnet. It appeared that he entered the house where the bonnet was, through a window which had been left open, and took the bonnet which belonged to a young girl whom he had seduced, and carried it to a hay-mow of his own, where he and the girl had been *twice [*591] before. The jury thought that the prisoner intended to induce the girl to go again to the hay-mow, but that he did not intend to deprive her of the bonnet. Of course this was held not to be larceny. R. v. Dickenson, Russ. & Ry. 420.

It is not necessary that the prisoner should intend to appropriate the goods to his own benefit; it is sufficient if he intends to deprive the owner of his property in them, and in the words of Parke, B., in R. v. Halloway, *infra*, to assume the entire dominion over them. As where the prisoner took away a horse for the purpose of destroying it, R. v. Cabbage, *supra*, p. 568; and where a servant taking a letter for the same purpose, R. v. Jones, Ibid.(1)

In R. v. Morfit, Russ. & Ry. 307, the prisoners were charged with stealing a quan-

(1) To constitute a felonious intent, it is not necessary that the taking should be *lucri causa;* taking with intent to destroy is sufficient. Dignowitty v. The State, 17 Texas, 521; Hamilton v. The State, 35 Mississippi, 214.

tity of beans. They were servants of the prosecutor, and took care of his horses, for which the prosecutor made them an allowance of beans. The prisoners had entered the granary by means of a false key, and carried away a quantity of the beans, which they gave to the prosecutor's horses. The case was reserved, and eight judges out of eleven thought it was felony; but some of the judges gave as a reason for their decision that the men's work was lessened by the additional food given to the horses, and so that there was in some sort a benefit to themselves. This decision was acted on in R. v. Handley, Car. & M. 547: 41 E. C. L. R., by Patteson, J., who refused to reserve the point. But in R. v. Privett, 1 Den. C. C. 193, the point was again reserved. There the jury found distinctly that the prisoners "took the oats with the intent of giving them to their master's horses, and without any intent of applying them to their private benefit." The greater part of the judges present appeared to think that this was larceny, because the prisoners took the oats knowingly, against the will of the owner, and without any color of title or of authority, with intent not to take temporary possession merely and then abandon it (which would not be larceny), but to take the entire dominion over them, and that it made no difference that the taking was not *lucri causâ*, or that the object of the prisoners was to apply the things stolen in a way which was against the wish of the owner, but might be beneficial to him. But all agreed that they were bound by the previous decisions to hold this to be larceny, though several of them expressed a doubt if they should have so decided if the matter were *res integra*. Erle, J., and Platt, B., were of a different opinion; they thought that the former decision proceeded, in the opinion of some of the judges, on the supposition that the prisoners would gain by the taking, which was rejected in this case; and they were of opinion that the taking was not felonious, because to constitute a larceny it was essential that the prisoner should intend to deprive the owner of the property in the goods, which he could not if he meant to apply it to his use. MS. of Parke, B., as given in Denison.

In another case the prisoner was supplied with a quantity of pig-iron by B. & Co., his employers, which he was to put into a furnace to be melted, and he was paid according to the weight of the metal which ran out of the furnace and became puddle-bars. A. put the pig-iron into the furnace, and also put in with it an iron axle of B. & Co., which was not pig-iron; the value of the axle to B. & Co. was 7*s.*, but the gain to the prisoner by melting it, and thus increasing the quantity of metal which ran from the furnace was 1*d.* Tindal, C. J., held that if the prisoner put the axle [*592] into the furnace with an *intent to convert it to a purpose for his own profit, it was larceny. R. v. Richards, 1 C. & K. 532: 47 E. C. L. R.

Where the prisoner took some skins of leather, not with the intent to sell or dispose of them, but to bring them in and charge them as his own work, and get paid by his master for them; they having been dressed, not by the prisoner, but by another workman; it was held not to be a larceny. R. v. Holloway, 1 Den. C. C. 381. The distinction between this case and the last seems to be this: that in the former there was such a conversion of the goods to the prisoner's own purposes as that the master never could have them again in their original condition; whereas in the latter their condition was never altered. So in R. v. Poole, Dear. & B. C. C. 345, the prisoners were in the prosecutor's employ as glove finishers, and the practice was to take the finished gloves into an upper room on the prosecutor's premises and lay them on a table, in order that the workmen might be paid according to the number they had finished. The prisoners took a quantity of finished gloves out of a store-room on the same premises, and laid them on the table with intent fraudulently to obtain

payment for them as for so many gloves finished by them. It was held that this was not larceny.

Where a servant took his master's goods, and offered them for sale to the master himself, as the goods of another, he was held to be guilty of larceny, as it was clear that he intended to assume the entire dominion over the goods. R. v. Hall, 1 Den. C. S. 381; S. C. 18 L. J. M. C. 62; acc. R. v. Manning, Dears. C. C. 21; S. C. 22 L. J. M. C. 21.

If the prisoner has once assumed the entire dominion over the goods, a return of the goods will not be sufficient to prevent the offence amounting to larceny. Thus where the prosecutrix had deposited a box of plate with the prisoner for safe custody, which he broke open, and took out the plate and pawned it, the jury found a verdict of guilty, but recommended the prisoner to mercy on the ground that they believed that he intended ultimately to return the property. Some of the judges doubted whether this was in law any other than a general verdict of guilty, but all thought that the conviction was good. R. v. Trebilcock, Dears. & B. C. C. 453. See R. v. Peat, *supra*, p. 596.

Proof of the intent to deprive the owner of his property—goods taken under a fair claim of right.] Of course if the prisoner believe that he has a right to the goods there can be no larceny, even if the goods be taken by force; because though the seizure be wrongful, the intent to steal is wanting.(1) 2 East, P. C. 659. Thus where the owner of land takes a horse damage feasant, or a lord seizes it as an estray, though perhaps without title, yet these circumstances explain the intent, and show that it was not felonious; but these facts may be rebutted, as by showing that the horse was marked, in order to disguise him. 1 Hale, P. C. 506, 507; 2 East, P. C. 659. After a seizure of uncustomed goods, several persons broke, at night, into the house where they were deposited, with intent to retake them for the benefit of the former owner; and it was held that this design rebutted the presumption of a felonious intent. R. v. Knight, 2 East, P. C. 510, 659.

Whether the taking of corn by gleaners is to be considered as a trespass only, or whether it is to be regarded as a felony, must *depend upon the circum- [*593] stances of the particular case. In some places a custom, authorizing the practice of gleaning, is said to exist; in others, it is sanctioned by the permission of the tenant of the land; and even where no right whatever exists, yet if the party carry away the corn under a mistaken idea of right, the act would not amount to larceny, the felonious intent being absent. A conviction is said to have taken place at the Old Bailey, upon an indictment for the exercise of this supposed right; but the circumstances of the case are not stated. 2 Russ. by Grea. 10. See R. v. Price, 4 Burr. 1925; 1 H. Bl. 51.

Larceny of goods found.] A good deal of trouble has been caused by cases of goods obtained by finding. It will be useful to consider, in reference to these cases, both what is the right of a person who finds goods, and what is necessary to constitute larceny.

The right of a person who finds goods is to take possession of them, if they have no apparent owner.

If at the time the property be taken possession of there be no apparent owner, the

(1) Where property is taken in a fair color of claim or title, a felonious intent is wanting, and it is therefore no larceny. The State v. Homes, 17 Missouri, 379.

subsequent discovery of one will not render the original taking unlawful, nor will it render the finder a bailee for the true owner. No conversion of the property, therefore, subsequent to the discovery of the true owner, will render the finder guilty of larceny.

The great question, therefore, is to discover when the property can be said to have no apparent owner. That has been the main subject of discussion in the following cases.

A gentleman left a trunk in a hackney coach, and the coachman, taking it, converted it to his own use, this was held to be larceny; for the coachman must have known where he took the gentleman up, and where he set him down, and ought to have restored his trunk to him. R. v. Lamb, 2 East, P. C. 664. The prosecutor having had his hat knocked off in a quarrel with a third person, the prisoner picked it up, and carried it home. Being indicted for larceny, Park, J., said, "If a person picks up a thing, and knows that he can immediately find the owner, but instead of restoring it to the owner, converts it to his own use, this is felony."(1) R. v. Pope, 6 C. & P. 346: 25 E. C. L. R.

In the case of Merry v. Green (which was an action of trespass for false imprisonment) a person purchased at a public auction a bureau, in which he afterwards discovered, in a secret drawer, a purse containing several sovereigns. The contents of the bureau were not known to any one. The purchaser having appropriated the money to his own use, it was held that there was a taking which amounted to a trespass, and that he was guilty of larceny; it was held also, that a declaration by the auctioneer, that he sold all that the bureau contained with the article itself, would have given the purchaser a colorable right to the contents, in which case the abstraction of the money would not have been felonious. In the course of the argument in this case, one of the counsel asked, "If the original possession is lawful, when is the felony committed?" Parke, B., interrupting him, said, "Why, suppose a person find a check in the street, and in the first instance takes it up merely to see what it is; if afterwards he cashes it, and appropriates the money to his own use, that is a felony: though he is a mere finder till he looks at it." In delivering the judgment of the court, the same learned baron said, "The old rule in Coke's 3d Inst. 108, [*594] '*that if one lose his goods, and another find them, though he *convert them animo furandi, to his own use, is no larceny,*' has undergone in more recent times some limitation; one is, that if the finder knows who the owner of the lost chattel is, or if from any mark upon it, or the circumstances under which it is found, the owner could be reasonably ascertained, then the fraudulent conversion *animo furandi* constituted a larceny. . . . It is said that the offence cannot be larceny, unless the taking would be a trespass, and that is true; but if the finder, from the circumstances of the case, must have known who was the owner, and instead of keeping the chattel for him, meant from the first to appropriate it to his own use, he does not acquire it by a rightful title, and the true owner might maintain trespass; and it seems also, from R. v. Wynne, 1 Leach, 413, that if, under the like circumstances, he acquire posses-

(1) State v. Weston, 9 Conn. 527; People v. McGowen, 17 Wend, 460; *Contra*, People v. Anderson, 14 Johns. 294. See Penna. v. Becomb et al., Addis. 386; Tyler v. The People, 1 Bree. 227; Porter v. The State, Martin & Yerg. 226; State v. Jenkins, 2 Tyler, 379; The People v. Swan, 1 Parker, C. R. 9; The State v. McCann, 19 Missouri, 249; Pritchett v. The State, 2 Sneed, 285; Hunt v. The Commonwealth, 13 Grattan, 757; The People v. Kantz, 3 Parker, C. R. 129; Pyland v. The State, 4 Sneed, 357.

The finder of lost goods, who takes possession of them not intending to steal them, at the time of the original taking, is not rendered guilty of larceny by any subsequent felonious intention to convert them to his own use. Ransom v. The State, 22 Conn. 153; Fulton v. The State, 8 English, 168; The State v. Conway, 18 Missouri, 321.

sion and mean to act honorably, but afterwards alter his mind, and *open* the parcel, with intent to embezzle its contents, such unlawful act would render him guilty of larceny." Merry v. Green, 7 M. & W. 623.

The whole law with reference to this subject was considered in the elaborate and learned judgment of Parke, B., in R. v. Thurburn, 1 Den. C. C. R. 387; S. C. 18 L. J. M. C. 140. The prisoner found a bank note, which had been accidentally dropped on the high road. There was no name or mark on it indicating who was the owner, nor were there any circumstances attending the finding which would enable him to discover to whom the note belonged when he picked it up; nor had he any reason to believe that the owner knew where to find it again. The prisoner meant to appropriate it to his own use when he picked it up. The day after, and before he had disposed of it, he was informed that the prosecutor was the owner, and had dropped it accidentally; he then changed it, and appropriated the money taken to his own use. The jury found that he had reason to believe, and did believe, it to be the prosecutor's property before he thus changed the note, and the prisoner was convicted. But Parke, B., who tried the case, after conferring with Maule, J., was of opinion that the original taking was not felonious, and that in the subsequent disposal of it there was no taking, and therefore declined to pass sentence, and reserved the case for the opinion of the Court of Criminal Appeal. That court held that the conviction was wrong. Parke, B., who delivered the unanimous judgment of the court, thus explains its grounds: "In order to constitute the crime of larceny, there must be a taking of the chattel of another *animo furandi*, and against the will of the owner. This is not the full definition of larceny, but so much only of it as is necessary to be referred to for the present purpose. By the term *animo furandi*, is to be understood the intention to take, not a particular temporary, but an entire, dominion over the chattel, without a color of right. As the rule of law, founded on justice and reason, is that *actus non facit reum nisi mens sit rea*, the guilt of the accused must depend on the circumstances as they appear to him; and the crime of larceny cannot be committed unless the goods taken appear to have an owner, and the party taking must know or believe that the taking is against the will of that owner." After commenting on the authorities, the learned baron proceeds: "It is quite a mistake to suppose, as Mr. Greaves has done (2 Russ. Cr. c. 14), that I meant in Merry v. Green to lay down the proposition in the general terms contained in the extract from the report of the case in 7 M. & W., which, taken alone, seems to be applicable to every case of finding unmarked as *well as marked property. It was [*595] meant to apply to the latter only. The result of these authorities is that the rule of law on this subject seems to be, that if a man find goods that have been actually lost, or are reasonably supposed by him to have been lost, and appropriates them, with intent to take the entire dominion over them, really believing when he takes them that the owner cannot be found, it is not larceny. But if he takes them with the like intent, though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny. In applying this rule, as indeed in the application of all fixed rules, questions of some nicety may arise, but it will generally be ascertained, whether the person accused had reasonable belief that the owner could be found, by evidence of his previous acquaintance with the ownership of the particular chattel, the place where it is found, or the nature of the marks upon it. In some cases it would be apparent, in others appear only after examination. It would probably be presumed, that the taker would examine the chattel, as an honest man ought to do, at the time of taking it; and if he did not restore it to the owner, the jury might conclude that he took it, when he took complete possession of it,

animo furandi. The mere taking it up to look at it would not be a taking possession of the chattel. To apply these rules to the present case: The first taking did not amount to larceny, because the note was really lost, and there was no mark on it or other circumstance to indicate then who was the owner, or that he might be found, nor any evidence to rebut the presumption that would arise from the finding of the note as proved, viz., that he believed the owner could not be found, and therefore the original taking was not felonious; and if the prisoner had changed the note or otherwise disposed of it, before notice of the title of the real owner, he clearly would not have been punishable; but after the prisoner was in possession of the note, the owner became known to him, and he then appropriated it, *animo furandi*, and the point to be decided is whether that was a felony. Upon this question we have felt considerable doubt. If he had taken the chattel innocently, and afterwards appropriated it without knowledge of the ownership, it would not have been larceny; nor would it, we think, if he had done so, knowing who was the owner, for he had the lawful possession in both cases, and the conversion would not have been a trespass in either. But here the original taking was not innocent in one sense, and the question is, does that make a difference? We think not; it was dispunishable, as we have already decided, and though the possession was accompanied by a dishonest intent, it was still a lawful possession, and good against all but the real owner, and the subsequent conversion was not therefore a trespass in this case more than the others, and consequently no larceny. We therefore think that the conviction was wrong."

In a subsequent case, R. v. Preston, 2 Den. C. C. R. 353; S. C. 21 L. J. M. C. 41, also one of a lost bank note found by a person who appropriated it to his own use, it was decided that the jury are not to be directed to consider at what time the prisoner after taking it into his possession resolved to appropriate it to his own use, but whether, at the time he took possession of it, he knew, or had the means of knowing, who the owner was, and took possession of the note with intent to steal it; for if his original possession of it was an innocent one, no subsequent change of his mind or resolution to appropriate to his own use would amount to larceny.

[*596] *Where the prisoner was indicted for stealing a watch, which he had found, and the jury returned the following verdict, "We find the prisoner not guilty of stealing the watch, but guilty of keeping it in the hope of reward from the time he first had the watch," this was held to amount to a finding of not guilty. R. v. Yorke, 1 Den. C. C. R. 335; S. C. 18 L. J. M. C. 38. Where the jury found that the notes were lost, that the prisoner did not know the owner, but that it was probable that he could have traced him, it was held that the prisoner was not bound to do that, and that he had been wrongfully convicted of stealing the notes. R. v. Dixon, 25 L. J. M. C. 39.

As to what is lost property was considered in R. v. West, 1 Dears. C. C. R. 402; S. C. 24 L. J. M. C. 4. A purse containing money was left by a purchaser on the prisoner's stall. A third person afterwards pointed out the purse to the prisoner, supposing it to be hers. She put it in her pocket, and afterwards concealed it; and on the return of the owner denied all knowledge of it. The jury found that the prisoner took up the purse knowing that it was not her own, and intending at the time to appropriate it to her own use, but that she did not know who was the owner at the time she took it. It was held, under these circumstances, that the purse was not lost property, and that the prisoner was properly convicted of larceny.

In R. v. Christopher, 1 Bell C. C. 27; S. C. 28 L. J. M. C. 35, the court distinctly laid down the principle, that in order to convict the finder of property of

larceny, it is essential that there should be evidence of an intention to appropriate the property at the time of finding, and that evidence of any subsequent intent to do so was insufficient. In that case the learned judge had told the jury that a felonious intent was necessary to every larceny, but that the intent might be inferred from acts subsequent to, as well as immediate upon, the finding, and that if the prisoner, when he discovered the owner, did not take measures to find him, they might from his behavior infer such an intention. The Court of Criminal Appeal, however, held this direction wrong, as it was calculated to lead the jury to suppose that a felonious intent subsequent to the finding was sufficient.(1)

In R. v. Moore, L. & C. 1; S. C. 30 L. J. M. C. 77, the prisoner was indicted for stealing a bank note. It appeared that a customer having made a payment in the prisoner's shop from a purse in which the bank note was, dropped the note there. In answer to questions put to them, the jury found: First, that the prisoner found the note in his shop; secondly, that the prisoner at the time he picked up the note did not know, nor had he means of knowing who the owner was; thirdly, that he afterwards acquired a knowledge of who the owner was, and after that he converted the note to his own use; fourthly, that the prisoner intended when he picked up the note to take it to his own use, and deprive the owner of it, whoever he might be; fifthly, that the prisoner believed at the time he picked up the note, that the owner could be found. The Court of Criminal Appeal held that the prisoner was rightly convicted of larceny, apparently resting their judgment on the fourth finding, and disregarding the third finding, which is inconsistent with it. Perhaps all that the jury meant by the third finding was that, having appropriated the note from the first, the prisoner did not, after he discovered the owner, alter his mind and intend to return it. It is also difficult to reconcile *the fifth finding with the second, but here, again, [*597] the court probably considered that, taken together, the two findings came to this, that there were no marks apparent on the face of the note indicating who was the owner, but that the prisoner might, nevertheless, if he had taken reasonable pains, have ascertained who was the owner. At any rate, there is no indication that the court had any intention of overruling the previous cases. It is perhaps very doubtful, whether the property was, strictly speaking, lost property at all. See R. v. West, *supra*.

Larceny by the owner.] It is, of course, under ordinary circumstances, impossible for a man to commit larceny by taking possession of his own property. But there is a passage in the Year Book, 7 H. 6, 45 *a*, in which it is said, "that if I bail to you certain goods to keep, and then retake them feloniously, that I should be hung for it, and yet the property was in me: and Norton said that this was law." This passage, however at least requires qualification. It is repeated in all the criminal treatises, with the addition that it is felony if the goods be taken "with a fraudulent design, to charge the bailee with the value."(2) 1 Hale, P. C. 513, 514; Foster, 123; 2 East, P. C. 558; 4 Bl. Com. 331. In R. v. Wilkinson, Russ. & Ry. 471, it appeared that the prosecutors were lightermen, and were employed by one C., a merchant, to pass nux vomica through the custom-house. The prosecutors entered it for a vessel

(1) Where property (*e. g.*, a pocket-book containing bank-bills) with no mark about it indicating the owner, was lost, and found in the highway, and there was no evidence to show that the finder at the time knew who the owner was; *held*, that he could not be convicted of larceny, though he fraudulently, and with intent to convert the property to his own use, concealed the same immediately afterwards. The People v. Cogdell, 1 Hill, 94. See Lawrence v. The State, 1 Humphreys, 228.

(2) A man may steal his own property, if, by taking it, it is his intent to charge a bailee with it. The People v. Stone, 16 California, 369.

about to sail, then lying in the London Docks, and, having done what was necessary, delivered back the cocket bill and warrants to C., and joined with C. in a bond to government to export these goods. The prosecutors then employed the prisoners to convey the goods to the ship, and lent them one of their lighters for the purpose. The prisoner W. accordingly took the nux vomica on board the lighter, but, instead of delivering it on board the ship, he, in company with and assisted by the other prisoner, M., emptied the bags and refilled them with cinders; the nux vomica was then sent by them to London, and the bags of cinders delivered on board as and for the nux vomica. The prisoners were indicted for stealing nux vomica, *the property of the prosecutors*, but it appeared at the trial that it was really the property of the prisoner M., and that C. had only lent his name to facilitate the passing of the goods at the custom-house. It was also proved that the object of the transaction was to defraud the government of the duty. The case was considered by eleven judges. Four of them thought that it was no larceny, as there was no intent to cheat the prosecutors, but only the crown. Seven of the judges held it larceny, because the prosecutors had a *right to the possession until the goods reached the ship;* and they had also an interest in that possession, and the intent to deprive them of their possession wrongfully and against their will, was a felonious intent as against them, because it exposed them to a suit upon the bond. In the opinion of part of the judges, this would have been larceny, although there had been no felonious intent against the prosecutors, but only an intention to defraud the crown.

It may be doubted whether the law has not been somewhat distorted in this case, in order to punish a flagrant fraud. If the prisoner, who was the true owner of the goods, had demanded them, the prosecutors could scarcely have refused to deliver them to him: so that the decision at least comes to this, that the prisoner obtaining [*598] possession *of his own goods, to which possession he has an undeniable right, by a false pretence, with intent to defraud, is guilty of larceny.

There might be a difference in cases where the bailee has a right to retain the property as a pledge or security, as in that case he has more than the bare possession; he has what is called a *special property* in the goods; but it is extremely difficult to reconcile even this case with any accurate view of the offence of larceny; and, moreover, the case of R. v. Wilkinson stands almost, if not quite, alone.

Larceny by part-owners.] As with owners so with part-owners, a larceny cannot, in general, be committed of the goods which they have in common, for one part-owner taking the whole only does that which by law he is permitted to do.(1) Hale, P. C. 513. This, upon principles of common law, would not apply to a larceny of the goods of a corporation by a member, because an individual member has no right of property or possession in the goods of the corporation; and it might be doubtful whether it applied where by mutual arrangement the part-owner had no right to the possession of the goods, or when it was clear that there was an intention by the part-owner to deprive his partners entirely of their property. The passage in Hale means no more than that a part-owner, in the absence of any arrangement to the contrary, may assume the entire possession without committing a trespass.

In R. v. Bramley, Russ. & Ry. 479, the prisoner was indicted for burglary. It appeared that she was a member of a friendly society, and that the money of the

(1) One entitled to receive a share of a crop for his services, is not joint-tenant or tenant in common with his employer, and commits larceny in stealing a part. State v. Gay, 1 Hill, 364.
On an indictment for stealing the goods of A. and B., evidence that some belonged to A. and some to B. will not do. State v. Ryan, 4 McCord, 16.

society was kept in a box at the house of T. N. She broke into the house and carried off the box. In the indictment the property was laid in one count as belonging to T. N.; and in the other as belonging to the three stewardesses of the society. The question reserved was whether, considering the situation the prisoner stood in with respect to the property, the conviction was proper; and ten judges were clear that as *T. N. was responsible for the loss of the property*, the conviction was right. In the case of R. v. Webster, 31 L. J. M. C. 13, the same point arose as in that of R. v. Bramley. There H. was the sole manager of the business of a friendly society, and, as such, carried on a shop, in the profit and loss of which all the members shared. H. was responsible for all the moneys of the society coming into his possession. The prisoner was also a member of the society, and assisted H. in the management of the shop. On one occasion the prisoner had taken some sovereigns from the till, and appropriated them. It was held that the prisoner might be convicted on an indictment laying the money as the property of H. alone.

By the 1 & 2 Vict. c. 96, s. 1, made perpetual by the 5 & 6 Vict. c. 85 (*vide supra*, p. 565), in all cases of banking copartnerships under 7 Geo. 4, c. 46, the members are liable for larceny, embezzlement, and other criminal appropriation of the goods of the company, in the same way as if they were not members of the company. See Grant, Law of Bankers, p. 601. There does not, however, seem to be any analogous provision with reference to banks formed under subsequent statutes. If, however, they be corporate bodies, there would probably be no difficulty with regard to them for the reason mentioned above.

In an indictment for larceny from a banking company, consisting of more than twenty persons, the property of the goods stolen was laid in the public officer. Upon failure of proof of the appointment of the *public officer and of the regis- [*599] tration of the company, an amendment was asked for and made, stating the property to be in "W. and others," it being proved that W. was one of the members of the company. It was held by the Court of Criminal Appeal that under the 7 Geo. 4, c. 64, s. 14, the allegation of ownership, as amended, was right; and that the 7 Geo. 4, c. 46, s. 9, did not make it absolutely imperative that the property belonging to a banking company should be laid in their public officer. R. v. Pritchard, 1 L. & C. 34; S. C. 30 L. J. M. C. 169.

With regard to friendly societies, the difficulty is met by the 18 & 19 Vict. c. 63, s. 18, *supra*, p. 567, substituted for a similar provision contained in the 10 Geo. 4, c. 56, s. 21, which vests in the trustees for the time being all the property of the society, and directs that it shall, for all purposes of suit, civil or criminal, be stated to be the property of such trustees. The effect of this seems to be to vest the property in the trustees as against the members of the society. R. v. Cain, 2 Moo. C. C. 207. See also 7 Geo. 4, c. 64, s. 14, *supra*, p. 565.

A Bible had been given to a society of Wesleyan dissenters, and was bound at the expense of the society. No trust deed was produced. The Bible having been stolen, the indictment charged the property to be in A. and others. A. was a trustee of the chapel and a member of the society. Parke, J., held the indictment right. R. v. Boulton, 5 C. & P. 537: 25 E. C. L. R. It is not requisite that a strict legal partnership should exist. Where C. and D. carried on business in partnership, and the widow of C. upon his death, without taking out administration, acted as partner, and the stock was afterwards divided between her and the surviving partner, but before the division, part of the stock was stolen; it was held, that the goods were properly described as the joint property of the surviving partner and the widow, upon an objection that the children of C. ought to have been joined, or the goods described as the

property of the surviving partner and the ordinary, no administration having been taken out. R. v. Gabey, R. & R. 178. And where a father and son took a farm on their joint account, and kept a stock of sheep, their joint property, and upon the death of the son, the father carried on the business for the joint benefit of himself and his son's children, who were infants; it was held, upon an indictment for stealing sheep bred from the joint stock, some before and some after the death of the son, that the property was well laid in the father and his son's children. R. v. Scott, R. & R. 13; 2 East, P. C. 655.

Larceny by wife.] Very akin to the case of larceny by part-owners is that of larceny by a wife. If a wife take goods of which the husband is the joint or sole owner, the taking is not larceny, because they are in law but one person, and the wife has a kind of interest in the goods. Hawk. P. C. b. 1, c. 33, s. 19. Therefore, where the wife of a member of a friendly society, stole money belonging to the society, lodged in a box in her husband's custody, under the lock of the stewards of the society, it was held by the judges not to be larceny. R. v. Willis, 1 Moody, C. C. 375.

Whether, where a stranger and the wife jointly steal the husband's property, it is larceny in the stranger, has been the subject of contradictory decisions. R. v. Clark, O. B. 1818, 1 Moo. C. C. 376 (*n*); R. v. Folfree, 1 Moody, C. C. 243. In R. v. [*600] Rosenberg, 1 C. *& K. 233: 47 E. C. L. R., in a reply to a remark from counsel, that there is a passage in Dalton's Justice as to the delivery of the husband's goods by the wife to the adulterer constituting felony in him, Parke, B., said, "If that question arose, I should reserve it for the opinion of the judges." The point has been twice reserved for the opinion of the Court of Criminal Appeal. In R. v. Thompson, 1 Den. C. C. R. 549, the prisoner went away with the prosecutor's wife, and lived with her at Birmingham as man and wife; they took with them from the prosecutor's house several articles belonging to him, which were used in their house at Birmingham. The chairman of quarter session directed the jury to find the prisoner guilty, if they came to the conclusion either that the prisoner, going away with the prosecutor's wife for the purpose of an adulterous intercourse, was engaged jointly with her in taking the goods; or, secondly, that not being a party to the original taking or removal, the prisoner, after arriving at Birmingham, appropriated any part of the goods to his own use. The jury found the prisoner guilty; adding, that they did so on the ground that there was a joint taking by the prisoner and the prosecutor's wife; and the court were unanimously of opinion that the conviction was right.(1) In R. v. Featherstone, 1 Dears. C. C. R. 369; S. C. 23 L. J. M. C. 127, the prosecutor's wife had taken from his bedroom thirty-five sovereigns, and on leaving the house, called out to the prisoner, who was in a lower room of the house, "George, it is all right, come on." The prisoner left a few minutes afterwards, and he and the prosecutor's wife were traced to a public house, where they passed the night together. When taken into custody, the prisoner had twenty-two sovereigns upon him. The jury found the prisoner guilty, stating, that they did so "on the ground that he received the sovereigns from the wife, and that she took them without the authority of her husband." The court held that the conviction was right. "The general rule," said Campbell, C. J., in giving judgment, "is that a wife cannot be convicted of larceny for stealing the goods of her husband. It is no larceny in her to carry away her husband's goods, as husband and wife are one. But the law has

(1) The People v. Schuyler, 6 Cowen, 572.

properly qualified that general rule, by saying, that if a wife commit adultery, and then steal the goods of her husband with the adulterer, she has determined her quality of wife, and is no longer looked upon as having any property in the goods, and the person who assists her is guilty of larceny. I think the case of the prisoner must be considered in the same light as if he had taken the goods himself. This is not the case of a receiving of the goods from the wife, but the prisoner is supposed actually to have assisted her in taking them. It is said in Russell on Crimes, 23, 'If the wife steal the goods of her husband and deliver them to B., who, knowing it, carries them away, B. being the adulterer of the wife, this, according to a very good opinion, would be felony in B., for in such case no consent of the husband can be presumed.' That is this very case. The prisoner was the adulterer of the wife, and knew that the goods were carried away without the consent of the husband. This case is within the express authority of the rule which is first laid down in Dalton, c. 104, p. 268, and to be found in every book on the criminal law." It is the same whether the adultery be actually committed or only intended. R. v. Tollett, C. & Moo. 112; R. v. Thompson, *supra*. If the wife and the adulterer take away only the wife's wearing apparel, it is not larceny. *R. v. Fitch, Dear. & B. C. [*601] C. 187; S. C. 26 L. J. M. C. 169. If there be no evidence that an adultery has been committed or intended, then a question may arise whether a stranger who takes the goods of the husband is exonerated by the wife being privy and consenting thereto. But if the wife be the principal in the transaction, and take the goods herself, a stranger cannot be convicted as accessory, this being no felony in the principal. R. v. Avery, 1 Bell, C. C. 150; S. C. 28 L. J. M. C. 27.

Distinction between larceny, embezzlement, and false pretences.] The cases which explain the distinction between larceny and embezzlement have already been stated, *ante*, pp. 414 and 587. It must be borne in mind that, though by the 24 & 25 Vict. c. 96, s. 72, *supra*, p. 564, a prisoner, on an indictment for larceny, may be found guilty of embezzlement, and on an indictment for embezzlement may be found guilty of larceny, yet the verdict must be found according to the facts, and a prisoner cannot be legally convicted of one of these offences on facts which constitute the other. R. v. Garbutt, *supra*, p. 415.

If the prisoner be indicted for obtaining money or goods by false pretences, and the offence turn out to be larceny, the prisoner is not entitled to be acquitted of the misdemeanor; so that there is no difficulty in this case analogous to that which was the subject of decision in R. v. Garbutt, *supra*. If, however, the prisoner be indicted for larceny, and it appears that the offence was really an obtaining by false pretences, the prisoner must be acquitted. It is necessary, therefore, to distinguish the offences. The cases illustrating this distinction will be found at pp. 575–577.

Proof of value.] The rule that evidence of some value must be given, for which it is usual to quote R. v. Phipoe, 2 Lea. 680, has been questioned by Parke, B., in R. v. Morris, 9 C. & P. 349: 38 E. C. L. R.; at any rate, it is said by that learned judge that it need not be of the value of any coin known to the law. Neither is it necessary that the property should be of value to third persons, if valuable to the owner. Therefore a man may be convicted of stealing bankers' reissuable notes, which have been paid.(1) R. v. Clarke, 2 Leach, 1037; R. v. Ransom, Id. 1090;

(1) Payne v. The People, 6 Johns. 103. Therefore, in larceny of a bank note, it must be proved to be genuine. The State v. Tillery, 1 Nott & McC. 9.

Russ. & Ry. 232. In R. v. Walsh, R. & R. 215, the judges are reported to have held (p. 220), that a check in the hands of the drawer is of no value, and could not be the subject of larceny. But where the prisoner, who was employed by the prosecutors as an occasional clerk, received from them a check on their bankers, payable to a creditor, for the purpose of giving it to such creditor, and the prisoner caused the check to be presented by a third party, and appropriated the amount to his own use: being found guilty of stealing the check, the judges affirmed the conviction. R. v. Metcalf, I Moo. C. C. 433. See tit. Written Instruments.

In certain statutory felonies, as stealing trees, &c., the article stolen must be proved to be of a certain value, *infra*, tit. Trees. In such cases of course the value must be proved. As to allegations of value in the indictment, see *supra*, pp. 77 and 85.

Proof of ownership—cases where it is unnecessary to allege or prove ownership.] [*602] In some cases, in consequence of the provisions of certain *statutes it is unnecessary either to allege or prove the ownership of the property stolen, as upon an indictment under the 24 & 25 Vict. c. 96, s. 81, *ante*, p. 459, in which many of the judges thought that the right way of laying the case was, to allege the lead to have been fixed to a certain building, &c., without stating the property to be in any one. R. v. Hickman, 2 East, P. C. 593. So by 24 & 25 Vict. c. 96, s. 29, upon an indictment for stealing a will, &c., it shall not be necessary to allege that such will, &c., is the property of any person; and the same with regard to stealing records, &c., s. 30; see *infra*, tit. Written Instruments.(1)

Proof of the ownership—intermediate tortious taking.] It is an established and well-known rule of law, that the possession of the true owner of goods cannot be divested by a tortious taking; and, therefore, if a person unlawfully take my goods, and a second person take them again from him, I may, if the goods were feloniously taken, indict such second person for the theft, and allege in the indictment that the goods are my property, because these acts of theft do not change the possession of the true owner. Per Gould, J., delivering the opinion of the judges, R. v. Wilkins, 1 Leach, 522. If A., says Lord Hale, steal the horse of B., and after C. steal the same horse from A., in this case C. is a felon, both as to A. and B., for by the theft by A., B. lost not the property, nor in law the possession of his horse, and therefore C. may be indicted for felony in taking the horse of B. 1 Hale, P. C. 507. But if A. steals the horse of B., and afterwards *delivers it* to C., who was no party to the first stealing, and C. rides away with it, *animo furandi*, yet C. is no felon to B., because, though the horse was stolen from B., yet it was stolen by A. and not by C., for C. did not take it, neither is he a felon to A., for he had it by his delivery. Ibid. The doctrine as to property not being changed by felony, holds also with regard to property taken by *fraud*, for otherwise a man might derive advantage from his own wrong. Per Gould, J., 1 Leach, 523; Noble v. Adams, 7 Taunt. 39: 2 E. C. L. R.; Kelby v. Wilson, Ry. & Moo. N. P. C. 178: 21 E. C. L. R.; Irving v. Motley, 7 Bingh. 543: 20 E. C. L. R.

(1) To sustain an indictment for larceny, proof must be adduced that the goods alleged to be stolen are the absolute or special property of the person named as owner in the indictment, and that a felony has been committed. State v. Furlong, 19 Maine, 225.

If the goods of A. be stolen by B., and afterwards they be stolen from B. by C., an indictment against the latter may allege the title to be in either A. or B., at the election of the pleader. Ward v. The People, 3 Hill, 395; 6 Hill, 144. See also The State v. Furlong, 19 Maine, 225; The Commonwealth v. Doane, 1 Cushing, 5.

Proof of ownership—of goods in custodiâ legis.] Goods seized by the sheriff under a *fi. fa.* remain the property of the defendant until a sale. Lucas v. Nockells, 10 Bingh. 182: 25 E. C. L. R. A sheriff's officer seized goods under a *fi. fa.* against J. S., and afterwards stole part of them. The indictment against him described the goods as the goods of J. S., upon which it was objected that they were no longer the goods of J. S., and should have been described as the goods of the sheriff; but upon the point being reserved, the judges held, that notwithstanding the seizure, the general property remained in J. S., and the loss would fall upon him if they did not go to liquidate the debt; that the seizure left the debt as it was, and that the whole debt continued until the goods were applied to its discharge. R. v. Eastall, 2 Russ. by Grea. 92.

Proof of ownership—goods of an adjudged felon.] The goods of an adjudged felon, stolen from his house, in the possession of, and occupation of his wife, may be described in an indictment for larceny, as the goods of the queen; but the house cannot be so described without *office found. R. v. Whitehead, 2 Moo. C. [*603] C. 181; S. C. 9 C. & P. 429.

Proof of ownership—goods in possession of children.] Clothes and other necessaries, provided for children by their parents, are often laid to be the property of the parents, especially where the children are of a tender age; but it is good either way. 2 East, P. C. 654; 2 Russ. by Grea. 94. In a case at the Old Bailey, in 1701, it was doubted whether the property of a gold chain, which was taken from a child's neck, who had worn it for four years, ought not to be laid to be in the father. But Tanner, an ancient clerk in court, said that it had always been usual to lay it to be the goods of the child in such case, and that many indictments, which had laid them to be the property of the father, had been ordered to be altered by the judges. 2 East, P. C. 654. Where a son, nineteen years of age, was apprenticed to his father, and in pursuance of the indentures of apprenticeship, was furnished with clothes by the father, it was held, that the clothes were the property of the son exclusively, and ought not to have been laid in the indictment to be the property of the father. R. v. Forsgate, 1 Leach, 463. Where the prisoner was indicted for stealing a pair of trousers, the property of J. Jones, and it appeared that J. Jones bought the cloth of which the trousers were made, and paid for it, but the trousers were made for his son Thomas, who was seventeen years of age: and J. Jones stated that he found clothes for his son, who was not his apprentice, but a laborer like himself, and worked for the same master, but at different work, and lived with his father: Patteson, J., said, "I think the property is well laid. It may be laid in these cases, either in the father or in the child; but the better course is to lay it in the child." R. v. Hughes, 2 Russ. by Grea. 95; Car. & M. 593: 41 E. C. L. R. In R. v. Green, Dears. B. C. C. 113, it appeared that A. was a boy of fourteen years of age, living with and assisting his father; that the boots which the prisoner was charged with stealing were the property of the father, but that at the time they were stolen A. had the temporary care of the stall from which they were taken. It was held, that the ownership of the goods could not properly be laid in A.

Proof of ownership—goods in possession of bailees.] Any one who has a special property in goods stolen, may lay them to be his in an indictment, as a bailee, pawnee, lessee for years, carrier, or the like; *à fortiori*, they may be laid to be the

property of the respective owners, and the indictment is good either way.(1) But if it appear in evidence that the party whose goods they are laid to be, had neither the property nor the possession (and for this purpose the possession of a *feme covert* or servant is, generally speaking, the possession of the husband or master), the prisoner ought to be acquitted on that indictment. 1 Hale, P. C. 513; 2 East, P. C. 652. Many cases have been decided on this principle.

Goods stolen from a *washerwoman*, who takes in the linen of other persons to wash, may be laid to be her property, for persons of this description have a possessory property, and are answerable to their employer, and could all maintain an appeal of rob- [*604] bery or larceny, *and have restitution. R. v. Facker, 2 East, P. C. 653; 1 Leach, 357 (*n*). So an *agister*, who only takes in sheep to agist for another, may lay them to be his property, for he has the possession of them, and may maintain trespass against any who takes them away. R. v. Woodward, 2 East, P. C. 653; 1 Leach, 357 (*n*). A coach-master, in whose coach-house a carriage is placed for safe custody, and who is answerable for it, may lay the property in himself. R. v. Taylor, 1 Leach, 356. So where a glass was stolen from a lady's chariot, which had been put up in a coach-yard at Chelsea, while the owner was at Ranelagh, the property was held to be properly laid in the master of the yard. R. v. Statham, cited 1 Leach, 357. Goods at an inn, used by a guest, when stolen, may be laid to be either the property of the innkeeper or the guest. R. v. Todd, 2 East, P. C. 653. Where the landlord of a public house had the care of a box belonging to a benefit society, and by the rules he ought to have had a key, but in fact had none, and two of the stewards had each a key, the box being stolen, upon an indictment, laying the property in the landlord, Parke, J., held, that there was sufficient evidence to go to the jury of the property being in the landlord alone.(2) R. v. Wymer, 4 C. & P. 391: 19 E. C. L. R. A house was taken by Kyezor, and Miers, who lived on his own property, carried on the business of a silversmith there, for the benefit of Kyezor and his family, but had himself no share in the profits and no salary, but had power to dispose of any part of the stock, and might, if he pleased, take money from the till as he wanted it. Miers sometimes bought goods for the shop, and sometimes Kyezor did. Bosanquet, J., held, that Miers was a bailee of the stock, and that the property in a watch stolen out of the house might properly be laid in him. R. v. Bird, 9 C. & P. 44: 38 E. C. L. R.

When property is parted with by a bailee under a mistake, his special property in it is not divested; and if a larceny of it be committed, it may well be laid as the property of such bailee. R. v. Vincent, 2 Den. C. C. R. 464.

Proof of ownership—goods in possession of carriers.] Carriers, as bailees of goods, have such a possession as to render an indictment, laying the property in them, good. *Supra.* And so it has been held with regard to the driver of a stage-coach. The prisoner was indicted for stealing goods, the property of one Markham. The goods had been sent by the coach driven by Markham, and had been stolen from the boot

(1) In an indictment for larceny, proof that the person alleged to have been the owner had a special property in the thing, or that he had it to do some act upon it, or for the purpose of conveyance, or in trust for the benefit of another, would be sufficient to support that allegation in the indictment. State v. Somerville, 21 Maine, 14.

Where leather has been delivered to a person to be manufactured into shoes, the shoes may be laid as the property of the manufacturer. The State v. Ayer, 3 Foster, 301.

Where one person has the general and another a special property in a thing stolen, in the indictment the property may be alleged to be in either. Langford v. The State, 8 Texas, 115; The People v. Smith, 1 Parker, C. R. 329; Barrus v. The People, 18 Illinois, 52.

(2) So as to goods in possession of a captain of a vessel. Williams's Case, 1 Rogers's Rec. 29.

on the road. The question was, whether the goods were properly laid to be the property of Markham, who was not the owner, but only the driver of the coach, there being no contract between him and the proprietors that he should be liable for anything stolen, and it not appearing that he had been guilty of any laches. Upon a case reserved, the judges were of opinion, that the property was rightly laid in Markham; for though as against his employers, he, as driver, had only the bare charge of the property committed to him, and not the legal possession, which remained in his masters; yet, as against all the rest of the world, he must be considered to have such a special property therein as would support a count charging them as his goods, for he had, in fact, the possession of and control over them, and they were intrusted to his custody and disposal during the journey. They said that the law, upon an indictment against the driver of a *stage-coach, on the prosecution of the pro- [*605] prietors, considers the driver to have the bare charge of the goods belonging to the coach; but on a charge against any other person, for taking them tortiously and feloniously out of the driver's custody, he must be considered as the possessor. R. v. Deakin, 2 Leach, 862, 876; 2 East, P. C. 653.

Proof of ownership—goods of deceased persons.] Where a person dies intestate, and the goods of the deceased are stolen before administration granted, the property must be laid in the ordinary; but if he dies, leaving a will, and making executors, the property may be laid in them, though they have not proved the will; and it is not necessary that the prosecutor should name himself ordinary or executor, because he proceeds on his own possession.(1) 1 Hale, P. C. 514; 2 East, P. C. 652. Where a deceased had appointed executors who would not prove the will, Bolland, B., and Coleridge, J., held, that the property must be laid in the ordinary, and not in a person who, after the commission of the offence, but before the indictment, had taken out letters of administration. R. v. George Smith, 7 C. & P. 147 : 32 E. C. L. R.; R. v. Johnson, 27 L. J. M. C. 52. There can be no property in a dead body, and though a high misdemeanor, the stealing of it is no felony. See p. 392. A shroud stolen from the corpse must be laid to be the property of the executors, or of whoever else buried the deceased. So the coffin may be laid to be the goods of the executors. But if it do not appear who is the personal representative of the deceased, laying the goods to be the goods of a person unknown is sufficient. 2 East, P. C. 652; 2 Russ. by Grea. 98. A knife was stolen from the pocket of A. as he lay dead on a road in the diocese of W. A.'s last place of abode was at T. in the diocese of G., but A.'s father stated, that he believed his son had left T. to come to live with him, but he did not know whether his son had given up his lodgings at T. Patteson, J., held, that there was sufficient proof to support a count for larceny, laying the property in the Bishop of W. R. v. Tippin, Car. & M. 545 : 41 E. C. L. R.

In some cases the property of an intestate has been held to be rightly described as being in the party in actual possession, no administration having been granted. D. and C. were partners; C. died intestate, leaving a widow and children. From the time of his death, the widow acted as partner with D., and attended to the business of the shop. Three weeks after his death part of the goods were stolen, and were described in the indictment as the goods of D. and the widow. It was contended, that the name of the children, as next of kin, should have been joined, or that the property should have been laid in D. and the ordinary; but Chambre, J., held, that

(1) Property cannot be laid as belonging to a person deceased. The State v. Davis, 2 Car. Law Rep. 291.

actual possession, as owner, was sufficient, and the judges, on a case reserved, were of the same opinion. R. v. Gabey, Russ. & Ry. 178. So where a father and son carried on business as farmers, and the son died intestate, after which the father carried on the business for the joint benefit of himself and the son's next of kin, some of the sheep being stolen, and being laid as the property of the father and next of kin, the judges, on a case reserved, held the indictment right. R. v. Scott, Russ. & Ry. 13.

The prisoner was charged with stealing a number of articles laid as the property of the Bishop of Peterborough; the county in which the things were stolen, being in [*606] that diocese. To prove the intestacy of *the person to whom the property had belonged, it was shown that an unsuccessful search had been made for a will in the boxes and drawers of the deceased, and that no administration had been taken out in the proper court. As to some of the articles mentioned in the indictment, it was shown that they were in the possession of the deceased at the time of her death; but as to the majority there was no evidence of this, but it was shown that on the day of the funeral they were taken by the prisoner to the house of a witness. The court, at the trial, refused to confine the case to the things shown to have been in the possession of the deceased at the time of her death, and the jury found the prisoner guilty. It was held that there was sufficient evidence of the intestacy of the prisoner, and that the property was in the ordinary; and that the conviction was right. R. v. Johnson, Dear. & B. C. 340; S. C. 27 L. J. M. C. 152.

Proof of ownership—goods of lodgers.] Where a room, and the furniture in it, are let to a lodger, he has the sole right to the possession, and if the goods are stolen, it has been held, in two cases, by the judges, that the property must be laid in the lodger. R. v. Belstead, Russ. & Ry. 411; R. v. Brunswick, 1 Moo. C. C. 26.

Proof of ownership—goods of married women.] Where goods, in the possession of a married woman, are stolen, they must not be described as her property, but as that of her husband; for her possession is his possession. 2 East, P. C. 652. See R. v. French, Russ. & Ry. 491; R. v. Wilford, Id. 517, stated *ante*, p. 338. Where the goods of a *feme sole* are stolen, and she afterwards marries, she may be described by her maiden name. R. v. Turner, 1 Leach, 536.

Proof of ownership—goods of persons unknown.] Felony may be committed in stealing goods, though the owner is not known, and they may be described in the indictment as the goods of a person to the jurors unknown; and the king is entitled to them. 1 Hale, P. C. 512; 2 East, P. C. 651. But if the owner be really known, an indictment, alleging the goods to be the property of a person unknown, is improper. 2 East, P. C. 651.

In prosecutions for stealing the goods of a person unknown, some proof must be given sufficient to raise a reasonable presumption that the taking was felonious, or *invito domino;* it is not enough that the prisoner is unable to give a good account how he came by the goods. 2 East, P. C. 651; 2 Hale, P. C. 290. An indictment for plundering a wreck contained two counts: the first count stated the property in the ship to be in certain persons named; the second, in persons unknown. The witness for the prosecution could not recollect the christian names of some of the owners. The counsel for the crown then relied on the second count, but Richards, C. B., said, "I think the prisoner must be acquitted. The owners, it appears, are known, but

the evidence is defective on the point. How can I say that the owners are unknown?" R. v. Robinson, Holt's N. P. C. 596: 3 E. C. L. R.; 2 Russ. by Grea. 98 (*n*).

Proof of ownership—goods in the possession of servants.] In general, the possession of a servant is the possession of the master, *the servant having merely [*607] the charge and custody of the goods; and in such case, the property must be laid in the master, and not in the servant.(1) 2 East, P. C. 652; 2 Russ. by Grea. 92. Upon an indictment for stealing goods from a dissenting chapel, laying the property in one Evans, it appeared that Evans was the servant of the trustees of the chapel; that he had a salary of 5*l.* a year, with the care of the chapel and the things in it, to clean and keep in order; that he held the only key of the chapel, but that the minister had a key of the vestry, through which he might enter the chapel. Upon a case reserved the judges were of opinion, that the property of the goods taken could not be considered as belonging to Evans. R. v. Hutchinson, Russ. & Ry. 412. But in some cases, as against third persons, a party who, as against his employer, has the bare *charge* of goods, may be considered as having the possession, as in the case of the driver of a stage-coach. *Ante*, p. 604. So it has been said that where the owner of goods steals them from his own servant, with intent to charge him with the loss, the goods may be described as the property of the servant. *Ante*, p. 597, *sed quære.*

Proof of ownership—goods of corporations.] Where goods are the property of a company of persons not incorporated, they must be described as the goods of the individuals, or of some one of the individuals, and others. 1 Russ. by Grea. 99. But by the 7 Geo. 4, c. 64, s. 20 (the 9 Geo. 4, c. 54, I), judgment shall not be stayed or reversed on the ground that any person or persons, mentioned in an indictment or information, is or are designated by the name of office, or other descriptive appellation, instead of his, her, or their proper name or names.

The goods of a corporation must be described as their goods, by their corporate name. Where in an indictment the goods were laid to be the property of A. B. C. D., &c., they, the said A. B. C. D., &c., being the churchwardens of the parish church; and it appeared that the churchwardens were incorporated by the name of "the churchwardens of the parish church of Enfield," the court (at the Old Bailey) held the variance fatal. They said, that where any description of men are directed by law to act in a corporate capacity, their natural and individual capacity, as to all matters respecting the subject of their incorporation, is totally extinct. If an action were brought in the private names of the prosecutors, for any matter relating to their public capacity, they must unavoidably be nonsuited, and *à fortiori* it must be erroneous in a criminal prosecution. R. v. Patrick, 1 Leach, 252. But where trustees were appointed by an act of Parliament (but not incorporated), for providing a workhouse, and property stolen from them was laid to be the property of "the trustees of the poor of," &c., without naming them, the court (at the Old Bailey) held it wrong; for as the act had not incorporated the trustees, and by that means given them collectively a public name, the property should have been laid as belonging to A. B., &c., by their proper names, and the words "trustees of the poor of," &c., subjoined as a description of the capacity in which they were authorized by the legislature to

(1) Commonwealth v. Morse, 14 Mass. 217; Norton v. The People, 8 Cowen, 137; Poole v. Symonds, 1 N. Hamp. 289.

Where one has received money for himself and for another, for whom he acted as agent, and to whom he had given credit for his share, it is well alleged in the indictment for larceny, that the money was the property of the person receiving it. State v. Grant, 22 Maine, 171.

act. R. v. Sherrington, 1 Leach, 513. On the authority of this case the following was decided: By the 24 Geo. 3, c. 15, certain inhabitants in seven parishes were incorporated by the name of "the guardians of the poor of," &c. Twelve directors were to be appointed out of the guardians, and the property belonging to the corpo- [*608] ration was vested *in "the directors for the time being," who were to execute the powers of the act. The prisoner was indicted for embezzling the moneys of "the directors of the poor of," &c. The judges on a case reserved held, that the money should have been laid, either as the money of the guardians of the poor, by their corporate name, or of the directors for the time being, by their individual names. R. v. Beacall, 1 Moo. C. C. 15. See R. v. Jones, 1 Leach, 366; 2 East, P. C. 991.

Proof of ownership—goods in a church.] Money stolen from an ancient poor's box fixed up in a church is properly laid in the vicar and churchwardens of the parish. R. v. Wortley, 1 Den. C. C. R. 162.

Venue.] An indictment for larceny must be tried in the county in which the offence was, either actually, or in contemplation of law, committed. But where goods stolen in one county are carried by the offender into another or others, he may be indicted in any of them, for the continuance of the asportation is a new caption.(1) 1 Hale, P. C. 507; 4 Bl. Com. 305; 1 Moo. C. C. 47 (*n*). The possession still continuing in the owner, every moment's continuance of the trespass is as much a wrong, and may come under the word *cepit*, as much as the first taking. Hawk, P. C. b. 1, c. 19, s. 52. Though a considerable period elapse between the original taking and the carrying of them into another county, the rule still applies; as where property was stolen on the 4th November, 1823, in Yorkshire, and carried into Durham on the 17th March, 1824. R. v. Parkin, 1 Moo. C C. 45. This rule does not, however, hold with regard to compound larcenies, in which case the prisoner can only be tried for simple larceny in the same county. Thus, where the prisoner robbed the mail of a letter, either in Wiltshire or Berkshire, and brought it into Middlesex, and was indicted on the statutes 5 Geo. 2, c. 25, and 7 Geo. 3, c. 40, the judges upon a case reserved held, that he could not be convicted capitally out of the county in which the letter was taken from the mail. R. v. Thompson, 2 Russ. by Grea. 116. So if A. robs B., in the county of C., and carries the goods into the county of D., A. cannot be convicted of robbery in the latter county, but he may be indicted for larceny there. 2 Hale, P. C. 163. If the thing stolen be altered in its character in the first county, so as to be no longer what it was when it was stolen, an indictment in the second county must describe it according to its altered, and not according to its original state. 2 Russ. by Grea. 116; see R. v. Edward, Russ. & Ry. 497. Thus an indictment in the county of H., for stealing "one brass furnace," is not supported by evidence that the prisoner stole the furnace in the county of R. and there broke

(1) Commonwealth v. Cousins, 2 Leigh, 708, Commonwealth v. Dewitt, 10 Mass. 154; State v. Douglass, 17 Maine, 193.

The rule that where property is stolen in one county, and is carried by the thief into another, he may be convicted of larceny in the latter county, applies as well to property which is made the subject of larceny by statute as to property which is the subject of larceny by the common law. Commonwealth v. Rand, 7 Metcalf, 475.

The legal possession of goods stolen continues in the owner, and every moment's continuance of the trespass and felony amounts in legal consideration to a new caption and asportation. And therefore it was held, that if goods were stolen before the Revised Statutes took effect, and were retained in the possession of the thief until after they came into operation, he might be indicted and punished under these statutes. State v. Somerville, 21 Maine, 14.

In simple larceny, the thief may be tried in any county in which he may be found possessed of the stolen goods. Tippins v. The State, 14 Georgia, 422; The Commonwealth v. Uprichard, 3 Gray, 434.

it to pieces, and brought the pieces into the county of H. R. v. Halloway, 1 C. & P. 127: 11 E. C. L. R. A joint original larceny in one county may become a separate larceny in another. Thus where four prisoners stole goods in the county of Gloucester, and divided them in that county, and then carried their shares into the county of Worcester, in separate bags, it was ruled by Holroyd, J., that the joint indictment against all the prisoners could not be sustained as for a joint larceny in the county of Worcester; and he put the counsel for the prosecution to his election, as to which of the prisoners he would proceed against. R. v. Barnett, 2 Russ. by Grea. 117. But where a larceny was committed by two, and one of them carried the stolen goods into another county, *the other still accompanying him, without their ever [*609] having been separated, they were held both indictable in either county, the possession of one being the possession of both in each county, as long as they continued in company. R. v. McDonagh, Carr. Suppl. 23, 2d ed.

A man may be indicted for larceny in the county into which the goods are carried, although he did not himself carry them thither. The prisoners, County and Donovan, laid a plan to get some coats from the prosecutrix, under pretence of buying them. The prosecutrix had them in Surrey, at a public house, the prisoners got her to leave them with Donovan, whilst she went with County, that he might get the money to pay for them. In her absence Donovan carried them into Middlesex, and County afterwards joined him there, and concurred in securing them. The indictment was against both in Middlesex, and upon a case reserved the judges were unanimous, that as County was present aiding and abetting in Surrey at the original larceny, his concurrence afterwards in Middlesex, though after an interval, might be connected with the original taking, and brought down his larceny to the subsequent possession in Middlesex. They therefore held the conviction right. R. v. County, 2 Russ. by Grea. 118.

The prisoner was tried in Kent for stealing two geldings in that county. The horses were stolen in Sussex. The prisoner was apprehended with them at Croydon, in Surrey. The only evidence to support the charge of stealing in Kent was, that when the prisoner was apprehended at Croydon, he said he had been at Dorking to fetch the horses, and that they belonged to his brother who lived at Bromley. The police officer offered to go to Bromley. They took the horses and went as far as Beckenham Church, when the prisoner said he had left a parcel at the Black Horse, in some place in Kent. The police officer went thither with him, each riding one of the horses; when they got there, the officer gave the horses to the hostler. The prisoner made no inquiry for the parcel, but effected his escape, and afterwards was again apprehended in Surrey. The prisoner was convicted, but sentence was not passed, Gaselee, J., reserving the question whether there was any evidence to support the indictment in Kent. The judges were unanimously of opinion, that there was no evidence to be left to the jury of stealing in Kent, and that no judgment ought to be given upon the conviction, but that the prisoner should be removed to Surrey. R. v. Simmond, 1 Moody, C. C. 408. The prisoner was indicted for a larceny at common law, for stealing a quantity of lead in Middlesex. It appeared that the lead was stolen from the roof of the church of Iver, in Buckinghamshire. The prisoner being indicted at the Central Criminal Court, which has jurisdiction in Middlesex, and not in Buckinghamshire, the judges (Park, J., Alderson, B., and Patteson, J.), held, that he could not be convicted there, on the ground that the original taking not being a larceny, but a felony created by statute, the subsequent possession could not be considered a larceny. R. v. Millar, 7 C. & P. 665: 32 E. C. L. R.

Now by the 24 & 25 Vict. c. 96, s. 114 (replacing the 7 & 8 Geo. 4, c. 29, s. 78), *supra*, p. 564, the prisoner may be indicted in any county in which he is found in possession of the goods.

If the original taking be such of which the common law cannot take cognizance, [*610] as where the goods are stolen at sea, the thief cannot *be indicted for larceny in any county into which he may carry them.(1) 3 Inst. 113; 2 Russ. by Grea. 119. And so where the goods are stolen abroad (as in Jersey), carrying them into an English county will not render the offender indictable there. R. v. Prowes, 1 Moody, C. C. 349. So where the goods are stolen in France. R. v. Madge, 9 C. & P. 29: 38 E. C. L. R.(2)

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Blasphemous libels—at common law.] ALL blasphemies against God, or the Christian religion, or the Holy Scriptures, are indictable at common law, as also are all impostors in religion, such as falsely pretend extraordinary missions from God, or terrify or abuse the people with false denunciations of judgment. In like manner all malicious revilings, in public derogation and contempt of the established religion, are punishable at common law, inasmuch as they tend to a breach of the peace. 1 East, P. C. 3; 1 Russ. by Grea. 220. So it has been held, that to write against Christianity in general is clearly an offence at common law, but this rule does not include disputes between learned men on particular controverted points, but only refers to those cases where the very root of Christianity itself is struck at. R. v. Woolston, Fitzgib. 66; 2 Str. 834. It is an indictable offence at common law to publish a blasphemous libel of and concerning the Old Testament. R. v. Hetherington, 5 Jur. 529.

With regard to the boundary of the rule regulating the discussion of religious topics, it is observed by Mr. Starkie, that a malicious and mischievous intention, or

(1) *Contra*, McCullough's Case, 2 Rogers's Rec.

(2) Larceny committed in one of the United States is not punishable in another, although the thing stolen be brought into the latter State. State v. Brown, 1 Hayw. 100; People v. Gardner, 2 Johns. 477; People v. Schenck, Id. 479; Commonwealth v. Simmons, 5 Binn. 617; McCullough's Case, 2 Rogers's Rec. 45. *Contra*, Commonwealth v. Cullen, 1 Mass. 115; Commonwealth v. Andrews, 2 Id. 14; State v. Ellis, 3 Conn. 185; Rex v. Peas, 1 Root, 69. See People v. Burke, 11 Wend. 120; Hamilton v. The State, 11 Ohio, 435.

what is equivalent to such intention, in law as well as morals, a state of apathy and indifference to the interests of society, is the broad boundary between right and wrong. If it can be collected from the circumstances of the publication, from a display of offensive levity, from contumelious and abusive expressions applied to sacred persons or subjects, that the design of the author was to occasion that mischief to which the matter which he publishes immediately tends, to destroy, or even to weaken men's sense of religious *or moral obligations, to insult those who [*612] believe by casting contumelious abuse and ridicule upon their doctrines, or to bring the established religion and form of worship into disgrace and contempt, the offence against society is complete. 2 Starkie on Slander, 147, 2d ed. Upon an indictment alleging that Jesus Christ was an impostor, a murderer in principle, and a fanatic, a juryman inquired whether a work denying the divinity of our Saviour was a libel; Abbott, C. J., stated, that a work speaking of Jesus Christ in the language here used was a libel, and the defendant was found guilty. Upon a motion for a new trial, on the ground that this was a wrong answer to the question put, the Court of King's Bench held the answer correct. R. v. Waddington, 1 B. & C. 26: 8 E. C. L. R.

Blasphemous libels—statutes.] By the 1 Ed. 6, c. 1, persons reviling the sacrament of the Lord's Supper, are punishable by imprisonment. By the 1 Eliz. c. 2, *ministers* and others speaking in derogation of the book of Common Prayer, are punishable as therein mentioned. See also the 12 Eliz. c. 12; 3 Jac. 1, c. 21, s. 9.

By the 9 & 10 Wm. 3, c. 32, s. 1, "If any person or persons having been educated in, or at any time having made profession of the Christian religion within this realm, shall by writing, printing, teaching, or advised speaking [deny any one of the Persons in the Holy Trinity to be God or] shall assert or maintain there are more Gods than one, or shall deny the Christian religion to be true, or the Holy Scriptures of the Old and New Testament to be of divine authority, shall upon an indictment or information in any of his majesty's courts at Westminster, or at the assizes, be thereof lawfully convicted by the oath of two or more credible witnesses, such person or persons for the first offence shall be adjudged incapable and disabled in law, to all intents and purposes whatsoever, to have or enjoy any office or offices, employment or employments, ecclesiastical, civil, or military, or any part in them, or any profit or advantage appertaining to them or any of them. And if any person or persons so convicted as aforesaid, shall, at the time of his or their conviction, enjoy or possess any office, place, or employment, such office, place, or employment shall be void, and is hereby declared void. And if such person or persons shall be a second time lawfully convicted as aforesaid, of all or any of the aforesaid crime or crimes, then he or they shall from thenceforth be disabled to sue, prosecute, plead, or use any action or information in any court of law or equity, or to be guardian of any child, or executor or administrator of any person, or capable of any legacy or deed of gift, or to bear any office, civil or military, or benefice ecclesiastical forever within this realm; and shall also suffer imprisonment for the space of three years, without bail or mainprize, from the time of such conviction."

By s. 2, information of such words must be given upon oath before a justice, within four days after such words spoken, and the prosecution of such offence be within three months after such information.

By s. 3, persons convicted shall for the first offence (upon renunciation of such offence or erroneous opinions in the court where they were convicted, within four months after such conviction) be discharged from all penalties and disabilities incurred by such conviction.

So much of the 1 Wm. 3, c. 18, s. 17, and 9 & 10 Wm. 3, c. 32, as *related to persons denying the doctrine of the Trinity, was repealed by the 53 Geo. 3, c. 160. The statute of the 9 & 10 Wm. 3 has been held not to affect the common law offence, being cumulative only. R. v. Carlile, 3 B. & A. 161; R. v. Waddington, 1 B. & C. 26.

Indecent libels.] Although an opinion formerly prevailed, that the publication of an obscene or indecent writing, not containing reflections upon any individual, was not an indictable offence: Hawk. P. C. b. 2, c. 73, s. 9; yet a different rule has been since established, and it is now clear, that an indictment at common law may be maintained for any offence which is against public morals or decency. R v. Sedley, Sid. 168; R. v. Wilkes, 4 Burr. 2530; Holt on Libel, 73, 2d ed. Under this head may be comprehended every species of representation, whether by writing, by printing, or by any manner of sign or substitute, which is indecent and contrary to public order. Holt, *ubi suprà*. The principle of the cases also seems to include the representation of obscene plays, an offence which has formed the ground of many prosecutions. 2 Stark. on Slander, 159, 2d ed.; Holt, 73; 1 Russ. by Grea. 233.

A summary power of searching for obscene books, pictures, and other articles, and punishing persons in whose possession they are found, is given by the 20 & 21 Vict. c. 83.

Libels on the government.] The result of the numerous cases respecting libels on the government, is thus given by Mr. Starkie: "It is the undoubted right of every member of the community to publish his own opinions on all subjects of public and common interest, and so long as he exercises this inestimable privilege candidly, honestly, and sincerely, with a view to benefit society, he is not amenable as a criminal. This is the plain line of demarcation; where this boundary is overstepped, and the limit abused for wanton gratification or private malice, in aiming a stab at the private character of a minister, under color and pretence of discussing his public conduct, or where either public men or their measures are denounced in terms of obloquy or contumely, under pretence of exposing defects, or correcting errors, but in reality for the purpose of impeding or obstructing the administration of public affairs, or of alienating the affections of the people from the king and his government, and by weakening the ties of allegiance and loyalty, to pave the way for sudden and violent changes, sedition, or even revolution; in these and similar instances, where public mischief is the object of the act, and the means used are calculated to effect that object, the publication is noxious and injurious to society, and is therefore criminal." 2 Stark. on Slander, 183, 2d ed. The test, with regard to libels of this description, proposed by Mr. Starkie and adopted by another eminent text-writer, is this: "Has the communication a plain tendency to produce public mischief by perverting the mind of the subject, and creating a general dissatisfaction towards government?"(1) 1 Russ. by Grea. 237; see also R. v. Lambert, 2 Campb. 398; R. v. Tuchin, Holt, R. 424; 5 St. Tr. 583; Holt on Libel, 88, 89; R. v. Collins, 9 C. & P. 456: 38 E. C. L. R.; R. v. Lovett, Ibid. 462.

Libels on the administration of justice.] Where a person either by writing, by [*614] publication in print, or by any other means, calumniates *the proceedings of a court of justice, the obvious tendency of such an act is to weaken the administration

(1) Respublica v. Dennie, 4 Yeates, 267.

of justice, and consequently to sap the very foundations of the constitution itself. Per Buller, J., R. v. Watson, 2 T. R. 199. It certainly is lawful, with decency and candor, to discuss the propriety of the verdict of a jury, or the decisions of a judge; but if the writing in question contain no reasoning or discussion, but only declamation and invective, and is written, not with a view to elucidate the truth, but to injure the character of individuals, and to bring into hatred and contempt the administration of justice, such a publication is punishable.(1) Per Grose, J., R. v. White, 1 Campb. 359.

Libels upon individuals.] A libel upon an individual is defined by Mr. Serjeant Hawkins to be a malicious defamation, expressed either in printing or writing, and tending either to blacken the memory of one that is dead, or the reputation of one that is alive, and expose him to public hatred, contempt, or ridicule.(2) Hawk. P. C. b. 2, c. 73, s. 1. Though the words impute no punishable crime, yet if they contain that sort of imputation which is calculated to vilify a man and to bring him into hatred, contempt, and ridicule, an indictment lies.(3) Per Mansfield, C. J., Thorley v. Lord Kerry, 4 Taunt. 364; Digby v. Thompson, 4 B. & Ad. 821: 24 E. C. L. R. No man has a right to render the person or abilities of another ridiculous, not only in publications, but if the peace and welfare of individuals or of society be interrupted, or even exposed by types or figures, the act by the law of England is a libel. Per Lord Ellenborough, R. v. Cobbett, Holt on Lib. 114, 2d ed. Thus an information was granted against Dr. Smollett for a libel in the "Critical Review," upon Admiral Knowles, insinuating that he wanted courage and veracity, and tending to cause it to be believed that he was of a conceited, obstinate, and incendiary disposition. R. v. Smollett, Holt on Lib. 224 (*n*). So an information was granted against the printer of a newspaper for a ludicrous paragraph, giving an account of the Earl of Clanricarde's marriage with an actress at Dublin, and of his appearing with her in the boxes with jewels, &c. R. v. Kinnersley, 1 W. Bl. 294. And for a libel on the Bishop of Durham, contained in a paragraph which represented him as a "bankrupt." Anon. K. B., Hil. T. 1819; Holt on Lib. 224 (*n*), 2d ed.

It is extremely difficult to define the boundaries beyond which reflections upon the character of an individual are commonly cognizable. It is said by Mr. Holt, that where there is no imputation on the moral character, no words of ridicule or contempt, and nothing which can affect the party's reception in life, it is no libel; and he illustrates this position by the following case. The alleged libel was this: "The Rev. John Robinson and Mr. James Robinson, inhabitants of this town, not being persons that the proprietors and annual subscribers think it proper to associate with, are excluded this room." This libel was published in the casino room at Southwold, by posting it on a paper. It was held, that the paper and mode of promulgating it did not amount to a libel: 1st, because it did not, by any necessary or probable implication, affect the moral fame of the party; 2dly, that it was the regulation of a subscription assembly, and the paper might import no more than that the party was not a social and agreeable character in the intercourse of common life; 3dly, that the words charged him with nothing definite, threw *no blemish on his repu- [*615]

(1) It is libellous to publish of one in his capacity of a juror, that he agreed with another juror to stake the decision of the amount of damages to be given in a cause then under consideration, upon a game of draughts. The Commonwealth v. Wright, 1 Cushing, 46.

(2) McCorkle v. Binns, 5 Binn. 349; State v. Avery, 7 Conn. 266.

(3) Where a painter, to revenge himself on one whose likeness he had taken, for disapproving of the execution, painted the ears of an ass to it and exposed it to sale at auction, it was held indictable as a libel. Mezzara's Case, 2 Rogers's Rec. 113.

tation, and implied no unfitness for general society. Robinson v. Jermyn, 1 Price, 11; Holt on Libel, 218, 2d ed.

In Gregory v. Reg. (*in error*), 15 Q. B. 957: 69 E. C. L. R., the Court of Exchequer Chamber held the following words sufficient to maintain an indictment for libel: "Why should T. be surprised at anything Mrs. W. does; if she chooses to entertain B. (the prosecutor) she does what very few will do; and she is of course at liberty to follow the bent of her own inclining, by inviting all infatuated foreigners who crowd our streets, to her table if she thinks fit."

Wherever an action will lie for a libel without laying special damage, an indictment will also lie. Also, wherever an action will lie for verbal slander without laying special damage, an indictment will lie for the same words if reduced to writing and published. But the converse of this latter proposition will not hold good; for an action or indictment may be maintained for words written, for which an action could not be maintained if they were merely spoken. Thorley v. Lord Kerry, 4 Taunt. 355. As for instance, if a man write or print, and publish, of another that he is a scoundrel, J'anson v. Stuart, 1 T. R. 748, or villain, Bell v. Stone, 1 B. & P. 331, it is a libel, and punishable as such; although, if this were merely spoken, it would not be actionable without special damage. 2 H. Bl. 531. But no indictment will lie for mere words not reduced into writing: 2 Salk. 417; R. v. Langley, 6 Mod. 125; unless they be seditious, blasphemous, grossly immoral, or uttered to a magistrate in the execution of his office, or uttered as a challenge to fight a duel, or with an intention to provoke the other party to send a challenge. Archb. 613, 10th ed.

With regard to libels on the memory of persons deceased, it has been held, that a writing, reflecting on the memory of a dead person, not alleged to be published with a design to bring scandal or contempt on the family of the deceased, or to induce them to break the peace, is not punishable as a libel.(1) R. v. Topham, 4 T. R. 127; and see R. v. Taylor, 3 Salk. 198; Holt on Lib. 230, 2d ed.

A libel upon a foreigner is indictable. Thus Lord George Gordon was found guilty upon an information for a libel on the Queen of France; 2 Stark. on Slander, 217, 2d ed.; and informations have also been granted for libels upon the characters of the Emperor of Russia, and of Napoleon. Id. In the latter case, Lord Ellenborough appears to have considered the situation of the individuals as forming the ground of the decision. "I lay it down as law," he says, "that any publication which tends to disgrace, revile, and defame persons of considerable situations of power and dignity in foreign countries, may be taken to be and treated as a libel, and particularly where it has a tendency to interrupt the amity and peace between the two countries."

It is not necessary that the libel should reflect upon the character of any particular individual, provided it immediately tend to produce tumult and disorder; 2 Stark. on Slander, 213, 2d ed.; although the contrary was formerly held. Hawk. P. C. b. 1, c. 28, s. 9. Thus an information was granted for a libel, containing an account of a murder of a Jewish woman and child, by certain Jews lately arrived from Portugal; and the affidavits set forth, that certain persons recently arrived from Portugal had [*616] been attacked by the *mob, and barbarously treated in consequence of the libel. R. v. Osborne, Sess. Ca. 260; Barnard, K. B. 138, 166.

Information at the suit of public bodies upon the application of individuals presiding over them, have been frequently granted by the Court of King's Bench. R. v. Campbell, R. v. Bell, Holt on Lib. 240, 2d ed.; R. v. Williams, 5 B. & A. 595: 7 E. C. L. R.

(1) The Commonwealth v. Taylor, 5 Binney, 281

Punishment.] The punishment for a libel, at common law, was fine or imprisonment, or both.

But now, by the 6 & 7 Vict. c. 96 (E. & I.), an act to amend the law respecting defamatory words and libels, s. 3, "If any person shall publish, or threaten to publish, any libel upon any other person, or shall directly, or indirectly, threaten to print or publish, or shall, directly or indirectly, propose to abstain from printing or publishing, or shall, directly or indirectly, offer to prevent the printing or publishing, of any matter or thing touching any other person, with intent to extort any money or security for money, or any valuable thing from such or any other person, or with intent to induce any person to confer or procure for any person any appointment or office of profit or trust, every such offender, on being convicted thereof, shall be liable to be imprisoned, with or without hard labor, in the common gaol or house of correction, for any term not exceeding three years: provided always, that nothing herein contained shall in any manner alter or affect any law now in force, in respect of the sending or delivery of threatening letters or writings."

By s. 4, "If any person shall maliciously publish any defamatory libel, knowing the same to be false, every such person, being convicted thereof, shall be liable to be imprisoned in the common gaol or house of correction, for any term not exceeding two years, and to pay such fine as the court shall award."

By s. 5, "If any person shall maliciously publish any defamatory libel, every such person, being convicted thereof, shall be liable to fine or imprisonment, or both, as the court may award, such imprisonment not to exceed the term of one year."

Proof of introductory averments.] Where the indictment contains introductory averments, inserted for the purpose of explaining and pointing the libel, such averments must be proved as laid. It frequently happens that the libel is directed against the prosecutor in a particular character, and an intent to libel him in that character is averred. In such case, it must be made to appear that the prosecutor bore that character. But in general, where the character is a public one, it will be sufficient if it appear that the prosecutor has acted in it, and it will not be necessary to give strict evidence of his appointment. Thus if the indictment allege that the prosecutor was, at the time of the supposed injury, a magistrate or a peace-officer, it is sufficient to show that he previously acted as such. Berryman v. Wise, 4 T. R. 366; 2 Stark. on Slander, 2, 2d ed.

Where the title to the particular situation is not the subject of any express documentary appointment, the acting in the situation is, of course, the only evidence which the fact admits of. 2 Stark. Ev. 860, 1st ed.

Whether a person practising as a physician, and libelled in his character as such, was bound to prove, by strict evidence, the introductory averment that he was a physician, was long a matter of *doubt. In a case at nisi prius, Buller, J., [*617] required such proof to be given; Pickford v. Gutch, 1787; 2 Stark. on Slander, 3 (*n*), 2d ed.; but in a subsequent case, the Court of Common Pleas was equally divided upon the point. Smith v. Taylor, 1 N. R. 196. It has, however, been decided by the Court of King's Bench, in a later case, that to support an averment that the party was a physician, it is necessary to give regular evidence that he possessed lawful authority to practise as such. Collins v. Carnegie, 1 A. & E. 695: 28 E. C. L. R.; 2 Nev. & M. 703.

In order to prove the prosecutor to be an attorney, an examined copy of the roll of attorneys, signed by the plaintiff, is sufficient. So the book from the master's office, containing the names of all the attorneys, produced by the officer in whose

custody it is kept, is good evidence, together with proof that the party practised as an attorney at the time of the offence. R. v. Crossley, 2 Esp. 526; Lewis v. Walter, 3 B. & C. 138: 10 E. C. L. R.; Jones v. Stevens, 11 Price, 1251. The stamp-office certificate, countersigned by the master of the Court of King's Bench, is sufficient *primâ facie* evidence of the party being an attorney of that court. Sparling v. Heddon, 9 Bingh. 11: 23 E. C. L. R.

Where the indictment specifies the particular mode in which the party was invested with the particular character in which he has been injured, it will, as it seems, be necessary to prove such a descriptive allegation with all its circumstances, although a more general allegation would have been sufficient; for though a totally irrelevant allegation may be regarded as surplusage, one which is material and descriptive of the legal injury must be proved as laid. 2 Stark. on Slander, 8, 2d ed.

In all cases where the libel itself is an admission of the particular character alleged, further proof of such particular character is unnecessary. Thus where, in an action for words spoken of the plaintiff as an attorney, it appearing that they contained a threat to have the plaintiff struck off the roll of attorneys, it was held unnecessary to give any proof of the plaintiff's professional character. Berryman v. Wyse, 4 T. R. 366. So where the words were, "He is a pettifogging, bloodsucking attorney." Armstrong v. Jordan, cor. Hullock, Stark. on Slander, 11 (*n*), 2d ed. Where the declaration alleged that the plaintiff held a certain office and place of trust and confidence, to wit, the office of overseer of a certain common field, and the alleged libel treated the plaintiff as holding an office of public trust, and charged him with not having given a proper account of the public property, the libel itself was held to be evidence of the introductory averment, though the plaintiff's own witnesses proved that the office was *not* one of trust and confidence, and that he was not trusted with the receipt of money. Bagnall v. Underwood, 11 Price, 621.

In the same manner, where the libel admits any other of the introductory averments, such averments need not be proved. Where the declaration averred that the plaintiff had been appointed envoy by certain persons exercising the powers of government in the Republic or State of Chili, in South America, the libel, stating that the plaintiff had colluded to obtain money in the matter of a loan for the Republic or State of Chili, was held to be sufficient proof of the existence of such a state. Yrisarri v. Clement, 3 Bingh. 432: 11 E. C. L. R. So where a libel alleged that [*618] certain acts of outrage *had been committed, and there was a similar introductory averment, it was held that the latter required no proof. R. v. Sutton. 4 M. & S. 548.

If an introductory averment be immaterial, it may be rejected as surplusage, and need not be proved; and, in general, where it is not matter of description, it is divisible, and part of it only may be proved.

The averment that the libel was published "of and concerning" the prosecutor, or "of and concerning" the particular matters averred, must be proved as laid.

The declarations of spectators, while viewing a libellous picture, publicly exhibited in an exhibition room, were admitted by Lord Ellenborough as evidence to show that the figures portrayed were meant to represent the parties alleged to have been libelled. Dubois v. Beresford, 2 Campb. 512.

Proof of publication—in general.] All who are concerned in publishing a libel are equally guilty of a misdemeanor: Bac. Ab. Libel (B), 1 Russ. by Grea. 248; but the writing or composing of a libel, without a publication of it, is not an offence. The mere writing of a defamatory libel, which the party confines to his own closet,

and neither circulates nor reads to others, is not punishable. R. v. Paine, 5 Mod. 165, 167. So the taking a copy of a libel is not an offence, unless the person taking the copy publishes it. Com. Dig. Libel (B. 2).

The question of publication is ordinarily one of mere fact, to be decided by the jury; but this, like all other legal and technical terms, involves law as well as fact, and it is a question for the court in doubtful cases, whether the facts, when proved, constitute a publication in point of law.(1) 2 Stark. on Slander, 311, 2d ed.

With regard to the acts which constitute a publication, it has been held, that a man who acts as servant to the printer of the libel, and claps down the press, is punishable, though it do not appear that he clearly knew the import of the libel, or that he was conscious he was doing anything wrong. R. v. Clark, 1 Barnard, 304. To this decision, however, Mr. Serjeant Russell has, with much reason, added a *quære*. 1 Russ. 234. Production of a libel, and proof that it is in the handwriting of the defendant, afford a strong presumption that he published it. R. v. Beare, 1 Lord Raym. 427. So if the manuscript of a libel be proved to be in the handwriting of the defendant, and it be also proved to have been printed and published, this is evidence to go to the jury that it was published by the defendant, although there be no evidence given to show that the printing and publication were by the direction of the defendant. R. v. Lovett, 9 C. & P. 243: 38 E. C. L. R. But the defendant may show that the publication was without his authority or knowledge. See *post*, p. 623. So printing a libel, unless qualified by circumstances, will, *primâ facie*, be understood to be a publishing, for it must be delivered to the compositor and the other subordinate workmen. Per cur. Baldwin v. Elphinstone, 2 W. Bl. 1038. A delivery of a newspaper (containing a libel), according to the provisions of the 38 Geo. 3, c. 78, to the officer of the stamp-office, has been held a publication, though such delivery was directed by the statute, for the officer had an opportunity* of [*619] reading the libel. R. v. Amphlitt, 4 B. & C. 35: 10 E. C. L. R.; see also Cook v. Ward, 6 Bingh. 408: 19 E. C. L. R. If a letter containing a libel have the post-mark upon it, that is *primâ facie* evidence of its having been published. Warren v. Warren, 1 C. M. & R. 360; 4 Tyr. 850; Shipley v. Todhunter, 7 C. & P. 680: 32 E. C. L. R. It is said by Mr. Justice Fortescue to have been ruled that the finding of a libel on a bookseller's shelf, is a publication of it by the bookseller. R. v. Dodd, 2 Cess. Ca. 33; Holt's L. of L. 284, 2d ed. The reading of a libel in the presence of another, without knowing it to be a libel, with or without malice, does not amount to a publication. 4 Bac. Ab. 458; Holt's L. of L. 282, 2d ed. But if a person, who has either read a libel himself or heard it read by another, afterwards maliciously reads or repeats any part of it to another, he is guilty of an unlawful publication of it. Hawk. P. C. b. 2, c. 73, s. 10.

Although, in civil cases, publication of a libel to the party libelled only is not sufficient to support an action, yet in criminal cases such publication will maintain an indictment or information.(2) Hawk. P. C. b. 1, c. 73, s. 11; 1 Russ. by Grea. 250 (*n*); R. v. Wegener, 2 Stark. N. P. C. 245. But such publication must be alleged to have been sent with intent to provoke the prosecutor to a breach of the peace, and not with intent to injure him in his profession, &c. R. v. Wegener, *supra*.

Where the libel is in a foreign language, and it is set out in the indictment, both in the original and in a translation, the translation must be proved to be correct. In a case of this kind, an interpreter being called, read the whole of that which was

(1) Resp v. Davies, 3 Yeates, 128; Southwick v. Stevens, 10 Johns. 442.
(2) Swindle v. The State, 2 Yerger, 581; The State v. Avery, 7 Conn. 266.

charged to be a libel in the original, and then the translation was read by the clerk at nisi prius. R. v. Peltier, Selw. N. P. 917.

Where the libel has been printed by the directions of the defendant, and he has taken away some of the impressions, a copy of those left with the printer may be read in evidence. R. v. Watson, 2 Stark. N. P. C. 129: 2 E. C. L. R., *ante*, p. 3. In order to show that the defendant had caused a libel to be inserted in a newspaper, a reporter to the paper was called, who proved that he had given a written statement to the editor, the contents of which had been communicated by the defendant for the purpose of publication; and that the newspaper produced was exactly the same, with the exception of one or two slight alterations, not affecting the sense; it was held, that what the reporter published might be considered as published by the defendant, but that the newspaper could not be read in evidence, without producing the written statement delivered by the reporter to the editor. Adams v. Kelly, Ry. & Moo. N. P. C. 157: 21 E. C. L. R.; and see R. v. Cooper, 8 Q. B. 533: 55 E. C. L. R.; S. C. 15 L. J. Q. B. 206; and Fryer v. Gathercole, 4 Ex. 262; S. C. 18 L. J. Ex. 389.

Where a libel is printed, the sale of each copy is a distinct publication, and a fresh offence; and a conviction or acquittal on an indictment for publishing one copy, will be no bar to an indictment for publishing another copy. R. v. Carlile, 1 Chitty, 451: 18 E. C. L. R.; 2 Stark. on Slander, 320, 2d ed.

Proof of publication—of libels contained in newspapers.] The proof of the publication of libels contained in newspapers was facilitated by the 38 Geo. 3, c. 78, [*620] but that act has been repealed by the *6 & 7 Wm. 4, c. 76 (U. K.), and provisions of a similar nature substituted.

By s. 6 of the recent statute, before any newspaper shall be printed, a declaration in writing shall be delivered at the stamp-office, made and signed by the printer or publisher and proprietor of such newspaper, as therein directed, which declaration shall set forth the title of the newspaper, and of the house or building wherein it is intended to be published; and also the name, addition, and place of abode of the printer and publisher thereof, and of the proprietors, if they, exclusive of the printer and publisher, do not exceed two, and if they do, then of two proprietors resident in the United Kingdom, and their proportional shares. On a change of ownership, a fresh declaration is to be made, and every person knowingly or wilfully making a false or defective declaration shall, on conviction, be deemed guilty of a misdemeanor.

By s. 7, persons printing or publishing, or selling or delivering out, any newspaper before such declaration is made, shall forfeit 50*l.* a day.

By s. 8, "All such declarations as aforesaid shall be filed and kept in such manner as the commissioners of stamps and taxes shall direct for the safe custody thereof; and copies thereof, certified to be true copies, as by this act is directed, shall respectively be admitted in all proceedings, civil and criminal, and upon every occasion whatsoever touching any newspaper mentioned in any such declaration, or touching any publication, matter, or thing, contained in any such newspaper, as conclusive evidence of the truth of all such matters set forth in such declaration as are hereby required to be therein set forth, and of their continuance respectively in the same condition down to the time in question, against every person who shall have signed such declaration, unless it shall be proved that previous to such time such person became lunatic, or that previous to the publication in question on such trial such person did duly sign and make a declaration that such person had ceased to be a printer, publisher, or proprietor of such newspaper, and did duly deliver the same to the said

commissioners, or to such officer as aforesaid, or unless it shall be proved that, previous to such occasion as aforesaid, a new declaration of the same or a similar nature respectively, or such as may be required by law, was duly signed and made, and delivered as aforesaid, respecting the same newspaper, in which the person sought to be affected on such trial did not join; and the said commissioners, or the proper authorized officer by whom any such declaration shall be kept according to the directions of this act, shall, upon application in writing made to them or him respectively by any person requiring a copy, certified according to this act, of any such declaration as aforesaid, in order that the same may be produced in any civil or criminal proceeding, deliver such certified copy, or cause the same to be delivered to the person applying for the same, upon payment of the sum of one shilling, and no more; and in all proceedings and upon all occasions whatsoever, a copy of any such declaration, certified to be a true copy under the hand of one of the said commissioners, or of any officer in whose possession the same shall be, upon proof made that such certificate hath been signed with the handwriting of a person described in or by such certificate as such commissioner or officer, and whom it shall not be necessary to prove to be a commissioner or officer, *shall be received in evidence against any and every [*621] person named in such declaration as a person making or signing the same, as sufficient proof of such declaration, and that the same was duly signed and made according to this act and of the contents thereof; and every such copy so produced and certified shall have the same effect for the purposes of evidence against any and every such person named therein as aforesaid, to all intents whatsoever, as if the original declaration, of which the copy so produced and certified shall purport to be a copy, had been produced in evidence, and been proved to have been duly signed and made by the person appearing by such copy to have signed and made the same as aforesaid; and whenever a certified copy of any such declaration shall have been produced in evidence as aforesaid against any person having signed and made such declaration, and a newspaper shall afterwards be produced in evidence, entitled in the same manner as the newspaper mentioned in such declaration is entitled, and wherein the name of the printer and publisher, and the place of printing shall be the same as the name of the printer and publisher, and the place of printing mentioned in such declaration, or shall purport to be the same, whether such title, name, and place printed upon such newspaper shall be set forth in the same form of words as is contained in the same declaration, or in any form of words varying therefrom, it shall not be necessary for the plaintiff, informant, or prosecutor in any action, prosecution, or other proceeding, to prove that the newspaper to which such action, prosecution, or other proceeding may relate, was purchased of the defendant, or at any house, shop, or office belonging to or occupied by the defendant, or by his servants or workmen, or where he may usually carry on the business of printing or publishing such newspaper, or where the same may be usually sold; and if any person, not being one of the said commissioners, or the proper authorized officer, shall give any certificate purporting to be such certificate as aforesaid, or shall presume to certify any of the matters or things by this act directed to be certified by such commissioner or officer, or which such commissioner or officer is hereby empowered or intrusted to certify; or if any such commissioner or officer shall knowingly and wilfully falsely certify, under his hand, that any such declaration as is required to be made by this act was duly signed and made before him, the same not having been so signed and made, or shall knowingly and wilfully falsely certify that any copy of any declaration is a true copy of the declaration of which the same is certified to be such copy, the same not being such true copy, every person so offending shall forfeit the sum of one hundred pounds."

By s. 9, service of legal process, either in civil or criminal suits at the place of printing or publishing mentioned in the declaration, shall be deemed sufficient service.

By s. 10, titles of newspapers and names of printers and publishers are to be entered in a book at the stamp-office, and persons shall have liberty to inspect it.

Since the passing of the 38 Geo. 3, c. 78, the production of a certified copy of the affidavit and of a newspaper corresponding in the title, and in the names and descriptions of printer and publisher, with the newspaper mentioned in the affidavit, has been sufficient evidence of publication. Mayne v. Fletcher, 9 B. & C. 382: 17 E. [*622] C. L. R.; R. v. Hunt, 31 State Trials, 375. But where the affidavit *and the newspapers vary in the place of residence of the party, Murray v. Souter, cited 6 Bing. 414: 19 E. C. L. R., or in the name of the printing-place, R. v. Francey, 2 A. & E. 49: 29 E. C. L. R., it is insufficient. See as to what is sufficient evidence of the identity of the newspaper under the 6 & 7 Wm. 4, c. 176, s. 8, Baker v. Wilkinson, Carr. & M. 399: 41 E. C. L. R.; see also R. v. Woolmer, 12 A. & E. 422: 40 E. C. L. R.; Duke of Brunswick v. Harmer, 3 C. & K. 10; and Gathercole v. Miall, 15 M. & W. 319.

The purchase of a copy of the newspaper at the office many years after the date of the libel has been held to be sufficient proof of publication. Duke of Brunswick v. Harmer, 14 Q. B. 110: 68 E. C. L. R.; S. C. 19 L. J. Q. B. 20.

The statute has been held to apply to motions for criminal informations. R. v. Donnison, 4 B. & Ad. 698: 24 E. C. L. R.; R. v. Francey, *supra*. A newspaper may be given in evidence, though it is not one of the copies published, and though it be unstamped. R. v. Pearce, Peake, 75.

Proof of publication—by admission of the defendant.] On an information for a libel, the witness who produced it stated, that he showed it to the defendant, who admitted that he was the author of it, errors of the press and some small variances only excepted. It was objected, that this evidence did not entitle the prosecutor to read the book, the admission not being absolute; but Pratt, C. J., allowed it to be read, and said that he would put it to the defendant to prove material variances. R. v. Hall, 1 Str. 416. An admission of the signature to a libel is no admission of its having been published in a particular county. Case of the Seven Bishops, 12 How. St. Tr. 183. An admission of being the publisher of a periodical work cannot be extended beyond the date of such admission. McLeod v. Wakley, 3 C. & P. 311: E. C. L. R.

Publication—constructive publication.] It is now well established, that, in order to render a party guilty of publishing a libel, it is not necessary that he should be the actual publisher of it, or that he should even have a knowledge of the publication; not only is a person who procures another to publish a libel, himself guilty of the offence, Hawk. P. C. b. 1, c. 73, s. 10, but a bookseller or publisher, whose servant publishes a libel, is criminally answerable for that act, though it was done without his knowledge. This rule, which is an exception to those which govern the other branches of criminal law, appears to be founded upon a principle of policy, and to have been arbitrarily adopted with the view of rendering publishers cautious with regard to the matters to which they give general circulation. The leading case on this subject is that of R. v. Almon, 5 Burr. 2689. The defendant, a bookseller, was convicted of publishing a libel in a magazine. The proof of the publication was, that the magazine was bought at his shop. A new trial was moved for, on the ground

that the libel had been sent to the defendant's shop, and sold there by a boy, without his knowledge, privity, or approbation; but the court were clear and unanimous in their opinion, that this libel, being bought in the shop of a *common known bookseller and publisher*, importing, by its title page, to be printed by him, was a sufficient *prima facie* evidence of its being published by him,—not indeed conclusive, because he might have contradicted it, if the facts would have borne *it by contrary [*623] evidence. The court regarded the matters urged as grounds for a new trial, merely as an extenuation of the offence. So Lord Kenyon ruled, that the proprietor of a newspaper was answerable, criminally as well as civilly, for the acts of his servants or agents in misconducting the paper; adding, that this was not his opinion only, but that of Lord Hale, Justice Powell, and Justice Foster; that it was the old received law for above a century, and was not to be broken in upon by any new doctrine upon libels. R. v. Walter, 3 Esp. 21. And the same rule was laid down by Lord Ellenborough. R. v. Cuthell, R. v. White, Holt, Law of Libel, 287; 2 Stark. on Slander, 33, 2d ed. In a later case, where it was urged that the rule respecting the liability of publishers in libel, was contrary to the principle which prevails in all other criminal cases, Lord Tenterden said, "The rule seems to me to be conformable to principle and to common sense. Surely a person who derives profit from, and who furnishes the means of carrying on the concern, and intrusts the conduct of the publication to one whom he selects and in whom he confides, may be said to cause to be published what actually appears, and ought to be answerable, although you cannot show that he was individually concerned in the particular publication. It would be exceedingly dangerous to hold otherwise; for then an irresponsible person might be put forward, and the person really producing the publication, and without whom it could not be published, might remain behind and escape altogether." R. v. Gutch, Moo. & M. 433: 22 E. C. L. R.

It does not appear to be well settled whether a publisher by whose servant a libel has been sold, may exonerate himself from the consequences of that act, by showing that he has himself in no way been accessory to the publication. If the libellous work has been sold by the servant in the regular performance of his duty towards his employer, the latter would, as it seems, still be answerable, although he should prove that in fact he was absent from the shop at the time, and that he was wholly ignorant of the contents of the book, and innocent of any intent to disseminate the libel. R. v. Dodd, 2 Sess. Ca. 33. If, on the contrary, the book was not sold by the servant in the ordinary course of his employment, but clandestinely brought by him to his master's shop, and vended there, in such case the master would not, as it seems, be guilty of the publication. In R. v. Almon, *ante*, p. 622, the court appear to have treated the publication by the servant as presumptive evidence only of a publication as against the master, who would be entitled to rebut such presumption; and in one case it seems to have been decided that if a printer is confined in prison, to which his servants have no access, and they publish a libel without his privity, the publication of it shall not be imputed to him. R. v. Woodfall, Essay on Libels, 18. See also R. v. Salmon, B. R. H. T. 1777; Hawk. P. C. b. 1, c. 73, s. 10 (*n*), 7th ed. The defendant may rebut the presumption by evidence that the libel was sold contrary to his orders, or clandestinely, or that some deceit or surprise was practised upon him, or that he was absent under circumstances which entirely negatived any presumption, or privity, or connivance.(1) 2 Starkie on Slander, 34, 2d ed. See the 6 & 7 Vict. c. 96, s. 7, *post*, p. 630.

(1) The Commonwealth v. Buckingham, 2 Wheeler's C. C. 198.

Where the libel is published by an agent of the defendant, the authority of such [*624] agent must be strictly proved. In the case of *booksellers and publishers, proof that the party actually vending the libel was a servant in the way of their business, is sufficient, for in such case an authority to sell will be implied, but it is not so with regard to other persons. Thus, where it appeared that the libel in question was in the handwriting of the defendant's daughter, who was usually employed by him to write his letters of business, but there was no evidence that the defendant had authorized her to write this particular document, it was held to be no evidence of publication as against him. Harding v. Greening, 1 B. Moore, 477.

Proof of innuendoes.] Where in order to bring out the libellous sense of the words, innuendoes are inserted in the indictment, they must, if material, be proved by witnesses acquainted with the parties, and with the transaction to be explained. It is sufficient if such witnesses speak in the first instance as to their belief with regard to the intended application of the words; the grounds of such belief may be inquired into on cross-examination.(1) 2 Stark. on Slander, 51, 2d ed. If the witness derives his conclusion from the terms of another libel, with the publication of which the defendant is not connected, this is not sufficient. Bourke v. Warren, 2 C. & P. 307: 12 E. C. L. R. If a good innuendo, ascribing a particular meaning to certain words, is not supported in evidence, the party will not be permitted to ascribe another meaning to those words. Williams v. Stott, 1 Crom. & M. 675; Archbishop of Tuam v. Robinson, 5 Bingh. 17; but see Harvey v. French, 1 Crom. & M. 11. Thus, where the words in fact imputed either a fraud or a felony, but by the innuendo were confined to the latter, Lord Ellenborough ruled that the plaintiff must prove that they were spoken in the latter sense. Smith v. Carey 3 Campb. 461. If a libel contains blanks, the jury ought to acquit the defendant, unless they are satisfied that those blanks are filled up in the indictment according to the sense and meaning of the writer. Per Lord Mansfield, R. v. Almon, 5 Burr. 2686. It is said by Tindal, C. J., that where words spoken impart in themselves a criminal charge, and the innuendo introduces matter which is merely useless, it may be rejected as surplusage. Day v. Robinson, 1 A. & E. 558: 28 E. C. L. R.; see also Williams v. Gardiner, Tyr. & G. 578; 1 M. & W. 245; West v. Smith, Tyr. & G. 825. And see Hoare v. Silverlocke, 12 Q. B. 625.

Proof of malice.] Where a man publishes a writing, which upon the face of it is libellous, the law presumes that he does so with that malicious intention which constitutes an offence, and it is unnecessary on the part of the prosecution to give evidence of any circumstances from which malice may be inferred. Thus it was said by Lord Tenterden, that a person who publishes what is calumnious concerning the character of another, must be presumed to have intended to do that which the publication is necessarily and obviously intended to effect, unless he can show the contrary. R. v. Harvey, 2 B. & C. 257: 9 E. C. L. R.; R. v. Burdett, 4 B. & A. 95: 10 E. C. L. R. In such case, it is incumbent upon the defendant, if he seeks to discharge himself from the consequences of the publication, to show that it was made under circumstances which justify it.

[*625] *It is, however, frequently necessary, upon prosecutions for libel, where the expressions are ambiguous, or the intentions of the defendant doubtful, to adduce evidence for the purpose of showing the malice which prompted the act of publication. Thus, where the occasion of the publication would, *primâ facie*, justify the

(1) Van Vechten v. Hopkins, 5 John. 211.

defendant, yet, if the libel be false and malicious, it is an offence; in such case, evidence of the malice must be given on the part of the prosecution to rebut the presumed justification. Where the material question, says Mr. Starkie, is whether the defendant was justified by the occasion, or acted from express malice, it seems in principle, that any circumstances are admissible which can elucidate the transaction, and enable the jury correctly to conclude whether the defendant acted fairly and honestly, or *malâ fide* and vindictively, for the purpose of causing evil consequences. 2 Stark. on Slander, 55, 2d ed. Upon this principle, in an action for libel contained in a weekly paper, evidence was allowed to be given of the sale of other papers, with the same title, at the same office, for the purpose of showing that the papers were sold deliberately, and in the regular course of circulation, and vended in regular transmission for public perusal. Plunkett v. Cobbett, 5 Esp. 136. So where on the trial of an action for libel contained in a newspaper, subsequent publications by the defendant in the same paper were tendered in evidence, to show *quo animo* the defendant published the libel in question, Lord Ellenborough said, no doubt they would be admissible in the case of an indictment. Stuart v. Lovel, 2 Stark. N. P. C. 93: 3 E. C. L. R. Again, in the trial of an action against the editor of a monthly publication for a libel contained in it, articles published from month to month alluding to the action and attacking the plaintiff, are admissible to show *quo animo* the libel was published, and that it was published concerning the plaintiff. Chubb v. Westley, 6 C. & P. 436: 25 E. C. L. R. In Barrett v. Long (in error), 3 H. of L. Cas. 395, other publications of the defendant, going back more than six years before the publication complained of, were held to be admissible to prove malice. So it was held by Lord Ellenborough, that any words or any act of the defendant are admissible, in order to show *quo animo* he spoke the words which are the subject of the action. Rustel v. Macquister, 1 Campb. 49. So either the prosecutor or the defendant is entitled to have extracts read from different parts of the same paper or book which contains the libel, relating to the same subject. R. v. Lambert, 2 Campb. 398.

When the publication is *primâ facie* excusable, on account of the cause of writing it, as in the case of servants' characters, or confidential advice, or communications to persons who ask it or have a right to expect it, malice in fact must be proved. Per Bayley, J., Bromage v. Prosser, 4 B. & C. 256: 10 E. C. L. R., and see McPherson v. Daniels, 10 B. & C. 272: 21 E. C. L. R. "Where a man has a right to make a communication, you must either show malice intrinsically from the language of the letter, or prove express malice." Per Parke, B., Wright v. Woodgate, Tyr. & G. 15.

Proof of intent.] Where the malicious intent of the defendant is, by averment in the indictment, pointed to a particular individual, or to a particular act or offence, the averment must be proved as laid. Thus where the indictment alleged a publication of a libel with intent *to disparage and injure the prosecutor in his pro- [*626] fession of an attorney, it was held that proof of a publication to the prosecutor only did not maintain the indictment, and that the intent ought to have been averred to provoke the prosecutor to a breach of the peace. R. v. Wegener, 1 Stark. N. P. 245: 2 E. C. L. R. The allegation of intent is divisible, *ante*, p. 94.

Venue.] The libel must be proved to have been published in the county in which the venue is laid. Where the libel is once published, the party is guilty of a publication in every county in which such libel is afterwards published.(1) R. v. John-

(1) So in the case of a newspaper printed in one State and circulated in another. Commonwealth v. Blanding, 3 Pick. 304.

son, 7 East, 65, B. N. P. 6. So if he sent it to be printed in London, it is his act if the publication is there. Upon an information for a libel, in the county of Leicester, it appeared that it was written in that county, and delivered to a person who delivered it to B. (who was not called) in Middlesex. It was inclosed in an envelope, but there was no trace of a seal. The judge directed the jury, that as B. had it open, they might presume that he received it open, and that as the defendant wrote it in the county of Leicester, it must be presumed that he received it in that county. The defendant having been found guilty, it was urged on a motion for a new trial, that there was no evidence of a publication in Leicestershire; but the Court of King's Bench (*diss.* Bayley, J.) held that the direction of the judge was proper, and that if the delivery open could not be presumed, a delivery sealed, with a view to and for the purpose of publication, was a publication: and they held that there was sufficient to presume some delivery, either open or sealed, in the county of Leicester. R. v. Burdett, 4 B. & A. 95: 6 E. C. L. R. In the above case the question was discussed, whether it was essential that the whole offence should be proved to have been committed in the county in which the venue was laid. Holroyd, J., expressed an opinion that the composing and writing a libel in the county of L., and afterwards publishing it, though that publication was not in L., was an offence which gave jurisdiction to a jury of the county of L. (R. v. Beer, 2 Salk. 417; Carth. 409; R. v. Knell, Barnard, K. B. 305), and that the composing and writing with intent afterwards to publish was a misdemeanor; but Bayley, J., held that the whole *corpus delicti* must be proved within one county, and that there was no distinction in this respect between felonies and misdemeanors. Abbott, J., said, that as the whole was a misdemeanor compounded of distinct parts, each of which was an act done in the prosecution of the same criminal intention, the whole might be tried in the county of L., where one of those acts had been done.

The post-marks upon letters (proved to be such) are evidence that the letters which bear them were in the offices to which the post-marks belong at the times denoted by the marks. R. v. Plumer, Russ. & Ry. 264. But the mark of double postage having been paid is not of itself proof that the letter contained an inclosure. Id.

Proof of a newspaper under the requisitions of the statute 38 Geo. 3, c. 78, *ante*, p. 620, was held to be proof that the paper was published in the county where the printing is described to be. R. v. Hart, 10 East, 94.

A letter containing a libel was proved to be in the handwriting of A., to have been addressed to a party in Scotland, to have been received at the post-office at C. from the post-office at H., and to have been then forwarded to London to be forwarded to [*627] *Scotland. It was produced at the trial, with the proper post-mark, and with the seal broken. This was held to be sufficient evidence of the letter having reached the person to whom it was addressed, and of its having been published to him. Warren v. Warren, 1 C. M. & R. 250; Tyr. 850.

Proof for the defendant.] As the offence of publishing a libel consists in the *malicious* publication of it, which, as already stated, is in general inferred from the words of the alleged libel itself, it is competent to the defendant, in all cases, to show the absence of malice on his part. He cannot, it is true, give in evidence matter of justification, that is to say, he cannot admit the publication to be malicious, and then rely for his defence upon circumstances which show that he was justified, however malicious the libel may be; but he is not precluded from giving evidence of those circumstances which tend to prove that the original publication of the libel was without malice. It may, perhaps, be laid down as a rule, that the matters which might

be given in evidence under the general issue in an action in order to disprove malice, are also admissible for the same purpose upon the trial of an indictment or information.(1)

The defendant may, therefore, show that the publication was merely accidental, and without his knowledge, as where he delivers one paper instead of another, or delivers a letter without knowing its contents. R. v. Topham, 4 T. R. 127, 128; R. v. Nutt, Fitzg. 47; R. v. Lord Abingdon, 1 Esp. 226. See also Day v. Bream, 2 Moo. & R. 54, where Patteson, J., held that a porter who in the course of his business delivered parcels containing libellous handbills, was not liable to an action for libel, if he were shown to be ignorant of the contents of the parcels. See the 6 & 7 Vict. c. 96, s. 7, *post*, p. 630.

So the defendant, under the plea of not guilty to the indictment, may show that the libel was published under circumstances which the law recognizes as constituting either an absolute justification or excuse, independently of the question of intention, or a qualified justification dependent on the actual intention and motive of the defendant. 2 Stark. on Sland. 308, 2d ed. Thus the defendant may show that the alleged libel was presented *bonâ fide* to the king as a petition for the redress of grievances: Case of the Seven Bishops, 12 St. Tr. 183; or to Parliament: Hawk. P. C. b. 2, c. 73, s. 8; or that it was contained in articles of the peace exhibited to a magistrate, or in any other proceeding in a regular course of justice. Ibid. It seems, says Hawkins, to have been held by some that no want of jurisdiction in the court to which such complaint is exhibited will make it a libel, because the mistake of the proper court is not imputable to the party, but to his counsel; yet if it shall manifestly appear from the whole circumstances of the case, that a prosecution is entirely false, malicious, and groundless, commenced, not with a design to go through with it, but only to expose the defendant's character under the show of legal proceeding, it would form a ground for an indictment at the suit of the king, as the malice of the proceeding would be a good foundation for an action on the case at the suit of the party. Ib.(2)

Though it is a defence to show that the alleged libel was published by a person in a privileged capacity, as by a member of Parliament in his place, or by some person in the course of a judicial proceeding, yet if it appear that the publication took place by the party when not *invested with that privileged capacity, or by a third [*628] person who has never been invested with it, it furnishes no defence. Thus a member of Parliament who, after delivering his speech in Parliament, publishes it, is criminally responsible for the libel. R. v. Creevey, 1 M. & S. 281; though by act of Parliament the members are protected from all charges against them for anything said in either house. 1 W. & M. st. 2, c. 2.

So it has been recently held by the Court of Queen's Bench, that it is no defence in law to an action for publishing a libel, that the defamatory matter is part of a document which was, by order of the House of Commons, laid before the house, and thereupon became part of the proceedings of the house, and which was afterwards, by orders of the house, printed and published by the defendants: and that the House of Commons heretofore resolved, declared, and adjudged, "that the power of publishing

(1) Whether the truth can be given in evidence divided the court in The People v. Crosswell, 3 Johns. Cases, 337, S. C.; 2 Wheeler's C. C. 330. That it cannot, however, see The State v. Lehr. 2 Wheeler's C. C. 282; Commonwealth v. Buckingham, Id. 181; State v. Morris, 3 Id. 464; Commonwealth v. Blanding, 3 Pick. 304; Commonwealth v. Clap, 4 Mass. 163. See also, State v. Burnham, 9 N. Hamp. 34.

(2) Bodwell v. Osgood, 3 Pick. 379; Gray v. Pentland, 2 Serg. & Rawle, 23; Lewis v. Few, 5 Johns. 1; Harris v. Huntingdon et al., 2 Tyler, 129; 1 Tyler, 164; Thorn v. Blanchard, 5 Johns. 508.

such of its reports, votes, and proceedings as it shall deem necessary or conducive to the public interests, is an essential incident to the constitutional functions of Parliament, more especially to the commons' house of Parliament as the representative portion of it." On the demurrer to a plea suggesting such a defence, it was also held, that a court of law is competent to determine whether or not the House of Commons has such privileges as will support the plea. Stockdale v. Hansard, 9 A. & E. 1: 36 E. C. L. R. It will, upon the same principle, be a defence to show that the supposed libel was written *bonâ fide*, with the view of investigating a fact in which the party is interested, provided the limits necessary for effectuating such inquiry are not exceeded. Delany v. Jones, 4 Esp. 191; Finden v. Westlake, Moo. & Malk. 461: 22 E. C. L. R.; Brown v. Croome, 2 Stark. N. P. C. 297: 3 E. C. L. R. So where the libel was an advertisement for the discovery of the plaintiff, an absconding debtor, published at the request of the party who had sued out a *capias*, for the purpose of enabling the sheriff to take him. Lay v. Lawson, 4 A. & E. 795: 31 E. C. L. R. So the showing of a libel to the person reflected on, with the *bonâ fide* intention of giving him an opportunity for making an explanation, or with a friendly intention to enable him to exculpate himself, or seek his legal remedy, is no offence. 2 Stark. on Slander, 249, 2d ed.; B. N. P. C. 8; McDougall v. Claridge, 1 Campb. 267. And the same with regard to a letter of friendly advice. Id. Thus a letter from a son-in-law to his mother-in-law, volunteering advice respecting her proposed marriage, and containing imputations upon the person whom she was about to marry, is a privileged communication, and not actionable, unless malice be shown. Todd v. Hawkins, 2 Moo. & R. 20. But an unnecessary publicity would render such a communication libellous, as if the letter were published in a newspaper. R. v. Knight, Bac. Ab. Libel (A. 2). So a representation made *bonâ fide* by the defendant to a public officer respecting the conduct of a plaintiff, a person acting under him, is not *primâ facie* actionable. Blake v. Pilfold, 1 Moo. & R. 198. So a letter to the postmaster-general, complaining of misconduct in a postmaster, is not libellous, if it contains a *bonâ fide* complaint. Woodward v. Landor, 6 C. & P. 548: 25 E. C. L. R. See also Hopwood v. Thorn, 8 C. B. 293: 65 E. C. L. R.; Harrison v. Bush, 25 L. J. Q. B. 25; Cooke v. Wildes, 1 Jur. N. S. 610. Upon the same principle the defendant may show that the supposed libel was written *bonâ fide* for the purpose of giving the character of a servant. Edmondson v. Stephenson, B. N. P. 8; Weatherstone v. Hawkins, 1 T. R. 110; Pattison v. Jones, 8 B. & C. 578: 15 E. C. L. R.; [*629] Child v. Affleck, 9 B. & C. 403: 17 E. C. L. R.; Somerville v. *Hawkins, 10 C. B. 583: 70 E. C. L. R.; Taylor v. Hawkins, 16 Q. B. 308: 71 E. C. L. R.; and Harris v. Thompson, 13 C. B. 33: 76 E. C. L. R.

How far the publication of the proceedings of a court of justice correctly given, containing a libel upon the character of an individual, and published by a third person not connected with the proceedings, and without any justification for the act, is criminally punishable, does not appear to be satisfactorily settled.(1) See Curry v. Walter, 1 Esp. 456; 1 B. & P. 525; R. v. Wright, 8 T. R. 298; Stiles v. Noakes, 7 East, 504; R. v. Fisher, 2 Camp. 563; Lewis v. Clement, 3 B. & A. 702: 6 E. C. L. R; Lewis v. Walter, 4 B. & A. 613: 7 E. C. L. R.; Duncan v. Thwaites, 3 B. & C. 583: 10 E. C. L. R.; Flint v. Pike, 4 B. & C. 476, 481: 10 E. C. L. R.;

(1) Commonwealth v. Blanding, 3 Pick, 304; State v. Leer, 2 Const. Rep. 809; Thomas v. Croswell, 7 Johns. 264; Clark v. Binney, 2 Pick. 113.

The editor of a newspaper has a right to publish the fact that an individual is arrested and upon what charge; but he has no right, while the charge is in the course of investigation before the magistrate, to assume that the person accused is guilty, or to hold him out to the world as such. Usher v. Leverance, 20 Maine, 9.

Roberts v. Brown, 10 Bing. 523: 25 E. C. L. R.; Hoare v. Silverlock, 6 C. B. 20: 60 E. C. L. R. It is however decided, that the publication of preliminary or *ex parte* proceedings in a court of justice cannot be justified, as the publication of depositions before a justice of the peace on a charge of murder: R. v. Lee, 5 Esp. 123; or the proceedings of a coroner's inquest: R. v. Fleet, 1 B. & A. 379; or proceedings before a corporation commissioner: Charlton v. Watton, 6 C. & P. 385: 25 E. C. L. R.

And the conduct and management by the clergyman of a parish, of a charitable society in a parish, for the benefit of which dissenters are by his sanction excluded, is not lawful subject of public comment so as to excuse a libellous publication respecting it. Gathercole v. Miall, 15 M. & W. 319; S. C. 15 L. J. Ex. 179. So where on showing cause against a rule for a criminal information, for publishing a blasphemous and seditious libel, it was urged that it was merely the report of a judicial proceeding; yet the court held, that if the statement contained anything blasphemous, seditious, indecent, or defamatory, the defendant had no right to publish it, though it had actually taken place in a court of justice. R. v. Carlile, 3 B. & A.: 5 E. C. L. R. Where a libel stated that there was a riot at C., and that a person fired a pistol at an assemblage of persons, and upon this imputed neglect of duty to the magistrates; Patteson J., held, that on the trial of a criminal information for this libel on the magistrates, the defendant's counsel, with a view of showing that the libel did not exceed the bounds of free discussion, could not go into evidence to prove that there was in fact a riot, and that a pistol was fired at the people. R. v. Brigstock, 7 C. & P. 184: 32 E. C. L. R.

Before the 6 & 7 Vict. c. 96 (E. & I.), the defendant was not allowed upon an indictment to give evidence of the truth of the libel; but now by s. 6 of that statute, "on the trial of any indictment or information for a defamatory libel, the defendant having pleaded such plea as hereinafter mentioned, the truth of the matters charged may be inquired into, but shall not amount to a defence, unless it was for the public benefit that the said matters charged should be published; and that to entitle the defendant to give evidence of the truth of such matters charged as a defence to such indictment or information, it shall be necessary for the defendant, in pleading to the said indictment or information, to allege the truth of the said matters charged in the manner now required in pleading a justification to an action for defamation, and further to allege that it was for the public benefit that the said matters charged should be published, and the particular fact or facts by reason whereof it was for the public benefit that the said matters charged should be published, to which plea the prosecutor shall be at liberty to reply generally, denying the whole thereof; and that if after such plea the defendant shall be convicted on such *indictment or informa- [*630] tion, it shall be competent to the court, in pronouncing sentence, to consider whether the guilt of the defendant is aggravated or mitigated by the said plea, and by the evidence given to prove or to disprove the same: provided always, that the truth of the matters charged in the alleged libel complained of by such indictment or information, shall in no case be inquired into without such plea of justification: provided also, that in addition to such plea it shall be competent to the defendant to plead a plea of not guilty: provided also, that nothing in this act contained shall take away or prejudice any defence under the plea of not guilty, which it is now competent to the defendant to make under such plea to any action or indictment or information for defamatory words or libel."

Where a defendant in an information for libel pleads the truth of the charges under this section, evidence is not admissible in support of the plea that the same charges had been previously published within the knowledge of the prosecutor,

and that he had not taken legal proceedings against the publisher. R. v. Newman, 1 Ell. & Bl. 268: 72 E. C. L. R.; S. C. 22 L. J. Q. B. 156. In the same case it was decided, that upon a general replication to such plea the defendant is bound to prove the truth of all the material allegations contained in it, and if he fail to do so, it is no ground for a new trial that, with respect to some of those upon which the jury gave a verdict against him, their finding was against the weight of the evidence: but the court, in pronouncing sentence, will consider the evidence on both sides, and form their own conclusion, "whether the guilt of the defendant is aggravated or mitigated by the plea and by the evidence given to prove or disprove the same." Affidavits, showing the grounds upon which the defendant proceeded in pleading, are receivable in mitigation of punishment.

This section does not apply to seditious libels. R. v. Duffy, 2 Cox, C. C. 45.

Where the plea of justification stated that the prosecutor had earned the reputation of a scandalous friar, a witness called on behalf of the defendant in support of the plea, was allowed to be asked on cross-examination as to the prosecutor's moral character. R. v. Newman, 3 C. & K. 252.

By s. 7, "Whensoever, upon the trial of any indictment or information for the publication of a libel, under the plea of not guilty, evidence shall have been given which shall establish a presumptive case of publication against the defendant by the act of any other person by his authority, it shall be competent to such defendant to prove that such publication was made without his authority, consent, or knowledge, and that the said publication did not arise from want of due care or caution on his part."

By s. 8, "In the case of any indictment or information by a private prosecutor for the publication of any defamatory libel, if judgment shall be given for the defendant, he shall be entitled to recover from the prosecutor the costs sustained by the said defendant by reason of such indictment or information; and that upon a special plea of justification to such indictment or information, if the issue be found for the prosecutor, he shall be entitled to recover from the defendant the costs sustained by the prosecutor by reason of such plea, such costs so to be recovered by the defendant or prosecutor respectively to be taxed by the proper officer of the court before which the said indictment or information is tried."

[*631] *Under the 8th sect., if judgment be given for the defendant, he is entitled to recover from the prosecutor the costs sustained by reason of the indictment or information, although the only plea is not guilty, and the judge certifies under sect. 2 of the 4 & 5 W. & M. c. 18, that there was reasonable cause for preferring the same. R. v. Latimer, 15 Q. B. 1077: 69 E. C. L. R.; S. C. 20 L. J. Q. B. 129.

Statute 32 Geo. 3, c. 60.] By Mr. Fox's act (the 32 Geo. 3, c. 60), reciting that doubts had arisen whether, on the trial of an indictment or information for the making or publishing of a libel, where an issue or issues are joined between the king and the defendant or defendants on the plea of not guilty pleaded, it be competent to the jury impanelled to try the same, to give their verdict upon the whole matter put in issue, it is (by sect. 1) *declared* and enacted, that on every such trial the jury sworn to try the issue, may give a general verdict of not guilty upon the whole matter put in issue upon such indictment or information, and shall not be required or directed by the court or judge before whom such indictment or information shall be tried, to find the defendant or defendants guilty merely on the proof of the publication, by such defendant or defendants, of the paper charged to be a libel, and of the

sense ascribed to the same in such indictment or information. By sect. 2 it is provided, that on every such trial the court or judge before whom such indictment or information shall be tried, shall, according to their or his discretion, give their or his opinion or discretion to the jury on the matter in issue between the king and the defendant or defendants, in like manner as in other criminal cases. By sect. 3 it is provided, that nothing in the act contained shall extend, or be construed to extend, to prevent the jury from finding a special verdict in their discretion, as in other criminal cases. And by sect. 4, in case the jury shall find the defendant or defendants guilty, it shall and may be lawful for the defendant or defendants to move an arrest of judgment, on such ground and in such manner as by law he or they might have done before the passing of the act.(1)

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*MAINTENANCE, &c. [*632]

Maintenance. 632
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Maintenance—nature of the offence.] MAINTENANCE signifies an unlawful taking in hand or upholding of quarrels or sides, to the disturbance or hindrance of common right.(2) Hawk. P. C. b. 1, c. 83, s. 1. It may be either with regard to matters in suit, or to matters not in legal controversy. Id. s. 2. It is an offence punishable at common law with fine and imprisonment, and is forbidden by various statutes. 1 Ed. 3, st. 2, c. 14; 20 Ed. 3, c. 4; 1 R. 2, c. 4; 32 Hen. 8, c. 9, s. 3. These acts, however, are only declaratory of the common law, with additional penalties. Pechell v. Watson, 8 M. & W. 691.

According to the old authorities, whoever assists another with money to carry on his cause, or retains one to be of counsel for him, or otherwise bears him out in the whole or any part of his suit, or by his friendship or interest saves him that expense which he might be otherwise put to, or gives evidence without being called upon to do so, or speaks in another's cause, or retains an attorney for him, or being of great power and interest says publicly that he will spend money to labor the jury, or stand by the party while his cause is tried, this is maintenance. Hawk. P. C. b. 1, c. 83, ss. 5, 6, 7. It may be doubted, however, whether, at the present day, some of these acts would be held to amount to an indictable offence, unless they were plainly accompanied with a corrupt motive. A bare promise to maintain another is not in itself maintenance, unless it be so in respect of the public manner in which, or the power of the person by whom it is made. Hawk. P. C. b. 1, c. 83, s. 8. So the mere giving of friendly advice, as what action it will be proper to bring to recover a certain debt, will not amount to maintenance. Ibid. s. 11.

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(1) See The People v. Croswell, 3 Johns. Cases, 337.
(2) See Small v. Molt, 22 Wend. 403.

Maintenance—justifiable—in respect of interest.] Those who have a certain interest, or even bare contingent interest, in the matter in variance, may maintain another in an action concerning such matter; as in the case of landlord and tenant, trustee and *cestui que trust.* Hawk. P. C. b. 1, c. 83, ss. 19, 20, 21. So where A. at the request of B. defended an action brought for the recovery of a sum of money in which B. claimed an interest, upon B. undertaking to indemnify him from the con- [*633] sequences of such action, this was held not to be *maintenance. Williamson v. Henley, 6 Bingh. 299. So wherever persons claim a common interest in the same thing, as in a way, common, &c., by the same title, they may maintain one another in a suit relating to the same. Hawk. P. C. b. 1, c. 83, s. 24.

Maintenance—justifiable—master and servant.] A master may go with his servant to retain counsel, or to the trial and stand by him, but ought not to speak for him; or, if arrested, may assist him with money. Hawk. P. C. b. 1, c. 83, ss. 31, 32. So a servant may go to counsel on behalf of his master, or show his evidences, but cannot lawfully lay out his own money to assist his master. Ibid. s. 34.

Maintenance—justifiable—affinity.] Whoever is in any way of kin or affinity to either of the parties, may stand by him at the bar, and counsel or assist him; but unless he be either father or son, or heir-apparent, or the husband of such an heiress, he cannot justify laying out money in his cause. Hawk. P. C. b. 1, c. 83, s. 26.

Maintenance—justifiable—poverty.] Any one may lawfully give money to a poor man, to enable him to carry on his suit.(1) Hawk. P. C. b. 1, c. 83, s. 36.

Maintenance—justifiable—counsel and attorneys.] Another exception to the general rule with regard to maintenance is the case of counsel and attorneys. But no counsel or attorney can justify the using of any deceitful practice in the maintenance of a client's cause, and they are liable to be severely punished for any misdemeanors of this kind. Hawk. P. C. b. 1, c. 83, s. 31. And by stat. West. 1, c. 29, if any serjeant, pleader, or other, do any manner of deceit or collusion in the king's court, or consent to it, in deceit of the court, or to beguile the court or the party, he shall be imprisoned for a year and a day. Procuring an attorney to appear for a man, and to confess judgment without a warrant, has been held within this statute. Hawk. P. C. b. 1, c. 83, s. 36. So bringing a *præcipe* against a poor man, knowing he has nothing in the land, on purpose to get the possession from the true tenant. Ibid. s. 35.

Champerty.] Champerty is a species of maintenance, accompanied by a bargain to divide the matter sued for between the parties, whereupon the champertor is to carry on the suit at his own expense. 4 Bl. Com. 135; 1 Russ. by Grea. 179. Champerty may be in personal as well as in real actions: Hawk. P. C. b. 1, c. 84, s. 5; and to maintain a defendant may be champerty. Ibid. s. 8.

By 31 Eliz. c. 5, the offence of champerty may be laid in any county, at the pleasure of the informer.

Various cases have occurred in modern times in which the doctrine of champerty has come in question. Where a bill was filed to set aside an agreement made by a seaman for the sale of his chance of prize-money, Sir William Grant, M. R., expressed an opinion that the agreement was void from the beginning, as amounting to

(1) Perine v. Dunn, 3 Johns. Ch. 508; The State v. Chitty, 1 Bailey, 401.

champerty, viz., the unlawful maintenance of a suit in consideration of a bargain for a part of a thing or some profit out of it. Stevens v. Bagwell, 15 Ves. 139. So it has been held, that an agreement to communicate such information as should enable a party to recover a sum of money by action, and to exert influence for procuring evidence *to substantiate the claim, upon condition of receiving a portion of the [*634] sum recovered, was illegal. Stanley v. Jones, 7 Bingh. 369 : 20 E. C. L. R.; 5 Moo. & P. 193; see Potts v. Sparrow, 6 C. & P. 749 : 25 E. C. L. R.

Embracery.] Embracery, likewise, is another species of maintenance. Any attempt to corrupt, or influence, or instruct a jury, or to incline them to be more favorable to one side than the other, by money, promises, letters, threats, or persuasions, except only by the strength of the evidence, and the arguments of the counsel in open court at the trial of the cause, is an act of embracery, whether the jurors gave any verdict or not, and whether the verdict given be true or false.(1) Hawk. P. C. b. 1, c. 85, s. 1. The giving of money to a juror after the verdict, without any preceding contract, is an offence savoring of embracery; but it is otherwise of the payment of a juror's travelling expenses. Id. s. 3. Embracery is punishable by fine and imprisonment. Ibid. s. 7.

Analogous to the offence of embracery is that of persuading, or endeavoring to persuade, a witness from attending to give evidence, an offence punishable with fine and imprisonment. It is not material that the attempt has been unsuccessful. Hawk. P. C. b. 1, c. 21, s. 15; R. v. Lawley, 2 Str. 904; 1 Russ. by Grea. 182.

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*MACHINERY. [*635]

Attempting to blow up machinery.] See 24 & 25 Vict. c. 97, ss. 10, 45, *supra*, pp. 532, 533.

Riotously destroying or damaging machinery.] See 24 & 25 Vict. c. 97, ss. 11, 12, *infra*, tit. Riot.

Destroying or damaging machinery.] By the 24 & 25 Vict. c. 97, the latter part of s. 14, "Whosoever shall unlawfully and maliciously cut, break, or destroy, or damage, with intent to destroy or render useless, any loom, frame, machine, engine, rack, tackle, tool, or implement, whether fixed or movable, prepared for or employed in carding, spinning, throwing, weaving, fulling, shearing, or otherwise manufacturing or preparing any such goods or articles [see first part of section, p. 646], or shall by force enter into any house, shop, building, or place, with intent to commit any of the offences in this section mentioned, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and if a male under the age of sixteen years, with or without whipping."

By s. 15, "Whosoever shall unlawfully and maliciously cut, break, or destroy, or damage, with intent to destroy or to render useless, any machine or engine, whether

(1) Gibbs v. Dewey, 5 Cowen, 503.

fixed or movable, used or intended to be used for sowing, reaping, mowing, threshing, ploughing, or draining, or for performing any other agricultural operation, or any machine or engine, or any tool or implement, whether fixed or movable, prepared for or employed in any manufacture whatsoever (except the manufacture of silk, woollen, linen, cotton, hair, mohair, or alpaca goods, or goods of any one or more of those materials, mixed with each other or mixed with any other material, or any framework knitted piece, stocking, hose, or lace), shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and if a male under the age of sixteen years, with or without whipping."

Destroying or damaging machinery used in mines.] See 24 & 25 Vict. c. 97, s. 29, *infra*, p. 647.

Malice against owner unnecessary.] See 24 & 25 Vict. c. 97, s. 58, *supra*, p. 264.

Persons in possession of injured property liable to be convicted.] See 24 & 25 Vict. c. 97, s. 59, *supra*, p. 264.

[*636] **Form of indictment.*] See 24 & 25 Vict. c. 97, s. 60, *supra*, p. 264.

Proof of damaging machinery.] Where the prisoner was indicted under the 28 Geo. 3, c. 55, s. 4, a similar statute now repealed, for entering a shop and maliciously *damaging* a certain frame used for the making of stockings, and it appeared that he had unscrewed and carried away a part of the frame, called the *half-jack*, an essential part of the frame, without which it is useless, this was held a *damaging* of the frame within the statute. R. v. Tacey, Russ. & Ry. 452.

Where the machine is imperfect.] It has been held in several cases, that it is an offence within the statute, though the machine at the time when it is broken has been taken to pieces, and is in different places, only requiring the carpenter to put those pieces together again. R. v. Mackerell, 4 C. & P. 448: 19 E. C. L. R. So where the machine was worked by water, and the prosecutor, expecting a riot, took it to pieces, and removed the pieces to a distance of a quarter of a mile, leaving only the water-wheel and its axis standing, and the wheel was destroyed by the prisoners; this was held to be an offence within the statute. R. v. Fidler, 4 C. & P. 449. Where certain sideboards were wanting to a machine at the time it was destroyed, but which did not render it so defective as to prevent it altogether from working, though it would not work so effectually, it was still held to be a threshing-machine within the statute. R. v. Bartlett, Salisb. Sp. Com. 2 Deac. Dig. C. L. 1517. So also where the owner removed a wooden stage, belonging to the machine, on which the man who fed the machine was accustomed to stand, and had also taken away the legs; and it appeared that, though the machine could not be conveniently worked without some stage for the man to stand on, yet that a chair or table, or a number of sheaves of corn, would do nearly as well, and that it could also be worked without the legs, it was held to be within the statute. R. v. Chubb, Salisb. Sp. Com. 2 Deac. Dig. C. L. 151. But where the owner had not only taken the machine to pieces, but broken

the wheel, from fear of its being set on fire, and it appeared that, without the wheel, the engine could not be worked, this was held to be a case not within the statute. R. v. West, Salib. Sp. Com. 2 Deac. Dig. C. L. 1518.

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*MALICIOUS INJURIES. [*637]

Most malicious injuries to person and property are specially provided for, and the law relating to them will be found under the various species of this kind of offence.

By the 24 & 25 Vict. c. 97, s. 51, "Whosoever shall unlawfully and maliciously commit any damage, injury, or spoil to or upon any real or personal property whatsoever, either of a public or private nature, for which no punishment is hereinbefore provided, the damage, injury, or spoil being to an amount exceeding five pounds, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labor; and in case any such offence shall be committed between the hours of nine of the clock in the evening and six of the clock in the next morning, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding five years, and not less than three, or to be imprisoned for any term not exceeding two years, with or without hard labor."(1)

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*MANSLAUGHTER. [*638]

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Punishment.] By the 24 & 25 Vict. c. 100, s. 5, "Whosoever shall be convicted of manslaughter shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, or to pay such fine as the court shall award, in addition to or without any such other discretionary punishment as aforesaid."

Form of indictment.] See 24 & 25 Vict. c. 100, s. 6, *infra*, p. 650.

Manslaughter abroad.] See 24 & 25 Vict. c. 100, s. 9, *supra*, p. 236.

Manslaughter where the death or cause of death happens abroad.] See 24 & 25 Vict. c. 100, s. 10; *infra*, tit. "Murder."

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(1) Mosely v. The State, 25 Georgia, 190.

Distinction between manslaughter and murder.] Manslaughter is principally distinguishable from murder in this, that though the act which occasions the death is unlawful, or likely to be attended with bodily mischief, yet the malice, either express or implied, which is the very essence of murder, is presumed to be wanting in manslaughter, the act being rather imputed to the infirmity of human nature.(1) 1 East, P. C. 218; Foster, 290. It has also been said to differ from murder in this respect, that there cannot be any accessories before the fact to manslaughter, since the act is presumed to be altogether sudden and without premeditation. 1 Hale, P. C. 437. But in the case of R. v. Gaylor, Dears. & B. C. C. 288, upon the above passage being referred to in the course of the argument, Erle, J., said that he thought that Lord Hale was there speaking of manslaughter *per infortunium* or *se defendendo* only, and that he did not understand him to mean that in ordinary cases of manslaughter there could be no accessory. See 1 Russ. by Grea. 579.

Where A. was indicted for the wilful murder of B, and C. was indicted for receiving, harboring, and assisting A., well knowing that he had committed the felony and murder aforesaid; Tindal, C. J., held, that if the offence of A. was reduced to [*639] manslaughter *C. might, notwithstanding, be found guilty as an accessory after the fact. R. v. Greenacre, 8 C. & P. 35: 34 E. C. L. R.

Proof in cases of provocation.] Whenever death ensues from sudden transport of passion or heat of blood, if upon reasonable provocation, and without malice, or upon sudden combat, it will be manslaughter; if without such provocation, or if the blood has had reasonable time to cool, or if there be evidence of express malice, it will be murder.(2) East, P. C. 232; Foster, 313. But where the provocation is sought by the prisoner, it will not furnish any defence against the charge of murder. 1 East, P. C. 239; 1 Hale, P. C. 457.

Words of reproach, how grievous soever, are not a provocation sufficient to free the party killing from the charge of murder; neither are indecent or provoking actions or gestures, without an assault. Foster, 290, 291; R. v. Brain, 1 Hale, P. C. 455; Russ. by Grea. 514; R. v. Morley, 1 Hale, P. C. 456; Kel. 55; 1 East, P. C. 233.

Although an assault is in general such a provocation as that, if the party struck strikes again, and death ensues, it is only manslaughter; yet it is not every trivial assault which will furnish such a justification. 1 East, P. C. 236; 1 Russ. by Grea. 515; R. v. Stedman, Foster, 292; R. v. Reason, Foster, 293; 2 Str. 499; 1 East, P. C. 320. On the subject of blows accompanied by words, Pollock, C. B., has expressed himself as follows, "If there be a provocation by blows, which would not of itself render the killing manslaughter, but it be accompanied by such provocation, by means of words or gestures, as would be calculated to produce a degree of exasperation equal to that which would be produced by a violent blow, I am not prepared to say that the law will not regard these circumstances as reducing the crime to that of manslaughter only." R. v. Sherwood, 1 C. & K. 556: 47 E. C. L. R.

In cases depending upon provocation, it is always material to consider the nature of the weapon used by the prisoner, as tending to show the existence of malice. If a deadly weapon be used, the presumption is, that it was intended to produce death,

(1) The State v. Smith, 10 Richardson Law, 341; Stokes v. The State, 18 Georgia, 17; Atkins v. The State, 16 Arkansas, 568; Rapp v. The Commonwealth, 14 B. Monroe, 614.

It is no defence to an indictment for manslaughter, that the homicide therein alleged appears by the evidence to have been committed with malice aforethought, and was therefore murder; but the defendant is such case may, notwithstanding, be properly convicted of the offence of manslaughter. Commonwealth v. McPike, 3 Cushing, 181.

(2) Young v. The State, 11 Humphreys, 200. See *post*, p. 680, n. 1.

which will be evidence of malice; but if the weapon was not likely to produce death, that presumption will be wanting.(1) 2 Lord Raym. 1498; R. v. Rowley, 12 Rep. 87; 1 Hale, P. C. 453; Foster, 294; 1 East, P. C. 236; 1 Leach, 369; R. v. Wigg, 1 Leach, 378 (*n*). In order that the provocation may have the effect of reducing the offence to manslaughter, it must appear to have been recent; for if there has been time for passion to subside, and for reason to interpose, the homicide will be murder. Foster, 296; 1 East, P. C. 252; 2 Lord Raym. 1496; R. v. Oneby, 2 Str. 766; 2 Lord Raym. 1485; R. v. Hayward, 6 C. & P. 157; 25 E. C. L. R. As evidence of provocation is only an answer to that presumption of malice which the law infers in every case of homicide, if there be proof of express malice at the time of the act committed, the additional circumstance of provocation will not extenuate the offence to manslaughter. In such a case, not even previous blows or struggling will reduce the offence to homicide. 1 Russ. by Grea. 515; R. v. Mason, Foster, 132; 1 East, P. C. 239. There is one peculiar case of provocation which the law recognizes as sufficient to reduce the act of killing to manslaughter; where a man finds another in the act of adultery with his wife, and kills him in the first transport of his passion. R. v. Manning, Sir T. Baym. 212; *1 Russ. by Grea. 581. But if the husband kill [*640] the adulterer deliberately, and upon revenge, after the fact and sufficient cooling time, the provocation will not avail in alleviation of the guilt. 1 East, P. C. 251; R. v. Kelley, 2 C. & K. 814: 61 E. C. L. R, per Rolfe, B.(2)

So if a father see a person in the act of committing an unnatural offence with his son, and instantly kill him, it seems that it will be only manslaughter, and that of the lowest degree; but, if he only hear of it, and go in search of the person, and meeting him, strike him with a stick, and afterwards stab him with a knife, and kill him, in point of law it will be murder. R. v. Fisher, 8 C. & P. 182: 34 E. C. L. R.

In the above case, Parke, J., said, that whether the blood has had time to cool or not, is a question for the court, and not for the jury; but it is for the jury to find what length of time elapsed between the provocation received and the act done.

It has been held by Rolfe, B., that a blow given to the prisoner's wife would afford the same justification as a blow given to the prisoner himself, so as to reduce the killing to manslaughter. R v. Rodgers, MS. York Spr. Ass. 1842.

It has been held by Park and Littledale, JJ., that R. v. Grindley, 1 Russ. by Grea. 8, in which Holroyd, J., ruled, that though voluntary drunkenness cannot excuse for the commission of crime, yet where, as upon a charge of murder, the question is, whether an act is premeditated or not, or done only from sudden heat or impulse, the fact of the party being intoxicated was a circumstance proper to be taken into consideration, is not law. R. v. Carroll, 7 C. & P. 145: 32 E. C. L. R. Where the prisoner was indicted for stabbing with a fork with intent to murder, and it appeared that he was in liquor, Alderson, B., said, "If a man uses a stick, you would not infer a malicious intent so strongly against him, if drunk, when he made an intemperate use of it, as you would if he had used a different kind of weapon; but where a dangerous weapon is used, which, if used, must produce grievous bodily harm, drunkenness can have no effect on the consideration of the malicious intent of the party." R. v. Meakin, 7 C. & P. 297. In R. v. Thomas, Id. 817, which was also an indictment for maliciously stabbing, Parke, B., told the jury, that "drunkenness

(1) See *post*, p. 683. n. 1.

(2) If one man finds another in the act of adultery with his wife, and kills him on the spot, the crime will be manslaughter. But if the adulterer is not slain until sufficient time has elapsed for the passion to cool, the slayer is guilty of murder. The State v. Samuel, 3 Jones's Law, 74; The State v. Neville, 6 Jones's Law, 423.

may be taken into consideration in cases where what the law deems sufficient provocation has been given, because the question is, in such cases, whether the fatal act is to be attributed to the passion of anger excited by the previous provocation, and that passion is more easily excitable in a person when in a state of intoxication than when he is sober. So where the question is, whether words have been uttered with a deliberate purpose, or are merely low and idle expressions, the drunkenness of the person uttering them is proper to be considered. But if there is really a previous determination to resent a slight affront in a barbarous manner, the state of drunkenness in which the prisoner was, ought not to be regarded, for it would furnish no excuse."

Proof in cases of mutual combat.] Death in the course of a mutual combat, though in some cases it amounts to murder, is generally found to constitute manslaughter only, there being most frequently an absence of that malice requisite to a conviction for murder, and a sufficient degree of provocation to show such absence.

The degree of provocation is not altogether of the same nature in these cases as in [*641] those mentioned under the last head, for where, upon *words of reproach, or indeed upon any other sudden provocation, the parties come to blows, and a combat ensues, in which no undue advantage is taken on either side, and one of the parties is killed, it is manslaughter only. 1 East, P. C. 241; 1 Hale, P. C. 456; Foster, 295. But if one of the parties provides himself with a deadly weapon beforehand, which he uses in the course of the combat, and kills his adversary, this will be murder, though it would be only manslaughter if, in the heat of the combat, he snatched up the weapon, or had it in his hand at the commencement of the combat, but without an intention of using it.(1) R. v. Anderson, 1 Russ. by Grea. 531; R. v. Kessal, 1 C. & P. 437: 12 E. C. L. R.; R. v. Snow, 1 East, P. C. 244–245; and see R. v. Murphy, *post*, tit. "Murder."

Not only may death, in the course of a mutual combat, be heightened to murder by the use of deadly weapons, but by the manner of fighting, as in "an up and down fight." R. v. Thorpe, 1 Lewin, C. C. 171. To reduce the homicide to manslaughter in these cases, it must appear that no undue advantage was sought or gained on either side. Foster, 295; 1 East, P. C. 242; R. v. Whitely, 1 Lewin, C. C. 173. The lapse of time between the origin and the quarrel is also to be greatly considered, as it may tend to prove malice. R. v. Lynch, 3 C. & P. 324: 14 E. C. L. R. But it is not in every case where there has been an old grudge that malice will be presumed. Hawk. P. C. b. 1, c. 31, s. 30; 1 Hale, P. C. 452.

If two parties go out to strike one another, and do so, it is an assault in both, and it is quite immaterial which strikes the first blow. R. v. Lewis, 1 C. & K. 419: 47 E. C. L. R. All struggles in anger, whether by fighting, wrestling, or in any other mode, are unlawful, and death occasioned by them is manslaughter at the least. R. v. Canniff, 9 C. & P. 539: 38 E. C. L. R.

The case of deliberate duelling is an exception to the general rule, that death ensuing in the course of a mutual combat is manslaughter only. Foster, 297. The authorities upon this subject will be found under the head *Murder*.

Proof in cases of resistance to officers of justice, &c.] The cases of homicide which arise in the instances of officers of justice, or others having authority to arrest, where resistance is made to them in the execution of their duty, include every species

(1) The People v. Tuki, 3 Wheeler's C. C. 242.

of homicide. If the officer is killed in the lawful execution of his duty, by the party resisting him, it is *murder*. If he be killed when acting under a void or illegal authority, or out of his jurisdiction, it is manslaughter, or excusable homicide, according to the circumstances of the case. If the party about to be arrested resist, and be killed, or he attempt to make his escape, and the officer cannot take him without killing him, it will be manslaughter, or excusable or justifiable homicide, according to circumstances.(1) These distinctions will be noticed, and the different authorities and cases collected under the head *Murder;* and it will only therefore be necessary to refer under the present head to the cases relating to manslaughter. In what instances peace officers are authorized to arrest individuals, and where they have power to do so without warrant, and in what cases the process under which they act is regular or irregular, and what is the consequence of such irregularity, is fully stated in other parts of this work. *Vide post*, title "Murder," and *supra*, title "Apprehension."

In order to render it murder, in a person who kills an officer *attempting [*642] to arrest him, it must appear that he had notice of the character in which the officer acted; for if he had not, the offence will amount to manslaughter only. Foster, 310. The mode in which a constable is bound to notify his authority will be stated hereafter, *post*, title "Murder."

Where a peace officer, who attempts to arrest another without having sufficient authority, is resisted, and in the course of that resistance is killed, the offence only amounts to manslaughter; as where he attempts to arrest on an insufficient charge of felony. R. v. Curvan, 1 Moo. C. C. 132, *post;* R. v. Thomson, Id. 80. So if a peace officer attempts to execute process out of his own jurisdiction, and is killed under the like circumstances. 1 Hale, P. C. 558; 1 East, P. C. 314; R. v. Mead, 2 Stark. N. P. C. 205: 3 E. C. L. R.; *post.* So where a peace officer unlawfully attempts to break open the outer door or window of a house (and as to his authority herein, see *post*, title "Murder"), and he is resisted and killed in the course of that resistance, it is manslaughter. 1 Hale, P. C. 458.

With regard to the cases of peace officers killing others in the supposed execution of their duty, it is to be observed that where they act without proper authority, and the party refuses to submit, and death ensues, it will be murder or manslaughter, according to the circumstances of the case. 1 Hale, P. C. 481; Foster, 271. So where an officer uses a greater degree of violence than is necessary to overcome the resistance of the party, and death ensues, it will be manslaughter in the officer. 1 East, P. C. 297. So where an officer kills a party attempting to make an escape, when arrested on a charge of misdemeanor. R. v. Foster, 1 Lewin, C. C. 187, *post*, title, "Murder."

A special constable, duly appointed under the 1 & 2 Wm. 4, c. 41, remains a constable until his services are either determined or suspended under sec. 9. Upon an indictment for the murder of J. Nutt, it appeared that Nutt was appointed, on the 9th of February, 1832, by two justices, in writing, and under their hands, "to act as a special constable for the parish of St. George, until he received notice that his service is suspended or determined." Nutt was killed in conveying a prisoner to the station house, on the 16th of August, 1840. It was objected that Nutt did not continue a special constable till that time; but it was held that the appointment was indefinite in point of time, and remained valid and in force till either suspended or determined under sec. 9; and as Nutt's appointment was not shown to have deter-

(1) Roberts v. The State, 13 Missouri, 382.

mined, he continued to be a special constable under the act on the 16th of August, 1840, and had then, under sec. 8, all the ordinary powers of a common constable. Per Coleridge, J., R. v. Porter, 9 C. & P. 778 : 38 E. C. L. R.

With regard to private persons attempting to make an arrest, the rule is the same as in the case of peace officers. Where a private person is justified in making an arrest (as to which see *supra*, p. 240), and he is resisted and is killed, it will be murder. But if a private person, without lawful authority, attempt to arrest, and be killed by the party whom he attempts to arrest, it will only be manslaughter in the latter. *Vide* the cases cited *post*, title "Murder."

Proof in cases of killing in the performance of an unlawful or negligent act.] If in doing an unlawful act death ensue, in conseqnence of the negligence of the party, but without any intent to do bodily harm, it is manslaughter at the least.(1) Foster, 261.

[*643] *Thus, if a person in sport throw stones down a coal-pit, whereby a man is killed, this is manslaughter, though the party was only a trespasser. R. v. Fenton, 1 Lewin, C. C. 179. So where a lad, as a frolic, without any intention to do any harm to any one, took the trapstick out of the front part of a cart, in consequence of which it was upset, and the carman, who was in it putting in a sack of potatoes, was pitched backward on the stones and killed, Gurney, B., and Williams, J., held that the lad was guilty of manslaughter. R. v. Sullivan, 7 C. & P. 641 : 32 E. C. L. R. So if an improper quantity of spirituous liquors be given to a child, heedlessly, and for brutal sport, and death ensues, it will be manslaughter. R. v. Martin, 3 C. & P. 211 : 14 E. C. L. R. The prisoners were indicted for murder. The deceased, being in liquor, had gone at night into a glasshouse, and laid himself down upon a chest. While there asleep the prisoners covered and surrounded him with straw, and threw a shovel of hot cinders upon his belly, the consequence of which was, that the straw ignited and he was burned to death. There was no evidence of express malice on the part of the prisoners. Patteson, J., told the jury that if they believed the prisoners really intended to do any serious injury to the deceased, although not to kill him, it was murder; but if they believed their intention to have been only to frighten him, in sport, it was manslaughter. The prisoners were convicted of the latter offence. R. v. Errington, 2 Lew. C. C. 217. Where a mother, being angry with one of her children, took up a small piece of iron, used as a poker, and on his running to the door of the room which was open, threw it after him, and hit another child who happened to be entering the room at the moment, in consequence of which the latter died, Parke, J., held this to be manslaughter, although it appeared that the mother had no intention of hitting her child with whom she was angry, but only intended to frighten him. The learned judge said, "If a blow is aimed at an individual unlawfully—and this was undoubtedly unlawful, as an improper mode of correction—and strikes another and kills him, it is manslaughter; and there is no doubt if the child at whom the blow was aimed had been struck and died, it would have been manslaughter, and so it is under the present circumstances." R v. Conner, 7 C. & P. 438 : 32 E. C. L. R. The prisoner was indicted for manslaughter. The deceased had entered the prisoner's house in his absence, and on his return was desired to withdraw, but refused to go. Upon this, words arose, and the prisoner becoming excited, proceeded to use force, and, by a kick which he gave to the deceased, caused an injury which produced his death. Alderson, B., said, "A kick is not a justifiable

(1) Holly v. The State, 10 Humphreys, 141.

mode of turning a man out of your house, though he be a trespasser. If the deceased would not have died but for the injury he received, the prisoner having unlawfully caused that injury, he is guilty of manslaughter." R. v. Wild, 2 Lew. C. C. 214. A man was in possession, under the sheriff. One of the prisoners, of whose goods he was in possession, assisted by the other prisoner, plied the man with liquor, themselves drinking freely also. When he was very drunk, they put him into a cabriolet, and caused him to be driven about the streets; about two hours after he had been put into the cabriolet he was found dead. Lord Denman, C. J., told the jury, that if the prisoner, when the deceased was drunk, drove him about in his cabriolet, in order to keep him out of possession, and by so doing accelerated his death, it would be manslaughter. R. v. Packard, Carr. & M. 246: 41 E. C. L. R.

The prisoner having the right to the possession of a gun which was *in the [*644] hands of the deceased, and which he knew to be loaded, attempted to take it away by force. In the struggle which ensued the gun went off accidentally and caused the death of the deceased. Lord Campbell directed the jury that, though the prisoner had a right to the possession of the gun, to take it away by force was unlawful; and that, as the evidence showed that the discharge of the gun, though accidental, was the result of this unlawful act, it was their duty to find the prisoner guilty of manslaughter. R. v. Archer, 1 F. & F. 351.

But the death must be the direct and not the indirect consequence of the unlawful act. Thus, where the prisoner was a maker of fireworks, and he made and kept them in a manner contrary to the provisions of the 9 & 10 Wm. 3, c. 7, s. 1, at his own house. During his absence, by the negligence of one of his servants, the fireworks became ignited, by which a neighboring house was set fire to, and a person therein burnt to death. It was held, that the prisoner was not indictable for manslaughter, as the death was caused by the negligence of the servant. R. v. Bennett, 1 Bell, C. C. 1; S. C. 28 L. J. M. C. 27. See, as to the negligent omission of a duty, R. v. Hughes, 1 Dears. & P. C. C. 188; 26 L. J. M. C. 133.

Another large class of cases of manslaughter consists of those in which death takes place in the course of prize-fights. 1 East, P. C. 270; R. v. Murphy, 6 C. & P. 103: 25 E. C. L. R.; R. v. Hargrave, 5 C. & P. 170: 24 E. C. L. R.

Death ensuing in the performance of an act otherwise lawful, may amount to manslaughter, by the negligence of the party performing the act, as in the instance of workmen throwing down stones from the top of a house, where they were working, where there is a small probability of persons passing by. 1 East, P. C. 262; Foster, 262.

The most common cases of this class are those where the death has been occasioned by negligent driving. 1 East, P. C. 263; R. v. Walker, 1 C. & P. 320: 12 E C. L. R.; R. v. Knight, 1 Lewin, C. C. 168; R. v. Grout, 6 C. & P. 629: 25 E. C. L. R. And it is no ground of defence that the death was partly caused by the negligence of the deceased himself. Per Pollock, C. B., in R. v. Swindall, 2 C. & K. 230: 61 E. C. L. R.

Where a person, practising medicine or surgery, whether licensed or unlicensed, is guilty of gross negligence, or criminal inattention, in the course of his employment, and in consequence of such negligence or inattention death ensues, it is manslaughter.(1) 1 Hale, P. C. 429; 4 Bl. Com. c. 14; R. v. Van Butchell, 3 C. & P. 632: 14 E. C. L. R.; R. v. Williamson, 3 C. & P. 635; R. v. Long, 4 C. & P. 398: 19 E. C. L. R.; R. v. Senior, 1 Moo. C. C. 346; R. v. Simpson, 4 C. & P. 407 (*n*);

(1) Ann v. The State, 11 Humphreys, 159.

1 Lewin, C. C. 172; R. v. Spiller, 5 C. & P. 333: 24 E. C. L. R.; R. v. Ferguson, 1 Lewin, C. C. 181; R. v. Spilling, 2 Moo. & R. 107; R. v. Ellis, 2 C. & K. 470: 61 E. C. L. R.; R. v. Whitehead, 2 C. & K. 368; all stated *post*, tit. "Murder."

So a person may, by a neglect of duty, render himself liable to be convicted of manslaughter, as where an engineer, employed to manage a steam-engine, used to draw up miners from a coal-pit, left the engine in charge of a boy, whom he knew was incapable of managing it, and death ensued in consequence to one of the miners, the engineer was held, by Campbell, C. J., to be guilty of manslaughter. R. v. Lowe, 3 C. & K. 123; see also R. v. Haines, 2 C. & K. 368: 61 E. C. L. R.; and R. v. Barrett, 2 C. & K. 343.(1)

[*645] Trustees, appointed under a local act for the purpose of repairing *roads in a district, with power to contract for executing such repair, are not chargeable with manslaughter, if a person, using one of such roads, is accidentally killed in consequence of the road being out of repair through neglect of the trustees to contract for repairing it. R. v. Pollock, 17 Q. B. 34: 71 E. C. L. R.

In R. v. Waters, 1 Den. C. C. R. 356; S. C. 18 L. J. M. C. 53, the prisoner was held to be properly convicted of the manslaughter of her infant female child, being of such tender age and feebleness as to be incompetent to take charge of herself, upon an indictment which stated the death to have been caused by exposure, whereby the child became mortally chilled, frozen, and benumbed. And see *ante*, tit. "Illtreating Apprentices," &c., p. 556, and *post*, tit. "Murder."

[*646] *MANUFACTURES.

Destroying goods in process of manufacture.] By the 24 & 25 Vict. c. 98, s. 14, "Whosoever shall unlawfully and maliciously cut, break, or destroy, or damage, with intent to destroy or to render useless, any goods or article of silk, woollen, linen, cotton, hair, mohair, or alpaca, or of any one or more of those materials mixed with each other or mixed with any other material, or any framework-knitted piece, stocking, hose, or lace, being in the loom or frame, or on any machine or engine, or on the rack or tenders, or in any stage, process, or progress of manufacture, or shall unlawfully and maliciously cut, break, or destroy, or damage, with intent to destroy or to render useless, any warp or shute of silk, woollen, linen, cotton, hair, mohair, or alpaca, or of any one or more of those materials, mixed with each other, or mixed with any other material, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and if a male under the age of sixteen years, with or without whipping."

Stealing goods in process of manufacture.] By the 24 & 25 Vict. c. 96, s. 62, "Whosoever shall steal to the value of ten shillings any woollen, linen, hempen, or cotton yarn, or any goods or articles of silk, woollen, linen, cotton, alpaca, or mohair, or of any one or more of those materials mixed with each other, or mixed with any other material, whilst laid, placed, or exposed, during any stage, process, or progress

(1) Under the act of Congress of July, 1838, every person who assumes to perform the duties of any important officer on board a steamboat, is guilty of manslaughter, if loss of life occurs through his ignorance or negligence in respect of his duties. United States v. Taylor, 5 McLean, 242.

of manufacture, in any building, field, or other place, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Where, on an indictment under the (repealed) statute 18 Geo. 4, c. 27, for stealing yarn from a bleaching ground, it appeared that the yarn at the time it was stolen was in heaps, for the purpose of being carried into the house, and was not spread out for bleaching, Thompson, B., held that the case was not within the statute. R. v. Hugill, 2 Russ. by Grea. 225. So where the indictment was for stealing calico, placed to be printed and dried in a certain building, it was held, that in order to support the capital charge, it was necessary to prove that the building from which the calico was stolen was used either for drying or printing calico. R. v. Dixon, R. & R. 53. But it is to be observed, that the statute under which this case was decided mentioned particularly a building, &c., made use of by any calico printer, &c., for printing, whitening, booking, bleaching, or dyeing. It has been decided that goods remain in a "stage, process, or progress of manufacture," within the meaning of the former statute, the 7 & 8 Geo. 4, c. 30, s. 3, though the texture be complete, if they are not yet brought into a condition for sale. R. v. Woodhead, 1 Moo. & R. 549.

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*MINES. [*647]

Setting fire to a coal mine.] See 24 & 25 Vict. c. 97, ss. 26, 27, *supra*, p. 262.

Conveying water into a mine, obstructing the shaft, &c.] By the 24 & 25 Vict. c. 97, s. 28, "Whosoever shall unlawfully and maliciously cause any water to be conveyed or run into any mine, or into any subterraneous passage communicating therewith, with intent thereby to destroy or damage such mine, or to hinder or delay the working thereof, or shall with the like intent unlawfully and maliciously pull down, fill up, or obstruct, or damage with intent to destroy, obstruct, or render useless, any airway, waterway, drain, pit, level, or shaft of or belonging to any mine, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping: provided that this provision shall not extend to any damage committed underground by any owner of any adjoining mine in working the same, or by any person duly employed in such working."

Damaging steam-engines, staiths, wagon-ways, &c., for working mines.] By s. 29, "Whosoever shall unlawfully and maliciously pull down or destroy, or damage with intent to destroy or render useless, any steam-engine or other engine for sinking, draining, ventilating, or working, or for in anywise assisting in sinking, draining, ventilating, or working any mine, or any appliance or apparatus in connection with any such steam or other engine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, wagon-way, or trunk for conveying minerals from any mine, whether such engine, staith, building, erection, bridge, wagon-way, or trunk be completed or in an unfinished state, or shall unlawfully and

maliciously stop, obstruct, or hinder the working of any such steam or other engine, or of any such appliance or apparatus as aforesaid, with intent thereby to destroy or damage any mine, or to hinder, obstruct, or delay the working thereof, or shall unlawfully and maliciously, wholly or partially cut through, sever, break, or unfasten, or damage with intent to destroy or render useless, any rope, chain, or tackle, of whatsoever material the same shall be made, used in any mine, or in or upon any inclined plane, railway or other way, or other work whatsoever, in anywise belonging or appertaining to or connected with or employed in any mine or the working or business thereof, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not ex- [*648] ceeding two years, with or without hard *labor, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping."

As to riotously damaging machinery used in mines, see 24 & 25 Vict. c. 97, ss. 11, 12; *infra*, tit. "Riot."

Larceny from mines.] By the 24 & 25 Vict. c. 96, s. 38, "Whosoever shall steal, or sever with intent to steal, the ore of any metal, or any lapis calaminaris, manganese, or mundick, or any wad, black cawke, or blackLead, or any coal or cannel coal, from any mine, bed, or vein thereof respectively, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement.

Miners removing ore with intent to defraud.] By s. 39, "Whosoever, being employed in or about any mine, shall take, remove, or conceal any ore of any metal, or any lapis calaminaris, manganese, mundick, or other mineral found or being in such mine, with intent to defraud any proprietor of or any adventurer in such mine, or any workman or miner employed therein, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Venue.] See, as to offences under the 24 & 25 Vict. c. 96, *supra*, p. 564.

Malice against owner of property injured unnecessary.] See 24 & 25 Vict. c. 97, s. 58, *supra*, p. 264.

Persons in possession of property injured liable to be convicted.] See 24 & 25 Vict. c. 97, s. 59, *supra*, p. 264.

Form of indictment for injury.] See 24 & 25 Vict. c. 97, s. 60, *supra*, p. 264. In an indictment under this section the mine may be laid as the property of the person in possession and working it, though only an agent for others. R. v. Jones, 2 Moo. C. C. 293.

Proof of injury to mine.] Where A. and B. were the owners of adjoining collieries, and A., asserting that a certain airway belonged to him, directed his workmen to stop it up, and they, acting *bona fide*, and believing that A. had a right to give such an order, did so; Lord Abinger, C. B., held, they were not guilty of felony

under the above section. R. v. James, 8 C. & P. 131: 34 E. C. L. R. But if such workmen knew that the stopping up of the airway was a malicious act of their master, such workmen would be guilty of felony. Ibid.

*MURDER. [*649]

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Punishment.] By the 24 & 25 Vict. c. 100, s. 1, "Whosoever shall be convicted of murder, shall suffer death as a felon."

Sentence for murder.] By s. 2, "Upon every conviction for murder the court shall pronounce sentence of death, and the same may be carried into execution; all other proceedings upon such sentence and in respect thereof may be had and taken, in the same manner in all respects as sentence of death might have been pronounced *and carried into execution, and all other proceedings thereupon and in re- [*650] spect thereof might have been had and taken, before the passing of this act, upon a conviction for any other felony for which the prisoner might have been sentenced to suffer death as a felon."

Body to be buried in prison.] By s. 3, "The body of every person executed for murder shall be buried within the precincts of the prison in which he shall have been last confined after conviction, and the sentence of the court shall so direct."

Conspiring or soliciting to commit murder.] See 24 & 25 Vict. c. 100, s. 4, *supra*, p. 391.

Form of indictment.] By the 24 & 25 Vict. c. 100, s. 6, "In any indictment for murder or manslaughter, or for being an accessory to any murder or manslaughter, it shall not be necessary to set forth the manner in which or the means by which the death of the deceased was caused, but it shall be sufficient in any indictment for murder to charge that the defendant did feloniously, wilfully, and of his malice aforethought kill and murder the deceased; and it shall be sufficient in any indictment for manslaughter to charge that the defendant did feloniously kill and slay the deceased; and it shall be sufficient in any indictment against an accessory to any murder or manslaughter to charge the principal with the murder or manslaughter (as the case may be) in the manner hereinbefore specified, and then to charge the defendant as an accessory in the manner heretofore used and accustomed."

Petit treason abolished.] By s. 8, "Every offence which before the commencement of the act of the ninth year of King George the Fourth, chapter thirty-one, would have amounted to petit treason, shall be deemed to be murder only, and no greater offence; and all persons guilty in respect thereof, whether as principals or as accessories shall be dealt with, indicted, tried, and punished as principals and accessories in murder."

Venue in cases of murder committed abroad.] See 24 & 25 Vict. c. 100, s. 9, *supra*, p. 236.

Child murder.] By s. 60, "If any person tried for the murder of any child shall be acquitted thereof, it shall be lawful for the jury, by whose verdict such person shall be acquitted, to find, in case it shall so appear in evidence, that the child had recently been born, and that such person did by some secret disposition of the dead body of such child, endeavor to conceal the birth thereof, and thereupon the court may pass such sentence as if such person had been convicted upon an indictment for concealment of the birth." See p. 360.

Punishment of accessory after the fact to murder.] By s. 67, "Every accessory after the fact to murder shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor."

[*651] **Proof of a murder having been committed.*] The *corpus delicti*, that a murder had been committed by some one, is essentially necessary to be proved; and Lord Hale advises that in no case should a prisoner be convicted, where the dead body has not been found—where the fact of murder depends upon the fact of disappearance: *ante*, p. 15.(1)

A girl was indicted for the murder of her child, aged sixteen days. She was proceeding from Bristol to Llandogo, and she was seen near Tintern with a child in her arms, at six o'clock in the evening; she arrived at Llandogo, between eight and nine

(1) Tyner v. The State, 5 Humphreys, 383.
It is not essential to a conviction for murder that the body of the deceased be found. Stocking v. The State, 7 Indiana, 326; The People v. Ruloff, 3 Parker, C. R. 401; Ruloff v. The People, 4 Smith, 179; The State v. William, 7 Jones's Law, 446.

without the child. The body of a child was afterwards found in the Wye, near Tintern, which appeared not to be the child of the prisoner. Lord Abinger, C. B., held that the prisoner must be acquitted, and that she could not by law either be called upon to account for her child, or to say where it was, unless there was evidence to show that her child was actually dead. R. v. Hopkins, 8 C. & P. 591: 34 E. C. L R.

Where the death has been occasioned in secrecy, says Mr. Starkie, a very important preliminary question arises whether it has not resulted from accident, or from the act of the party himself. It sometimes happens that a person, determined on self-destruction, resorts to expedients to conceal his guilt, in order to save his memory from dishonor, and his property from forfeiture. Instances also have occurred where, in doubtful cases, the surviving relations have used great exertions to rescue the character of the deceased from ignominy by substantiating a charge of murder. (R. v. Cowper, 5 St. Tr.) On the other hand, in frequent instances attempts have been made by those who have really been guilty of murder, to perpetrate it in such a manner as to induce a belief that the party was *felo de se.* Where the circumstances are natural and real, and have not been counterfeited with a view to evidence, they must necessarily correspond and agree with each other, for they did really so coexist; and therefore if any one circumstance, which is essential to the case attempted to be established, be wholly inconsistent and irreconcilable with such other circumstances as are known or admitted to be true, a plain and certain inference results that fraud and artifice have been resorted to, and that the hypothesis to which such a circumstance is essential cannot be true. 2 Stark. Ev. 521, 2d ed.

The question, observes Mr. Starkie, whether a person has died a natural death, as from apoplexy, or a violent one, as from strangulation, whether the death of a person found immersed in water, has been occasioned by drowning, or by force and violence previous to the immersion (see R. v. Cowper, 5 St. Tr.), whether the drowning was voluntary, or the result of force, whether the wounds inflicted on the body were inflicted before or after death, are questions to be decided by medical skill. It is scarcely necessary to remark, that where a reasonable doubt arises whether the death resulted, on the one hand, from natural or accidental causes, or, on the other, from the deliberate and wicked act of the prisoner, it would be unsafe to convict him, notwithstanding strong, but merely circumstantial, evidence against him. Even medical skill is not, in many instances, and without reference to the particular circumstances of the case, decisive as to the cause of the death; and persons of science must, in order to form their own conclusion *and opinion, rely partly on external cir- [*652] cumstances. It is, therefore, in all cases expedient that all the accompanying facts should be observed and noted with the greatest accuracy: such as the position of the body, the state of the dress, marks of blood, or other indications of violence; and in cases of strangulation, the situation of the rope, the position of the knot; and also the situation of any instrument of violence, or of any object, by which, considering the position and state of the body, and other circumstances, it is possible that the death may have been accidentally occasioned.(1) 2 Stark. Ev. 521, 2d ed.

(1) When death is caused by a wound received, the person who inflicts is responsible for its consequences, though the deceased might have recovered by the exercise of more care and prudence. McCallister v. The State, 17 Alabama, 434.

When a surgical operation is performed in a proper manner, and under circumstances which render it necessary in the opinion of competent surgeons, upon one who has received a wound apparently mortal, and such operation is ineffectual to afford relief and save the life of the patient, or is itself the immediate cause of death, the party inflicting the wound will nevertheless be responsible for the consequences. Commonwealth v. McPike, 3 Cushing, 181.

Proof of the murder—as to the party killed.] A child in the womb is considered *pars viscerum matris*, and not possessing an individual existence, and cannot therefore be the subject of murder. Thus, if a woman, quick or great with child, take a potion to procure abortion, or if another give her such potion, or strike her, whereby the child within her is killed, it is neither murder nor manslaughter. 1 Hale, P. C. 433. Whether or not a child was born alive is a proper question for the opinion of medical men. Where a woman was indicted for the wilful murder of her child, and the opinion of the medical men was that it had breathed, but they could not take upon themselves to say whether it was wholly born alive, as breathing may take place before the whole delivery is completed, Littledale, J., said, that with respect to the birth, the being born must mean that the whole body is brought into the world, and that it is not sufficient that the child respire in the progress of its birth. R. v. Poulton, 5 C. & P. 329: 24 E. C. L. R. The authority of this decision was recognized by Park, J., in R. v. Brain, where he said, "A child must be actually wholly in the world, in a living state, to be the subject of a charge of murder; but if it has been wholly born, and is alive, it is not essential that it should have breathed at the time it was killed, as many children are born alive and yet do not breathe for some time after their birth. But the jury must be satisfied that the child was wholly born into the world before it was killed, or they cannot find the prisoner guilty of murder;" and he cited R. v. Poulton (*supra*), R. v. Brain, 6 C. & P. 349: 25 E. C. L. R. In another case, Mr. Justice James Parke ruled the same way, saying that a child might breathe before it was born, but that its having breathed was not sufficient to make the killing murder, and that there must have been an independent circulation in the child, or that it could not be considered as alive for this purpose. R. v. Pulley, 5 C. & P. 539: 24 E. C. L. R. See also R. v. Wright, 9 C. & P. 754: 38 E. C. L. R. So where the prisoner was charged with the murder of her new-born child, by cutting off its head, Coltman, J., held, that in order to justify a conviction for murder, the jury must be satisfied that the entire child was actually born into the world in a living state, and that the fact of its having breathed was not a decisive proof that it was born alive, as it might have breathed and yet died before birth. R. v. Sellis, 7 C. & P. 850: 32 E. C. L. R. Where an indictment charged, that the prisoner being big with child, did bring forth the child alive, and afterwards strangled it, Parke, B., held, that in order to convict upon an indictment so framed, the jury must be satisfied that the whole body of the child had come forth from the body of the mother when the ligature was applied. The learned baron added, that if the jury should be of [*653] opinion that the child was strangled *intentionally, while it was connected with the umbilical cord to the mother, and after it was wholly produced, he should direct them to convict the prisoner, and reserve the point, his impression being that it would be murder if those were the facts of the case. The prisoner was acquitted. R. v. Crutchley, 7 C. & P. 814: 32 E. C. L. R.; see R. v. Senior, *post*; also R v. Reeves, 9 Carr. & P. 25: 38 E. C. L. R. In R. v. Trilloes, 2 Moo. C. C. 260, it was held that murder may be committed on a child still attached to the mother by the navel string.

It is said by Lord Hale, that if the child be born alive, and afterwards die in consequence of the blows given to the mother, this is not homicide. 1 Hale, P. C. 433. And see 5 Taunt. 21. But Lord Coke, on the contrary, says that if the child be born alive, and die of the potion, battery, or other cause, this is murder. 3 Inst. 50. The latter is generally regarded as the better opinion, and has been followed by modern text writers. Hawk. P. C. b. 1, c. 31, s. 16; 4 Bl. Com. 198; 1 Russ. by Grea. 485. See 5 C. & P. 541 (*n*): 24 E. C. L. R. And in conformity with the

same opinion, the following case was decided. A person, grossly ignorant, practising midwifery, in attempting to deliver a woman, as soon as the head of the child became visible, broke and compressed the skull, and thereby occasioned its death shortly after it was born. Being indicted for manslaughter, it was objected that the child was not wholly born when the injury was received, but the judge overruled the objection, and the prisoner being convicted, the judges held the conviction right. R. v. Senior, 1 Moo. C. C. 346.

Where the indictment was for the murder of "a certain female child, whose name was to the jurors unknown," and it appeared that the child was twelve days old, and that the child's mother had said she should like to have it called "Mary Anne," and on two occasions had called it by that name; the prisoner having been convicted, the judges held the conviction right. R. v. Smith, 6 C. & P. 151: 25 E. C. L. R. Where the deceased was described as "George Lakeman Clark," and it was proved, that being a bastard child, he had been baptized "*George Lakeman*" (the name of his reputed father), and there was no evidence that he had obtained, or was called by the mother's name of *Clark*, the variance was held fatal. R. v. Clark, Russ. & Ry. 358. With regard to what is sufficient evidence of a child being known by a certain name, it was said by Burrough, J., "It is proved, by one of the witnesses, that she should have known him by that name. It cannot be necessary that all the world should know him by that name, because children of so tender an age are hardly known at all, and are generally called by a christian name only." R. v. Sheen, 2 C. & P. 639: 12 E. C. L. R. The prisoner was charged with the murder of Eliza Waters, and it appeared that the deceased (who was about ten days old) was her illegitimate child, and the only evidence given of the name was by a witness, who stated, "the child was called Eliza. I took it to be baptized, and said it was Eleanor Waters's child." It being objected that there was no evidence of the child's surname of Waters, Lord Denman, C. J., reserved the point, and the prisoner, who had been convicted, was afterwards pardoned. R. v. Waters, 7 C. & P. 250: 32 E. C. L. R. An illegitimate child, six weeks old, was baptized on a Sunday, and from that day to the following Tuesday was called by its name of baptism and its mother's surname. Erskine, J. (after consulting Patteson, J.), held, that the evidence *was quite sufficient to warrant the jury in finding that the deceased was [*654] properly described by those names in the indictment, which was for murder. R. v. Evans, 8 C. & P. 765: 34 E. C. L. R. Where an indictment against a married woman for the murder of her illegitimate child, stated, that she, "in and upon a certain infant male child of tender age, to wit, of the age of six weeks, and not baptized, feloniously and wilfully," &c., did make an assault, &c.: It was objected, that the child being born in wedlock, ought to have been described by the surname of the father, or, at least, to have been described as a certain child to the jurors unknown. The point being reserved for the consideration of the judges, they unanimously held that the deceased was insufficiently described. R. v. Biss, 8 C. & P. 773; S. C. 2 Moo. C. C. 93. An indictment for the murder of a bastard child, described as Harriet Stroud, is not sustained by proof of a child christened Harriet, and only called by that name, though the mother's name was Stroud. The proper description is Harriet. A child, "whose name is to the jurors unknown," is not "good," because the name of Harriet was known. R. v. Stroud, 2 Moo. C. C. 270; S. C. 1 C. & K. 187: 47 E. C. L. R See R. v. Hick, 2 Moo. & R. 302. But where the prisoners were indicted for the murder "of a certain illegitimate male child, then late before born of the body of the said J. H, and the fact as proved in evidence was, that the child had been destroyed by the prisoners almost instantly after its birth; Lord Denman,

C. J., held, that the description was sufficient, observing that this was not the case of a party whose name was unknown, but of one who had never acquired a name, and the indictment identified the party by showing the name of its parent." R. v. Hogg, 2 Moo. & R. 380. This ruling was confirmed by the case of R. v. Willis, 1 Den. C. C. R. 80. Where a prosecutor has been baptized by one christian name, and confirmed by a different one, and has not acquired the former by common reputation, a description of him in an indictment by such baptismal name is erroneous. R. v. Smith, 1 Cox, C. C. 248. Where the indictment charged the prisoner with the murder of "a female bastard child," it was held that proof of its being illegitimate lay upon the prosecutor, but that evidence of the prisoner having told a person, that she had only told of her being with child to the father of it, who had lately got married, was sufficient evidence to support the allegation. R. v. Poulton, 5 C. & P. 329: 24 E. C. L. R.

As to the power of the court to amend for a variance between the indictment and the evidence, see 14 & 15 Vict. c. 100, s. 1, *ante*, p. 192.

Proof that the prisoner was the party killing.] When it has been clearly established, says Mr. Starkie, that the crime of wilful murder has been perpetrated, the important fact, whether the prisoner was the guilty agent, is, of course, for the consideration of the jury, under all the circumstances of the case. Circumstantial evidence in this, as in other criminal cases, relates principally: 1st, to the probable *motive* which might have urged the prisoner to commit so heinous a crime; for, however strongly other circumstances may weigh against the prisoner, it is but reasonable, in a case of doubt, to expect that some motive, and that a strong one, should be assigned as his inducement to commit an act from which our nature is abhorrent, [*655] and the consequence of which is usually so fatal to the criminal. *2dly, the means and opportunity which he possessed for perpetrating the offence. 3dly, his conduct in seeking for opportunities to commit the offence, or in afterwards using means and precautions to avert suspicion and inquiry, and to remove material evidence. The case cited by Lord Coke and Lord Hale, and which has already been adverted to, is a melancholy instance to show how cautiously proof arising by inference from the conduct of the accused is to be received, where it is not satisfactorily proved by other circumstances, that a murder has been committed; and even where satisfactory proof has been given of the death, it is still to be recollected that a weak, inexperienced, and injudicious person, ignorant of the nature of evidence, and unconscious that the truth and sincerity of innocence will be his best and surest protection, and how greatly fraud and artifice, when detected, may operate to his prejudice, will often, in the hope of present relief, have recourse to deceit and misrepresentation. 4thly, circumstances which are peculiar to the nature of the crime, such as the possession of poison, or of an instrument of violence corresponding with that which has been used to perpetrate the crime, stains of blood upon the dress, or other indications of violence. 2 Stark. Ev. 521, 2d ed. On a trial for murder, where the case against the prisoner was made up entirely of circumstances, Alderson, B., told the jury, that before they could find the prisoner guilty, they must be satisfied "not only that those circumstances were consistent with his having committed the act, but they must also be satisfied that the facts were such as to be inconsistent with any other rational conclusion than that the prisoner was the guilty party." R. v. Hodge, 2 Lew. C. C. 227.

In order to convict the prisoner of murder it is not necessary to prove that the fatal

blow was given by his hand.(1) If he was present, aiding and abetting the fact committed, he is a principal in the felony. The *presence* need not always be an actual immediate standing by, within sight or hearing of the fact. 4 Bl. Com. 34. Thus, if several persons set out together, or in small parties, upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, and each takes the part assigned him, some to commit the fact, others to watch at proper distances and stations to prevent a surprise, or to favor, if need be, the escape of those who are more immediately engaged, they are all, if the fact be committed, in the eye of the law present at it. Foster, 350. But in order to render a party principal in the felony, he must be aiding or abetting at the fact, or ready to afford assistance if necessary. Therefore, if A. happens to be present at a murder, but takes no part in it, nor endeavors to prevent it, nor apprehends the murderer, this, though highly criminal, will not of itself render him either principal or accessory. Foster, 350. But in case of assassination or murder committed in private, the circumstances last stated may be made use of against A., as evidence of consent or concurrence on his part, and in that light should be left to the jury, if he be put upon his trial. Foster, 350. Where the prisoner is charged with committing the act himself, and it appears to have been committed in his presence by a third person, the indictment is sustained. Thus, where the indictment charged that the prisoner "with both her hands about the neck of one M. D., suffocated and strangled," &c., and it was doubtful whether the murder was not committed in the prisoner's presence by third persons; Parke, J., in summing up, said, *"If you are satisfied that this child came [*656] by her death by suffocation or strangulation, it is not necessary that the prisoner should have done it with her own hands, for if it was done by any other person in her presence, she being privy to it, and so near as to be able to assist, she may be properly convicted on this indictment." R. v. Culkin, 5 C. & P. 121: 24 E. C. L. R. *vid supra*

In general, if a man in the prosecution of a *felonious intent* kill another, it will be murder. A. shoots at the poultry of B., and by accident kills a man; if his intention was to steal the poultry, which must be collected from circumstances, it will be murder by reason of the felonious intent; but if it be done wantonly and without that intention, it will be barely manslaughter. Foster, 259.

Although where a man goes out with intent to commit a felony, and in the pursuit of that unlawful purpose death ensues, it is murder; yet if several go out with a common intent to commit a felony, and death ensues by the act of one of the party, the rest will not necessarily be guilty of murder. If three persons, says Parke, J., go out to commit a felony, and one of them, unknown to the others, puts a pistol in his pocket, and commits a felony of *another kind*, such as murder, the two who did not concur in this second felony, will not be guilty of it, notwithstanding it happened while they were engaged with him in the felonious act for which they went out. R. v. Duffey, 1 Lewin, C. C. 194. Three soldiers went together to rob an orchard; two got upon a pear tree, and the third stood at the gate with a drawn sword in his hand. The owner's son coming by, collared the man at the gate, and asked him what business he had there; whereupon the soldier stabbed him. It was ruled by Holt, C. J., to be murder in him, but that those in the tree were innocent. They came to commit an inconsiderable trespass, and the man was killed on a sudden affray without their knowledge. It would, said Holt, have been otherwise if they had come

(1) If one throw a bludgeon to another with intent to furnish that other with a deadly weapon to assault, and the assault is made and murder committed, he who threw the bludgeon with such intent is equally guilty with him who struck the blow. Commonwealth v. Drew et al., 4 Mass. 391.

thither with a general resolution against all opposers. This circumstance, observes Mr. Justice Foster, would have shown that the murder was committed in prosecution of their original purpose. But that not appearing to have been the case, those in the tree were to be considered as mere trespassers. Their offence could not be connected with that of him who committed the murder. Foster, 353. The following is a leading case on this subject. A great number of persons assembled at a house called Sissinghurst, in Kent, and committed a great riot and battery upon the possessors of a wood adjacent. One of their names, viz., A., was known, but the rest were not known, and a warrant was obtained from a justice of the peace, to apprehend the said A. and divers persons unknown, who were altogether in Sissinghurst House. The constable, with sixteen or twenty other persons, his assistants, went with the warrant to the house, demanded entrance, and acquainted some of the persons within that he was a constable, and came with the justices' warrant, demanding A. and the rest of the offenders who were in the house. One of the persons from within coming out, read the warrant, but denied admission to the constable, or to deliver A. or any of the malefactors, but going in, commanded the rest of the company to stand to their staves. The constable and his assistants, fearing mischief, went away, and being about five roods from the door, several persons, about fifteen in number, issued out, and pursued the constable and his assistants. The constable commanded the [*657] peace, but they fell on his company, killing one and *wounding others, and they then retired into the house to their companions, of whom A. and one G., who read the warrant, were two. For this A. and G., with those who had issued from the house, and others, were indicted for murder, and these points were resolved by the Court of King's Bench. 1. That although the indictment was that B. gave the stroke, and the rest were present aiding and assisting, and though in truth C. gave the stroke, or it did not appear upon the evidence which of them gave it, but only that it was given by one of the rioters, yet that such evidence was sufficient to maintain the indictment, for in law it was the stroke of all the party, according to the resolution in R. v. Macally (9 Co. 67 b). 2. That in this case all that were present and assisting the rioters, were guilty of the death of the party slain, though they did not all actually strike him or any of the constable's company. 3. That those within the house, if they abetted or counselled the riot, were in law present, aiding and assisting, and principals, as well as those that issued out and actually committed the assault, for it was but within five roods of the house and in view of it, and all done as it were at the same instant. 4. That there was sufficient notice that it was the constable, before the man was killed; because he was the constable of the village; and because he notified his business at the door before the assault; and because, after his retreat, and before the man was slain, he commanded the peace. 5. It was resolved that the killing the assistant of the constable was murder, as well as the constable himself. 6. That those who came to the assistance of the constable, though not specially called thereto, were under the same protection as if they had been called to his assistance by name. 7. That though the constable retired with his company upon the non-delivery up of A., yet the killing of the assistant in that retreat was murder; because the retreat was one continued act in pursuance of his office, being necessary when he could not attain the object of his warrant; but principally because the constable, in the beginning of the assault, and before the man was struck, commanded the peace. In the conclusion the jury found nine of the prisoners guilty, and acquitted those within, not because they were absent, but because there was no clear evidence that they consented to the assault, as the jury thought. Sissinghurst-house Case, 1 Hale, P. C. 461.

Although the criminal intent of a single person, who, without the knowledge or

assent of his companions, is guilty of homicide, will not involve them in his guilt, yet it is otherwise where all the party proceed with an intention to commit an unlawful act, and with a resolution at the same time to overcome all opposition by force; for if in pursuance of such resolution, one of the party be guilty of homicide, his companions will be liable to the penalty which he has incurred. Foster, 353; Hawk. P. C. b. 2, c. 29, s. 8. A person of the name of John Thom, who called himself Sir William Courtenay, and who was insane, collected a number of persons together, having a common purpose of resisting the lawfully constituted authorities, Thom having declared that he would cut down any constables who came against him. Thom in the presence of the two prisoners afterwards shot an assistant of a constable who came to apprehend Thom, under a warrant. It was held by Lord Denman, C. J., that the prisoners were guilty of murder as principals in the first degree, and that any apprehension that they had of personal danger to themselves from Thom, was no ground of defence for continuing with him after *he had so declared his [*658] purpose; and also that it was no ground of defence, that Thom and his party had no distinct or particular object in view when they assembled together and armed themselves. R. v. Tyler, 8 C. & P. 616: 34 E. C. L. R. The apprehension of personal danger does not furnish any excuse for assisting in doing any act which is illegal. Ibid.

Proof of the means of killing.] The killing may be by any of the thousand forms of death by which life may be overcome .4 Bl. Com. 196. But there must be a corporal injury inflicted, and therefore if a man by working upon the fancy of another, or by unkind usage, puts another into such a passion of grief or fear, as that he either dies suddenly or contracts some disease, in consequence of which he dies, this is no felony, because no external act of violence was offered of which the law can take notice. 1 Hale, P. C. 429. Seven modes of killing are enumerated by Lord Hale. 1. By exposing a sick or weak person to the cold. 2. By laying an impotent person abroad so that he may be exposed to and receive mortal harm. 3. By imprisoning a man so strictly that he dies. 4. By starving or famine. 5. By wounding or blows. 6. By poisoning. 7. By laying noxious and noisome filth at a man's door to poison him. 1 Hale P. C. 431.

Forcing a person to do an act which is likely to produce and does produce death, is murder; and threats may constitute such force. The indictment charged, first, that the prisoner killed his wife by beating; secondly, by throwing her out of the window; and thirdly and fourthly, that he threatened to throw her out of the window and to murder her, and that by such threats and violence she was so terrified that, through fear of his putting his threats into execution, she threw herself out of the window, and of the beating and bruising received by the fall, died. There was strong evidence that the death of the wife was occasioned by the blows she received before her fall, but Heath, J., Gibbs, J., and Bayley, J., were of opinion, that if her death was occasioned partly by blows, and partly by the fall, yet if she was constrained by her husband's threats of further violence, and from a well-grounded apprehension of his doing such further violence, as would endanger her life, he was answerable for the consequences of the fall, as much as if he had thrown her out of the window himself. The prisoner, however, was acquitted, the jury being of opinion that the deceased threw herself out of the window from her own intemperance, and not under the influence of the threats. R. v. Evan, 1 Russ. by Grea. 489; see also R. v. Pitts, Carr. & M. 284: 41 E. C. L. R.

If a man has a beast which is used to do mischief, and he, knowing this, purposely

turns it loose, though barely to frighten people, and make what is called sport, and death ensues, it is as much murder as if he had incited a bear or a dog to worry the party; and if, knowing its propensity, he suffers it to go abroad, and it kills a man, even this is manslaughter in the owner. 4 Bl. Com. 197; Palmer, 545; 1 Hale, P. C. 431.

In proving murder by poison, the evidence of medical men is frequently required, and in applying that evidence to the facts of the case, it is not unusual for difficulties to occur. Upon this subject the following observations are well deserving attention. In general it may be taken that where the testimonials of professional men are [*659] *affirmative, they may be safely credited; but where *negative*, they do not appear to amount to a disproof of a charge otherwise established by strong, various, and independent evidence. Thus on the view of a body after death, on suspicion of poison, a physician may see cause for not positively pronouncing that the party died by poison; yet, if the party charged be interested in the death, if he appears to have made preparations of poisons without any probable just motive, and this secretly; if it be in evidence that he has in other instances brought the life of the deceased into hazard; if he has discovered an expectation of the fatal event; if that event has taken place suddenly and without previous circumstances of ill health; if he has endeavored to stifle the inquiry by prematurely burying the body, and afterwards, on inspection, signs agreeing with poison are observed, though such as medical men will not positively affirm could not be owing to any other cause, the accumulative strength of circumstantial evidence may be such as to warrant a conviction, since more cannot be required than that the charge should be rendered highly credible from a variety of detached points of proof, and that supposing poison to have been employed, stronger demonstrations could not reasonably have been expected, under all the circumstances, to have been produced. Lofft. in 1 Gilb. Ev. 302. With regard to the law of principal and accessory, there is a distinction between the case of murder by poison and other modes of killing. In general, in order to render a party guilty as principal, it is necessary either that he should with his own hand have committed the offence; or that he should have been present aiding and abetting; but in the case of killing by poison it is otherwise. If A., with an intention to destroy B., lays poison in his way, and B. takes it and dies, A., though absent when the poison is taken, is a principal. So if A. had prepared the poison and delivered it to D. to be administered to B. as a medicine, and D. in the absence of A. accordingly administered it, *not knowing that it was poison*, and B. had died of it, A. would have been guilty of murder as principal. For D. being innocent, A. must have gone unpunished, unless he could be considered as principal. But if D. had known of the poison as well as A. did, he would have been a principal in the murder, and A. would have been accessory before the fact. Foster, 349; Kel. 52; 1 Russ by Grea. 35. An indictment for the murder of A. B. by poison, stating that the prisoner gave and administered a certain deadly poison, is supported by proof that the prisoner gave the poison to C. D. to administer as a medicine to A. B., but C. D. neglecting to do so, it was accidentally given to A. B. by a child, the prisoner's intention throughout being to murder. R. v. Michael, 2 Moo. C. C. 120; S. C. 9 C. & P. 356: 38 E. C. L. R.

Whether or not the giving false evidence against another upon a capital charge, with intent to take away his life (the party being executed upon such evidence) will amount to murder appears to be a doubtful point. There are not wanting old authorities to prove that such an offence amounts to wilful murder. Mirror, c. 1, s. 9; Brit. c. 52; Bract. l. 3, c. 4; see also Hawk, P. C. b. 1, c. 31, s. 7. But Lord Coke, says, "it is not holden for murder at this day." 3 Inst. 43. The point arose in R.

v. McDaniel, where the prisoners were indicted for wilful murder, and a special verdict was found, in order that the point of law might be more fully considered. But the attorney-general declining to argue the point of law, the prisoners *were [*660] discharged. Foster, 131. The opinion of Sir Michael Foster, who has reported the case, is against the holding the offence to be murder, though he admits that there are strong passages in the ancient writers which countenance such a prosecution. The practice of many ages, however, he observed, by no means countenances those opinions, and he alludes to the prosecutions against Titus Oates, as showing that at that day the offence could not have been considered as amounting to murder, otherwise Oates would undoubtedly have been so charged. Foster, 132. Sir W. Blackstone states, on the contrary, that though the attorney-general declined, in R. v. McDaniel, to argue the point of law, yet he has good grounds to believe it was not from any apprehension of his that the point was not maintainable, but from other prudential reasons, and that nothing, therefore, should be concluded from the waiving of that prosecution. 4 Bl. Com. 196 (*n*). And it is asserted by Mr. East that he has heard Lord Mansfield say that the opinions of several of the judges at the time, and his own, were strongly in support of the indictment. 1 East, P. C. 333 (*n*). Sir W. Blackstone has not given any positive opinion against such an indictment, merely observing that the modern law (to avoid the danger of deterring witnesses from giving evidence upon capital prosecutions, if it must be at the risk of their lives) has not *yet* punished the offence as murder. 4 Bl. Com. 197.

Doubts occasionally arise in cases of murder, whether the death has been occasioned by the wound or by the unskilful and improper treatment of that wound. The law on this point is laid down at some length by Lord Hale. If, he says, a man give another a stroke, which, it may be, is not in itself so mortal, but that with good care he might be cured, yet if he dies within the year and day, it is a homicide or murder as the case is, and so it has been always ruled. But if the wound be not mortal, but with ill applications by the party or those about him, of unwholesome salves or medicines, the party dies, if it clearly appears that the medicine and not the wound was the cause of the death, it seems it is not homicide, but then it must clearly and certainly appear to be so. But if a man receive a wound which is not in itself mortal, but for want of helpful applications or neglect, it turn to a gangrene or a fever, and the gangrene or fever be the immediate cause of the death, yet this is murder or manslaughter in him that gave the stroke or wound; for that wound, though it was not the immediate cause of the death, yet if it were the mediate cause, and the fever or gangrene the immediate cause, the wound was the cause of the gangrene or fever, and so consequently *causâ causans*. 1 Hale, P. C. 428.(1) Neglect or disorder in the person who receives the wound will not excuse the person who gave it. Thus it was resolved that if one give wounds to another who neglects the cure of them, and is disorderly, and does not keep that rule which a wounded person should do, if he die it is murder or manslaughter, according to the circumstances of the case, because, if the wounds had not been given, the man had not died. R. v. Rews, Kel. 26. So

(1) The Commonwealth v. Green, 1 Ashmead, 289; The State v. Scott, 12 Louis. Ann. 274; The Commonwealth v. Hackett, 2 Allen, 136.

When the wound is adequate and calculated to produce death, it is no excuse to show that had proper caution and attention been given a recovery might have ensued. Neglect or maltreatment will not excuse, except in cases where doubt exists as to the character of the wound. The State v. Corbett, 1 Jones's Law, 267.

If a wound is inflicted not dangerous in itself and the death which ensues was evidently occasioned by the grossly erroneous treatment of it, the original author will not be accountable. Parsons v. The State, 21 Alabama, 300. . As to death caused by disease but quickened by the blow, Livingston's Case, 14 Grattan, 592; The Commonwealth v. Fox, 7 Gray, 585.

Maule, J., has held that a party inflicting a wound which ultimately becomes the cause of death, is guilty of murder, though life might have been preserved if the deceased had not refused to submit to a surgical operation. R. v. Holland, 2 Moo. & R. 351. In the above case the deceased had been severely cut with an iron instru- [*661] ment across one of his fingers, and had refused to have it amputated. At *the end of a fortnight lockjaw came on, the finger was then amputated, but too late, and the lockjaw ultimately caused death. The surgeon gave it as his opinion that if the finger had been amputated at first the deceased's life would most probably have been preserved.

Whether the infliction of a blow which, had the party upon whom it was inflicted been sober, would not have produced death, will, when inflicted upon a person intoxicated and producing death, be deemed murder or manslaughter, may admit of much question. The point arose in the following case: upon an indictment for manslaughter, it appeared that the prisoner and the deceased had been fighting, and the deceased was killed. A surgeon stated that a blow on the stomach, in the state in which the deceased was, arising from passion and intoxication, was calculated to occasion death, but not so if the party had been sober. Hullock, B., directed an acquittal, observing, that where the death was occasioned partly by a blow and partly by a predisposing circumstance, it was impossible to apportion the operations of the several causes, and to say with certainty that the death was immediately occasioned by any one of them in particular. His lordship cited from his notes the following case: R. v. Brown, April, 1824. Indictment charged with killing by striking. The jury found that the death was occasioned by over-exertion in the fight. The judges held, that the prisoner was entitled to an acquittal. R. v. Johnson, 1 Lewin, C. C. 164. It may be doubted how far the ruling of the learned judge in this case was correct, for if, by the act of the prisoner, the death of the party was accelerated, it seems that the prisoner would be guilty of the felony. See R. v. Martin, 5 C. & P. 130: 24 E. C. L. R., *post*, p. 663. And although a state of intoxication might render the party more liable to suffer injury from the blows, yet it is difficult to say that the intoxication was the *cause* of his death, any more than the infirmity of age or sickness, which could not, it is quite clear, be so esteemed. Very few decisions are to be found in our own books on this subject, and it may therefore be allowable to illustrate it by a reference to a few cases in the Scotch law, which is in principle the same as our own on this point, and to the text-writers on the criminal law of that country. It is clear, says Mr. Alison, that if the death be owing not to the effects of the wound, but to a supervening accident or misfortune, though induced by the first violence, the prisoner cannot be convicted of homicide. Thus, if a person be wounded, no matter how severely, yet if he recover and engage in his ordinary occupation, and bear about with him no apparent seed of his malady, the assailant cannot afterwards be involved in the consequences of his death, even though it was connected with the previous violence. So it was found in the case of Patrick Kinninmonth, Nov. 2, 1697. Alison's Prin. Crim. Law of Scot. 146; 1 Hume, 181. So if a person be wounded, but recovers after a long confinement, which induces a consumption which ultimately proves fatal, still the death is here so remotely connected with the original violence that human tribunals cannot consider the one as the cause of the other. Ib. Burnett, 550. If, says Mr. Alison, the death be owing not to the natural and accustomed consequences of the injury, but to remote and improbable accidents which have since intervened, the prisoner must be acquitted. Alison's Prin. Crim. Law of Scot. 147. The prisoner was gamekeeper to Lord Blantyre, and in the course of a scuffle with a poacher, the latter discharged his piece, which lodged its contents in his thigh. He

was *carried to the Glasgow infirmary, where erysipelas at the time was ex- [*662] tremely prevalent, and having been unfortunately put into a bed formerly occupied by a patient with that disorder, he took it, and died in consequence. Till this supervened, the wound bore no peculiarly dangerous symptoms. The public prosecutor strongly contended that if the man had not been fired at, he never would have been exposed to the contagion of the erysipelas, and therefore his death was by a circuitous, but legitimate consequence, owing to the wound; but this was deemed too remote a conclusion, and the prisoner, under the direction of Lords Justices Clerk, Boyle, and Succoth, was acquitted. R. v. Campbell, Ibid. In like manner, where the prisoner had thrown a quantity of sulphuric acid in the face of the deceased, and produced such inflammation in the eyes that bleeding was deemed necessary, and the orifice made by the surgeon inflamed, and of this the party died, but not of the injury in the face, the court held this *second* injury, produced by a different hand, not so connected with the original violence as to support the charge of murder, and the prisoner was convicted of assault only. R. v. Macmillan, Ib. If the death be truly owing to the wound, it signifies not that under more favorable circumstances, and with more skilful treatment, the fatal result might have been averted. 1 Burnett, 551; Alison, 149. Thus, if an assault be made which opens an artery, it will be no defence to plead that by the assistance of a surgeon the wound might have been stanched and life preserved. 1 Hume, 184; Alison, 149. The prisoner was one of a party of smugglers who had fired at an officer of excise. The wounded man was carried to the nearest village, where he was attended by a surgeon of the country, who was not deficient in attention, but fever ensuing, the party died at the end of three weeks. It was objected that by skilful treatment the man might have recovered, but the court said that it was for the prisoner to prove, if he could, that death ensued *ex malo regimine*. R. v. Edgar, Alison, 149. The true distinction in all such cases is, that if the death was evidently occasioned by grossly erroneous medical treatment, the original author will not be answerable; but if it was occasioned from want merely of the higher skill, which can only be commanded in great towns, he will, because he has wilfully exposed the deceased to a risk from which practically he had no means of escaping. Accordingly, where the prisoner was indicted for the culpable homicide of a boy in a manufactory, by striking him on the shoulder, which dislocated his arm, it appearing that the arm had been worked upon two days after the blow by an ignorant bonesetter, whose operations did more harm than good, and that in consequence of the inflammation thus occasioned, acting upon a sickly and scrofulous habit of body, a white swelling ensued, which proved fatal, the jury, under the direction of Lord Meadowbank, acquitted the prisoner. R. v. Macewan, Ib. Though death do not ensue for weeks or months after the injury was received, yet if the wound be severe, and kept in a regular progression from bad to worse, so that the patient continually languishes and is consumed by it, as by a disease, this in reason and law is the same as if he had died on the spot. 1 Hume, 185; Alison's Princ. Cr. Law of Scot. 151. Thus, where the deceased, a postboy, was robbed, cut, and left on the ground all night, and death ensued at the end of two months, and it was proved by the medical evidence that the wound, with the cold which the deceased got by lying out all night, and the great loss of *blood which followed [*663] on it, were the cause of his death, the prisoner was convicted of the murder as well as the robbery. R. v. Caldwell, Burnett, 552 (*a*); Alison, Princ. 151. However feeble the condition of the deceased may have been, and however short his tenure of life, it is equally murder as if the person killed had been in the prime of youth and vigor. Accordingly, where it appeared that the deceased, a sick and infirm old man,

was violently beaten with a pair of tongs, of which in a few hours he died, and it was urged that his death was rather owing to his previous infirm condition than to the assault, it was held to be murder. R. v. Ramsay, 1 Hume, 183; Alison's Princ. Cr. Law of Scot. 149. The same point lately arose in a case in this country. Upon a trial for manslaughter, it appeared that the deceased, at the time of the blow given, was in an infirm state of health, and this circumstance was observed upon on behalf of the prisoner; but Parke, J., in addressing the jury, remarked: "It is said that the deceased was in a bad state of health, but that is perfectly immaterial, as, if the prisoner was so unfortunate as to *accelerate* her death, he must answer for it." R. v. Martin, 5 C. & P. 130.

Proof of the means of killing—variance in statement.] Where a man is indicted for one species of killing, as by poison, he cannot be convicted by evidence of a totally different species of death, as by shooting, starving, or strangling. But if the means of death proved agree in substance with those charged, it is sufficient. 1 East, P. C. 341; 2 Hale, P. C. 185; R. v. Kelly, 1 Moo. C. C. R. 113. But see the 24 & 25 Vict. c. 100, s. 6, which renders it unnecessary to state the means of death in the indictment. *Supra*, p. 650.

Proof of malice—in general.] The malice necessary to constitute the crime of murder is not confined to an intention to take away the life of the deceased, but includes an intention to do any unlawful act which may probably end in the depriving the party of life.(1) The malice prepense, says Blackstone, essential to murder, is not so properly spite or malevolence to the individual in particular, as an evil design in general, the dictate of a wicked, depraved, and malignant heart, and it may be either express or implied in law,—express, as where one, upon a sudden provocation, beats another in a cruel and unusual manner, so that he dies, though he did not intend his death; as where a park-keeper tied a boy who was stealing wood, to a horse's tail, and dragged him along the park; and a schoolmaster stamped on his scholar's belly, so that each of the sufferers died. These were justly held to be murders, because the correction being excessive, and such as could not proceed but from a bad heart, it was equivalent to a deliberate act of slaughter. 4 Bl. Com. 199. Also, continues the same writer, in many cases where no malice is expressed, the law will imply it, as where a man wilfully poisons another; in such a deliberate act the law presumes malice, though no particular enmity can be proved. And if a man kills another without any, or without a considerable provocation, the law implies malice; for no person, unless of an abandoned heart, would be guilty of such an act upon a slight or no apparent cause. Id. 200. The Scotch law resembles our own in this particular, and the rule is well laid down by Baron Hume. "Our practice," he says, "does not distinguish between an absolute purpose to kill and a purpose to do any excessive and grievous injury to the person, so that if the panel assault his

(1) The State v. Schænwald, 31 Missouri, 147; Marer v. The People, 10 Michigan, 212. Every killing is presumed to be malicious. The State v. Johnson, 3 Jones's Law, 266; Green v. The State, 28 Mississippi, 687; Atkins v. The State, 16 Arkansas, 568; The Commonwealth v. Fox, 8 Gray, 585. Though malice is not presumed merely from the fact of killing, yet the circumstances attending the homicide may be such that the law deems it malicious. United States v. Armstrong, 2 Curtis, C. C. 446; United States v. Mingo, Ibid. 1; Commonwealth v. Hawkins, 3 Gray, 463. A blow, with a dangerous weapon, calculated to produce and actually producing death, if struck without such provocation as reduces the crime to manslaughter, is deemed by law malicious, and the killing is murder. United States v. McGlue, 1 Curtis, C. C. 1.

Any facts may be shown, in a trial for homicide, that tend to show the intent with which it was committed. Austin v. The State, 14 Arkansas, 555.

*neighbor, meeting to hamstring him or cut out his tongue, or break his bones, or beat him severely, or within an inch of his life; and if in the prosecution of this outrageous purpose, he has actually destroyed his victim, he shall equally die for it, as if he had run him through the body with a sword. The corrupt disregard of the person and life of another is precisely the dole or malice, the depraved and wicked purpose, which the law requires and is content with." 2 Hume, 254, 256.

"Where it appears that one person's death has been occasioned by the hand of another, it behooves that other to show from evidence, or by inference from the circumstances of the case, that the offence is of a mitigated character, and does not amount to murder." Per Tindal, C. J., R. v. Greenacre, 8 C. & P. 35: 34 E. C. L. R. And see *ante*, p. 21.

Proof of malice—death ensuing in the performance of an unlawful or wanton act.] The rule in this case is thus laid down by Sir Michael Foster. If an action, unlawful in itself, be done deliberately and with intention of mischief, or great bodily harm to particulars, or of mischief indiscriminately, fall it where it may, and death ensue, against or beside the original intention of the party, it will be murder.(1) But if such mischievous intention do not appear (which is matter of fact to be collected from the circumstances), and the act was done heedlessly and incautiously, it will be manslaughter, not accidental death, because the act which ensued was unlawful. Foster, 261. Thus, where an injury intended to be inflicted upon A. by poison, blows, or other means of death, would, had he sustained it, have been murder, it will amount to the same offence, if B. by accident happens to lose his life by it. But on the other hand, if the blow intended for A. arose from a sudden transport of fury, which, in case A. had died by it, would have reduced the offence to manslaughter, the fact will admit of the same alleviation, if B. should happen to fall by the blow. Foster, 262; 1 Hale, P. C. 438. See R. v. Hunt, 1 Moo. C. C. 93, *post*, tit. Attempt to commit Murder.

So where two parties meet to fight a deliberate duel, and a stranger come to part them, and is killed by one of them, it is murder in the latter. 1 Hale, P. C. 441. And where the prisoner, intending to poison his wife, gave her a poisoned apple, which she, ignorant of its nature, gave to a child, who took it and died; this was held murder in the husband, although, being present, he endeavored to dissuade his wife from giving it to the child. R. v. Saunders, Plowd. 474; *Vide ante*, p. 187. Such also was the case of the wife who mixed ratsbane in a potion sent by the apothecary to her husband, which did not kill him, but killed the apothecary, who, to vindicate his reputation, tasted it himself, having first stirred it about. 9 Co. 81; Hawk. P. C. b. 1, c. 31, s. 46. So in a recent case, where the prisoner, intending to murder A., shot at and wounded B., supposing him to be A., it was held that he was properly convicted of wounding B. with intent to murder him. R. v. Smith, 25 L. J. M. C. 29.

(1) Where a statute distinguishes murder into degrees and makes capital only that which is committed deliberately, or with intent to kill, it matters not how short the deliberation is. Kilpatrick v. The Commonwealth, 7 Casey, 198; The People v. Moore, 8 California, 90; The State v. McDonnell, 32 Vermont, 491; The People v. Bealoba, 17 California, 389.

Homicide, with intent to kill, is murder, though the intent be formed but an instant before striking the blow. The People v. Clark, 3 Selden, 385; Mitchum v. The State, 11 Georgia, 615; The State v. Dunn, 18 Missouri, 419; The State v. Jennings, Ibid. 435; Jordan v. The State, 10 Texas, 479; Donnelly v. The State, 2 Dutcher, 463, 601.

Under the statute there must be a "premeditated design" to kill; and it is not a premeditated design, if the design be formed at the instant of striking the fatal blow. Sullivan v. The People, 1 Parker C. R. 347.

It is not necessary, in order to render the killing murder, that the unlawful act intended would, had it been effected, have been felony.

Thus, in the case of the person who gave medicine to a woman (1 Hale, P. C. 429), and of him who put skewers into a woman's womb, with a view in both cases to procure abortion, whereby the women were killed; such acts were clearly held [*665] murder, though the original *attempt, had it succeeded, would only have been a great misdemeanor; for the acts were in their nature malicious and deliberate, and necessarily attended with great danger to the persons on whom they were practised. 1 East, P. C. 230. So if in case of a riot or quarrel, whether sudden or premeditated, a justice of the peace, constable, or watchman, or even a private person, be slain in endeavoring to keep the peace and suppress the affray, he who kills him is guilty of murder; for notwithstanding it was not his primary intention to commit a felony, yet inasmuch as he persists in a less offence with so much obstinacy as to go on in it, to the hazard of the lives of those who only do their duty, he is, in that respect, equally criminal as if his intention had been to commit felony. Hawk. P. C. b. 1, c. 81, s. 54.

If a person rides a horse known to be used to kick, amongst a multitude of people, although he only means to divert himself, and death ensues in consequence, he will, it is said, be guilty of murder. Hawk. P. C. b. 1, c. 31, s. 61; 1 Lord Raym. 143; Foster, 261; 1 East, P. C. 231. And if a man, knowing that the people are passing along the street, throw a stone likely to create danger, or shoot over the house or wall, with intent to do hurt to people, and some one is consequently killed, it is murder, on account of the previous malice, though not directed against any particular individual; for it is no excuse that the party was not bent on mischief generally; but if the act were merely done incautiously, it would only be manslaughter. 1 East, P. C. 231; 1 Hale, P. C. 475. In all these cases the nature of the instrument and the manner of using it, as calculated to produce great bodily harm or not, will vary the offence. 1 East, P. C. 257.

The rule above stated must be taken to extend only to such acts as are *mala in se;* for if the act be merely *malum prohibitum*, as (formerly) shooting at game by a person not qualified to keep a gun for that purpose, the case of him so offending will fall under the same rule as that of a qualified person. The mere imposing of penalties will not in a case of this kind change the character of the accident. Foster, 259. So if one throw a stone at another's horse, and it hit a person and kill him, it is manslaughter only. 1 East, P. C. 257; 1 Hale, P. C. 39.

Death ensuing in consequence of a trespass committed in sport will be manslaughter. The prisoners were indicted for manslaughter, in having caused the death of a man by throwing stones down a coal-pit. Tindall, C. J., in addressing the jury said, if death ensue in consequence of a wrongful act which the party who commits it can neither justify nor excuse, it is not accidental death, but manslaughter. If the wrongful act was done under circumstances which show an intent to kill or do any serious injury in the particular case, or any general malice, the offence becomes that of murder. In the present instance the act was one of mere wantonness and sport, but still the act was wrongful, and was a trespass. R. v. Fenton, 1 Lewin, C. C. 179; see further, *ante*, p. 642.

The Scotch law does not recognize all the nice distinctions which exist in our own upon this head. The rule in that country is stated to be, that homicide, although not originally intended, will be held to be murder, when it takes place during the commission or in the attempt to commit a capital crime, or one obviously hazardous [*666] to life, but that where it ensues without being intended, during the course *of

an inferior delinquency, and from which no peril to life could have been reasonably anticipated, it will amount to culpable homicide only. Alison's Princ. Crim. Law of Scotl. 52. Perhaps the rule with regard to implied malice has been carried, in the English practice, to at least the full length which reason and justice warrant.

Death ensuing in consequence of the wilful omission of a duty will be murder; death ensuing in consequence of the negligent omission of a duty will be manslaughter. R. v. Hughes, Dears. & B. C. C. 1; 26 L. J. M. C. 202. In that case the prisoner was a brakesman at the mouth of a pit-shaft. Building materials were being sent into the pit, and it was the prisoner's duty to place a stage over the mouth of the pit as the loaded trucks came up, from which the materials were lowered into the pit. The prisoner negligently omitted to place the stage over the mouth of the pit as one of the trucks came up, in consequence of which it fell into the pit and killed the deceased. Lord Campbell, in delivering the judgment of the Court of Criminal Appeal, said, "If the prisoner, of malice aforethought, and with the premeditated design of causing the death of the deceased, had omitted to place the stage on the mouth of the shaft, and the death of the deceased had thereby been caused, the prisoner would have been guilty of murder. According to the common law form of an indictment for murder by reason of the omission of a duty, it was necessary that the indictment should allege that it was the duty of the prisoner to do the act, or to state the facts from which the law would infer this duty. R. v. Edwards, 8 C. & P. 611: 34 E. C. L. R.; R. v. Goodwin, 1 Russ. by Grea. 563 (*n*). But it has never been doubted that if death is the direct consequence of the malicious omission to perform a duty, as of a mother to nourish her infant child, this is a case of murder. If the omission was not malicious, and arose from negligence only, it is a case of manslaughter."

Proof of malice—neglect and ill treatment of infants, &c.] Amongst the modes of killing mentioned by Lord Hale, are the exposing a sick or weak person or infant to the cold, with the intent to destroy him, and laying an impotent person abroad, so that he may be exposed to and receive mortal harm, as laying an infant in an orchard, and covering it with leaves, whereby a kite strikes it and kills it. 1 Hale, P. C. 431, 432. In these cases the offence may amount to wilful murder, under the rule that he who wilfully and deliberately does any act which apparently endangers another's life, and thereby occasions his death, shall, unless he clearly prove the contrary, be adjudged to kill him of malice prepense. 1 East, P. C. 225. Such was the case of the man who carried his sick father against his will, in a severe season, from town to town, by reason whereof he died. Hawk. P. C. b. 1, c. 31, s. 5; 2 East, P. C. 225. See R. v. Stockdale, 2 Lew. C. C. 220.(1)

Cases of this kind have arisen, where apprentices or prisoners have died in consequence of the want of sufficient food and necessaries, and where the question has been whether the law would imply such malice in the master or gaoler, as is necessary to make the offence murder. The prisoner, Charles Squire, and his wife were both indicted for the murder of a parish apprentice, bound to the former. Both the prisoners had used the deceased in a most cruel and barbarous manner, and had not provided him with sufficient food and nourishment; but the surgeon who opened the body deposed that, *in his opinion, the boy died from debility and for want [*667] of proper food and nourishment, and not from the wounds he had received. Law-

(1) Where a seaman is in a state of debility, and the master knowingly and maliciously compels him to go aloft, and he falls into the sea, and is drowned, it is murder. If there be no malice, it is manslaughter. United States v. Freeman, 4 Mason, 505.

rence, J., upon this evidence, was of opinion that the case was defective as to the wife, as it was not her duty to provide the apprentice with food, she being the servant of her husband, and so directed the jury, who acquitted her; but the husband was found guilty and executed. R. v. Squire, 1 Russ. by Grea. 490. The not supplying an apprentice with sufficient food is an indictable misdemeanor. R. v. Friend, Russ. & Ry. 20. As to what is sufficient proof of the apprenticeship, see R. v. Plummer, Carr. & M. 597: 41 E. C. L. R.

Where a married woman was charged with the murder of her illegitimate child, three years old, by omitting to supply it with proper food; Alderson, B., held that she could not be convicted unless it was shown that her husband supplied her with food to give to the child, and that she wilfully neglected to give it. The learned judge said, "There is no distinction between the case of an apprentice and that of a bastard child, and the wife is only the servant of the husband, and according to the case before Mr. Justice Lawrence (R. v. Squire, *supra*), can only be made criminally responsible by omitting to deliver the food to the child, with which she had been supplied by her husband." R. v. Saunders, 7 C. & P. 277: 32 E. C. L. R. But in the case of an infant, the mother would be liable if the death arose from her not suckling the child when she was capable of doing so. Per Patteson, J., R. v. Edwards, 8 C. & P. 611: 34 E. C. L. R. In such a case the indictment must state that it was the duty of the prisoner to supply the child with food, otherwise it will be bad. Ibid.

The prisoner, an unmarried woman, left Worcester in a stage-wagon, and was in the wagon about ten at night at the Wellington Inn on the Malvern Hills. She must have subsequently left the wagon, as she overtook it at Ledbury. It appeared that she had been delivered of a child at the roadside between the Wellington Inn and Ledbury, and had carried it about a mile to the place where it was found, which was also at the roadside. The road was much frequented, and two wagon teams and several persons were on it about the time when the child was left. A wagoner, who was passing along the road, heard the child cry, but went on without rendering it any assistance. Having told some other persons, they proceeded to the spot, and found the child, which was quite naked, dead from cold and exhaustion. It further appeared, that the prisoner had arranged with a woman to be confined at her house, and to pay her 3*s.* 6*d.* a week for taking care of the child. Coltman, J., in summing up to the jury, said, "Suppose a person leaves a child at the door of a gentleman, where it is likely to be taken into the house almost immediately, it would be too much to say, that if death ensued it would be murder; the probability there would be so great, almost amounting to a certainty, that the child would be found and taken care of. If, on the other hand, it were left on an unfrequented place, a barren heath for instance, what inference could be drawn but that the party left it there in order that it might die. This is a sort of intermediate case, because the child is exposed on a public road where persons not only might pass, but were passing at the time, and you will therefore consider whether the prisoner had reasonable ground for believing that the child would be found and preserved." R. v. Walters, Carr. & M. 164: 41 [*668] E. C. L. R. See also R. v. Waters, *1 Den. C. C. R. 356; S. C. 18 L. J. M. C. 53, *ante*, p. 645. The prisoner was indicted for the murder, and was also charged on the coroner's inquisition with the manslaughter, of Sarah Jane Cheeseman, by beating her, and compelling her to work for unreasonable hours, and beyond her strength. The prisoner was aunt to the deceased, who was about fifteen, and with her sister, who was two or three years younger, their mother being dead, had been placed under the prisoner's care. The prisoner employed them both in stay-stitching

for fourteen and sometimes fifteen hours a day, and when they did not do the required quantity of work, severely punished them with the cane and the rod. The deceased was in ill health, and did not do so much work as her younger sister, and in consequence was much oftener and more cruelly punished by the prisoner, who accompanied her correction by the use of very violent and threatening language. The surgeon who examined the deceased stated before the coroner, that, in his opinion, she died from consumption, but that her death was hastened by the treatment she was said to have received. It appeared that the prisoner, when she beat the deceased for not doing her work, always said that she was sure that she was acting the hypocrite, and shamming illness, and that she had a very strong constitution. The prisoner having pleaded guilty to the charge of manslaughter, the counsel for the prosecution declined to offer any evidence upon the charge of murder, thinking there was not proof of malice sufficient to constitute that offence, in which opinion Vaughan, B., concurred. R. v. Cheeseman, 7 C. & P. 455 : 32 E. C. L. R.

Huggins, the warden of the Fleet, appointed Gibbons his deputy, and Gibbons had a servant, Barnes, whose duty it was to take care of the prisoners, and particularly of one Arne. Barnes put him into a newly-built room, over a common sewer, the walls of which were damp and unwholesome, and kept him there forty-four days without fire, chamber-pot, or other convenience. Barnes knew the state of the room, and for fifteen days at least before the death of Arne, Huggins knew its condition, having been once present, seen Arne, and turned away. By reason of the duress of imprisonment, Arne sickened and died. During the time Gibbons was deputy, Huggins sometimes acted as warden. These facts appearing on a special verdict, the court were clearly of opinion that Barnes was guilty of murder. They were deliberate acts of cruelty, and enormous violations of the trust reposed by the law in its ministers of justice; but they thought Huggins not guilty. It could not be inferred from the bare seeing the deceased once during his confinement, that Huggins knew his situation was occasioned by improper treatment, or that he consented to the continuance of it. They said it was material that the species of duress by which the deceased came by his death, could not be known by a bare looking in upon him. Huggins could not know the circumstances under which he was placed in the room against his consent, or the length of his confinement, or how long he had been without the decent necessaries of life, and it was likewise material that no application had been made to him, which, perhaps, might have altered the case. Besides the verdict found that Barnes was the servant of Gibbons, and Gibbons had the actual management of the prison, and the judges seemed to think that the accidental presence of the principal would not amount to a revocation of the deputy's authority. R. v. Huggins, 2 Str. 882; Foster, 322; 1 East, *P. C. 331. So where a gaoler, knowing that a [*669] prisoner, infected with the small-pox, lodged in a certain room in the prison, confined another prisoner, against his will, in the same room, and the latter prisoner, who had not had the distemper (of which the gaoler had notice), caught it, and died of it, it was held to be murder in the gaoler. Castell v. Bambridge, 2 Str. 856; Foster, 322; 1 East, P. C. 331.

But where the death ensues from incautious neglect, however culpable, rather than from any actual malice or artful disposition to injure, or obstinate perseverance in doing an act necessarily attended with danger, regardless of its consequences, the severity of the law, says Mr. East, may admit of some relaxation, but the case must be strictly freed from the latter incidents. 1 East, P. C. 226. An apprentice returned from Bridewell, whither he had been sent for bad behavior, in a lousy and distempered condition, and his master did not take the care of him which his situ-

ation required, and which he might have done. The apprentice was not suffered to lie in a bed, on account of the vermin, but was made to lie on boards, without any covering, and no medical aid was procured. The boy dying, the master was indicted for wilful murder, and the medical men who were examined were of opinion that his death was most probably occasioned by his previous ill-treatment in Bridewell, and the want of care when he went home. And they were inclined to think that, had he been properly treated when he came home, he might have recovered. There was no evidence of personal violence or want of sufficient sustenance. The recorder left it to the jury to consider whether the death was occasioned by ill-treatment of the prisoner, and if so, whether the ill-treatment amounted to evidence of malice, in which case it would be murder. At the same time they were told, with the concurrence of Mr. Justice Gould and Mr. Baron Hotham, that if they thought otherwise, yet as it appeared that the prisoner's conduct towards the apprentice was highly blamable and improper, they might, under all these circumstances, find him guilty of manslaughter, which they accordingly did, and the judges afterwards approved of the conviction. R. v. Self, 1 East, P. C. 226; 1 Russ. by Grea. 490.

The deceased, Mrs. Warner, was about seventy-four years of age, and lived with a sister until the death of the latter, in March, 1837. The prisoner attended the funeral of the sister, and after it was over, stated that the deceased was going to live with him until affairs were settled, and that he would make her happy and comfortable. Other evidence was given to show that the prisoner had interfered in her affairs, and had undertaken to provide her with food and necessaries as long as she lived. It appeared that, after July, no servant was kept, but the deceased was waited upon by the prisoner and his wife. The kitchen in which the deceased lived had a large window, through which persons in the court could see plainly what was passing within, and could converse with the inmates of it. Several witnesses swore that, after the servant left, the deceased remained locked in the kitchen alone, sometimes by the prisoner and sometimes by his wife, for hours together, and that on several occasions she complained of being confined, and cried to be let out. They also stated, that in cold weather they were not able to discern any fire in the kitchen, and it appeared that for some time before the deceased's death, she was not out of the kitchen [*670] at all, but was kept continually locked in *there. The prisoner's wife was the only person who was with the deceased about the time of her death, which happened in February, 1838. An undertaker's man, who was called in very soon after, stated, that from the appearance of the body, he thought she had died from want and starvation. A medical witness said, that there was great emaciation of the body, and the stomach and bowels were empty and collapsed, but that the immediate cause of death was water on the brain, which he seemed to think might be caused by want of food. In summing up to the jury, Patteson, J., said, "If the prisoner was guilty of wilful neglect, so gross and wilful that you are satisfied he must have contemplated the death of Mrs. Warner, then he will be guilty of murder. If, however, you think only that he was so careless that her death was occasioned by his negligence, though he did not contemplate it, he will be guilty of manslaughter. The cases which happened of this description have been generally cases of children and servants, where the duty has been apparent. This is not such a case; but it will be for you to say whether, from the way in which the prisoner treated her, he had not, by way of contract, in some way or other taken upon him the performance of that duty which she, from age and infirmity, was incapable of doing." After referring to the statements of some of the witnesses, the learned judge continued: "This is the evidence on which you are called on to infer that the prisoner undertook to provide the deceased

with necessaries; and though, if he broke that contract, he might not be liable to be indicted during her life, yet if by his negligence her death was occasioned, then he becomes criminally responsible." The prisoner was found guilty of manslaughter. R. v Marriott, 8 C. & P. 425: 34 E. C. L. R. As to the duty of a husband to supply his wife with shelter, see R. v. Plummer, 1 C. & K. 600.

A young woman, who was eighteen years of age, and unmarried, and who usually supported herself by her own labor, being pregnant, and about to be confined, returned to the house of her stepfather and her mother. The girl was taken in labor in the absence of the stepfather, and in presence of her mother. The mother did not take any steps to procure the assistance of a midwife, although she could have got one had she chosen, and the daughter died in her confinement from the want of such assistance. Held, that there was no such breach of duty by the mother as to render her criminally liable for the death of her daughter. R. v. Shepherd, 31 L. J. M. C. 102.

Proof of malice—death caused by negligence.] Where death is occasioned by the hand of a party engaged in the performance of an act otherwise lawful, it may, by reason of negligence, amount to manslaughter, or perhaps even to murder, according to the circumstances by which it is accompanied. The most usual illustration of this doctrine is the instance of workmen throwing stones and rubbish from a house in the ordinary course of their business, by which a person underneath happens to be killed. If they deliberately saw the danger, or betrayed any consciousness of it, whence a general malignity of heart might be inferred, and yet gave no warning, it will be murder, on account of the gross impropriety of the act. If they did not look out, or not till it was too late, and there was even a small probability of persons passing by, it will be manslaughter. *But if it had been in a retired place, where [*671] there was no probability of persons passing by, and none had been seen about the spot before, it seems to be no more than accidental death. For though the act itself might breed danger, yet the degree of caution requisite being only in proportion to the apparent necessity of it, and there being no apparent call for it in the instance put, the rule applies *de non existentibus et non apparentibus eadem est ratio.* So if any person had been before seen on the spot, but due warning were given, it will be only misadventure. On the other hand, in London and other populous towns, at a time of day when the streets are usually thronged, it would be manslaughter, notwithstanding the ordinary caution used on other occasions of giving warning; for in the hurry and noise of a crowded street, few persons hear the warning, or sufficiently attend to it, however loud. 1 East, P. C. 262; Foster, 262; 1 Hale, P. C. 472; 4 Bl. Com. 192.

Cases of negligent driving fall under the same consideration, and if death ensues it will be murder, manslaughter, or misadventure, according to the caution exercised, and with reference to the place where the injury occurred. It has been already stated that, under circumstances indicating a wanton and malicious disregard of human life, the offence may amount even to murder. If there be negligence only in the driver, it will be manslaughter, and if negligence be absent, it will amount to misadventure merely. If A. drives his cart carelessly, and it runs over a child in the street, if A. saw the child, and yet drove upon him, it is murder; if he did not see the child, it is manslaughter; if the child ran across the way, and it was impossible to stop the cart before it ran over the child, it is homicide *per infortunium.* 1 Hale, P. C. 476; Foster, 263. So if a boy, riding in a street, puts his horse to full speed, and runs over a child and kills him, this is manslaughter, and not *per infortunium;* and if he

rides into a press of people, with intent to do hurt, and the horse kills one of them, it is murder in the rider. 1 Hale, P. C. 476. A. was driving his cart with four horses, in the highway at Whitechapel. He being in his cart, and the four horses at a trot, they threw down a woman who was going the same way, with a burden upon her head, and killed her. Holt, C. J., two other judges, and the recorder, held this to be misadventure only; but, per Holt, C. J., if it had been in a street where people usually passed, it had been manslaughter. Upon this case, Mr. East has made the following observation: "It must be taken for granted from this note of the case that the accident happened in a highway, *where people did not usually pass*, for otherwise the circumstance of the driver being in the cart and going so much faster than is usual for carriages of that construction, savored much of negligence and impropriety, for it was extremely difficult, if not impossible, to stop the course of the horses suddenly, in order to avoid any person that could not get out of the way in time. And indeed such conduct in the driver of such heavy carriages, might, under such circumstances, be thought to betoken a want of due care, if any, though few persons; might probably pass by the same road. The greatest possible care is not to be expected, nor is it to be required, but whoever seeks to excuse himself for having unfortunately occasioned, by any act of his own, the death of another, ought at least to [*672] show that he took that care to avoid it which persons in similar situations *are accustomed to do." 1 East, P. C. 263. The deceased was walking along the road in a state of intoxication. The prisoner was driving a cart drawn by two horses, without reins. The horses were cantering, and the prisoner was sitting in front of the cart. On seeing the deceased, he called to him twice to get out of the way, but from the state he was in, and the rapid pace of the horses, he could not do so, and was killed. Garrow, B., said, that if a man drive a cart at an unusual rapid pace, whereby a person is killed, though he calls repeatedly to such person to get out of the way, if from the rapidity of the driving or any other cause the person cannot get out of the way in time enough, but is killed, the driver is guilty of manslaughter. He added, that it is the duty of every man who drives any carriage, to drive it with such care and caution as to prevent, as far as in his own power, any accident or injury that may occur. R. v. Walker, 1 C. & P. 320: 12 E. C. L. R. What will constitute negligence in the case of driving carriages, must depend greatly upon the circumstances of each particular case. It was ruled by Mr. Justice Bayley, that a carter, by being in the cart, instead of at the horse's head, or by its side, was guilty of negligence; and, if death ensues, of manslaughter. R. v. Knight, 1 Lewin, C. C. 168. And the same point was ruled by Hullock, B. Anon. Ibid. And see R. v. Swindall, *ante*, p 644. The prisoner was charged with manslaughter. It appeared that there were two omnibuses, which were running in opposition to each other, galloping along a road, and that the prisoner was driving that on which the deceased sat, and was whipping his horses just before the omnibus upset. In summing up to the jury, Patteson, J., said, "The main questions are, were the two omnibuses racing? and was the prisoner driving as fast as he could, in order to get past the other omnibus? and had he urged his horses to so rapid a pace that he could not control them? If you are of that opinion, you ought to convict him." R. v. Timmins, 7 C. & P. 499: 32 E. C. L. R.

To make the captain of a steam-vessel guilty of manslaughter, in causing a person to be drowned by running down a boat, the prosecutor must show some act done by the captain, and a mere omission on his part in not doing the whole of his duty, is not sufficient. But if there were sufficient light, and the captain of the steamer is either at the helm or in a situation to be giving the command, and does that which

causes the injury, he is guilty of manslaughter. Per Park, J., and Alderson, B., R. v. Green, 7 C. & P. 156; but see R. v. Hughes, *supra*, p. 644.

The prisoner was indicted for manslaughter, and it appeared that it was his duty to attend a steam-engine, and that on the occasion in question he had stopped the engine and gone away. During his absence, a person came to the spot and put it in motion, and being unskilled, was unable to stop it again; and in consequence of the engine being thus put in motion, the deceased was killed. Alderson, B., stopped the case, observing, that the death was the consequence, not of the act of the prisoner, but of the person who set the engine in motion after the prisoner went away, and that it was necessary, in order to a conviction for manslaughter, that the negligent act which caused the death, should be that of the party charged. R. v. Hilton, 2 Lew. C. C. 214; see also R. v. Lowe, *ante*, p. 644, and R. v. Bennett, Id.

It is sometimes very difficult to trace the boundaries between manslaughter and misadventure, as in the following case: A man found *a pistol in the street, [*673] which he had reason to believe was not loaded, he having tried it with the rammer. He carried it home and showed it to his wife, and she standing before him, he pulled the cock and touched the trigger. The pistol went off and killed the woman; and this was ruled to be manslaughter. Kel. 41. Admitting, says Mr. Justice Foster, that this judgment was strictly legal, it was, to say no better of it, *summum jus*. But, he continues, I think it was not so, for the law in these cases does not require the *utmost* caution that *can* be used; it is sufficient that a reasonable precaution, what is *usual* and *ordinary* in like cases, should be used. Foster, 264. Mr. Justice Foster mentions a similar case, which occurred before himself: "I once upon a circuit tried a man for the death of his wife by a like accident. Upon a Sunday morning the man and his wife went a mile or two from home with some neighbors, to take a dinner at the house of their common friend. He carried his gun with him, hoping to meet with some diversion by the way. But before he went to dinner he discharged it, and set it up in a private place in his friend's house. After dinner he went to church, and in the evening returned home with his wife and neighbors, bringing his gun with him, which was carried into the room where his wife was. He taking it up, touched the trigger, when it went off and killed his wife, whom he tenderly loved. It came out in evidence, that while the man was at church a person belonging to the family privately took the gun, charged it, and went after some game, but before the service at church was ended, restored it, *loaded*, to the place where it was taken, and where the defendant, ignorant of what had passed, found it, to all appearance, as he had left it. "I did not," says Mr. Justice Foster, "inquire whether the poor man had examined the gun before he carried it home, but being of opinion, upon the whole evidence, that he had reasonable grounds to believe that it was not loaded, I directed the jury, that if they were of the same opinion, they should acquit him, and they did acquit him accordingly." Foster, 265.

Parents, masters, and other persons having authority *in foro domestico*, may administer reasonable correction to those under their care, and if death ensue without their fault, it will be no more than accidental death. But if the correction exceed the bounds of moderation, either in the measure or in the instrument made use of for the purpose, it will be either murder or manslaughter, according to the circumstances of the case. Foster, 262. Thus, where a master struck a child, who was his apprentice, with a great staff, of which he died, it was ruled to be murder. 1 Hale, P. C. 474. Speaking of homicides of this class, Mr. Justice Foster says, if they be done with a cudgel or other thing not likely to kill, though improper for the purpose of correction, it will be manslaughter; if with a dangerous weapon likely to kill or

maim, it will be murder; due regard being had to the age and strength of the party. Foster, 262. Thus where a master directed his apprentice to do some work in his absence, and on his return, finding it had been neglected, threatened to send the apprentice to Bridewell, to which he replied, "I may as well work there as with such a master," upon which the master, striking him on the head with a bar of iron, which he had in his hand, killed him, it was held murder; for if a father, master, or schoolmaster, correct his child, servant, or scholar, it must be with such things as are fit for correction, and not with such instruments as may kill them; and a bar of iron is [*674] not an instrument of correction. R. v. Gray, *Kel. 64; 1 Russ. by Grea. 548. Though the correction exceed the bounds of moderation, yet the court will pay regard to the nature of the provocation, where the act is manifestly accompanied with a good intent, and the instrument is not such as will, in all probability, occasion death, though the party be hurried to great excess. A father whose son had been frequently guilty of thefts, of which complaints had been made, had often corrected him. At length the son, being charged with another theft, and resolutely denying it, though proved against him, the father in a passion beat his son, by way of chastisement, with a rope, by reason of which he died. The father expressed the utmost horror, and was in the greatest affliction for what he had done, intending only to have punished him with such severity as to have cured him of his wickedness. The learned judge who tried the prisoner, after consulting his colleague and the principal counsel on the circuit, ruled this to be manslaughter only. Anon. 1 East, P. C. 261.

As to manslaughter committed by the captain and mate of a vessel on one of the crew, see R. v. Leggett, 8 C. & P. 191: 34 E. C. L. R.

Where death ensues in the case of sports or recreations, such recreations being innocent and allowable, it falls within the rules of excusable homicide, because bodily harm is not the motive on either side. Foster, 250; 1 East, P. C. 268. Therefore persons playing at cudgels, Comb. 408, or foils or wrestling, R. v. Lane, 1 East, P. C. 268, are excusable if death ensue. Lord Hale appears to be of a different opinion. He says, "He that voluntarily and knowingly *intends to hurt the person of a man*, though he intends not death, yet if death ensue, it excuses not from the guilt of murder or manslaughter at least; as, if A. intends to beat B., but not to kill him, yet if death ensue, this is not *per infortunium*, but murder or manslaughter, as the circumstances of the case happen; and *therefore*," he continues, "I have known it ruled, that if two men are playing at cudgels together, or wrestling, by consent, if one by a blow or fall kills the other, it is manslaughter, and not *per infortunium*, as Mr. Dalton (cap. 90) seems to doubt it; and accordingly it was resolved, P. 2, Car. 2, by all the judges, upon a special verdict, from Newgate, where two friends were playing at foils at a fencing school, and one casually killed the other; resolved to be manslaughter." 1 Hale, P. C. 472. The questions in these cases appear to be twofold; 1st, whether the sport was lawful; and 2d, whether the parties engaged in it with a friendly mind, or with intent to do each other some bodily harm. The cases mentioned by Lord Hale seem to proceed upon the latter supposition, and on this ground they are distinguished by Mr. Justice Foster from the case of persons who in perfect friendship engage by mutual consent in recreations for the trial of skill or manhood, or for improvement in the use of arms. Foster, 259, 260; 1 East, P. C. 268. But if there be dangerous weapons used in such sports, and there be any negligence in the use of them, and one of the parties be killed, such negligence may render the act manslaughter. Sir John Chichester, fencing with his servant, made a pass at him, which the servant parried off with a bedstaff. In the heat of the exercise, the chape of the scabbard flew off, and the man was killed by the point of the

sword. It was held that this was manslaughter, because, though the act which occasioned the death intended no harm, nor could it have done harm, if the chape had not been struck off by the party killed, and though the parties were in sport, yet the act *itself, the thrusting at the servant, was unlawful. Aleyn, 12; 1 Hale, [*675] P. C. 472. Mr. Justice Foster puts this decision on another ground, observing that the party did not use the degree of circumspection which common prudence would have suggested; and therefore the fact so circumstanced might well amount to manslaughter. Foster, 260; 1 East, P. C. 269.

Death in the course of a friendly contest may also amount to manslaughter, if any undue advantage has been taken. Thus, if two persons are engaged to play at cudgels, and one of them makes a blow at the other likely to hurt, before he was upon his guard, and without warning, and death ensues, the want of due and friendly caution would make the act amount to manslaughter. 1 East, P. C. 269.

Though the weapons be of a dangerous nature, yet if they be not directed by the persons using them against each other, and so no danger be reasonably apprehended, if death casually ensue, it is only misadventure. 1 East, P. C. 269. Therefore, if a person be shooting at game or butts, or other lawful object, and a bystander be casually killed, it is only misadventure. 1 Hale, P. C. 38, 39, 472; 1 East, P. C. 269. But if the sport or recreation be unlawful, and death ensues in the course of it, it will be murder or manslaughter, according to the circumstances of the case. Thus, where a man playing at the diversion of cock-throwing at Shrovetide, missed his aim, and a child looking on, received a blow from the staff, of which he died, Mr. Justice Foster (who observes that this is a barbarous, unmanly custom, productive of great disorders, and dangerous to bystanders) ruled it to be manslaughter. Foster, 261.

Prize-fights, public boxing-matches, and the like, exhibited for the sake of lucre, are not lawful sports, for they serve no valuable purpose, but on the contrary, encourage a spirit of idleness and debauchery. Foster, 260. In such a case the intention of the parties is not innocent in itself, each being careless of what hurt may be given, provided the promised reward be obtained; and besides, such meetings have in their nature a strong tendency to a breach of the peace. Therefore in R. v. Ward, the prisoner having been challenged to fight by his adversary, for a public trial of skill in boxing, and also urged to engage by taunts; although the occasion was sudden, yet having killed his opponent, he was held guilty of manslaughter. 1 East, P. C. 270. So persons present at a prize-fight encouraging it by their presence will, in case of death, be guilty of manslaughter. Upon an indictment for murder, charging the prisoner with being present aiding and abetting, it appeared that there had been a fight between the deceased and another person, at which a great number of persons were assembled, and that in the course of the fight the ring was broken in several times by the persons assembled, who had sticks, which they used with great violence. The deceased died in consequence of the blows he received on this occasion. There was contradictory evidence as to the prisoner having acted as second. In summing up, the judge (Mr. Justice Littledale) said, "My attention has been called to the evidence that the prisoner did nothing; but I am of opinion that persons who are at a fight, in consequence of which death ensues, are all guilty of manslaughter, if they encouraged it by their presence; I mean if they remained present during the fight. If they were not merely casually passing by, but stayed at the place, they encouraged it by their presence, *although they did not say or do anything. But if the [*676] death ensued by violence unconnected with the fight itself, that is by blows not given by the other combatant, but by persons breaking in the ring and striking with their sticks, those who were merely present are not, by being present, guilty of man-

slaughter. The case is at most one of manslaughter only." R. v. Murphy, 6 C. & P. 103 : 25 E. C. L. R. It has been ruled, however, that persons present at a fatal prize-fight are not such accomplices as that their evidence requires confirmation. R. v. Hargrave, 4 C. & P. 170 : 19 E. C. L. R.

Where death casually ensues in the course of a lawful employment, and there is a want of due caution on the part of the person from whom it proceeds, it will not be misadventure, but manslaughter. A. having deer frequenting his cornfield, out of the precinct of any forest or chase, set himself in the night-time to watch in a hedge, and B., his servant to watch another corner of the field with a gun, charging him to shoot when he heard the deer rustle in the corn. The master himself imprudently rushed into the corn, when the servant, supposing it to be the deer, shot and killed his master. This was held to be only chance medley, for the servant was misguided by the master's own directions. But it seemed to Lord Hale, who tried the prisoner, that if the master had not given such directions, it would have been manslaughter to have shot a man, though mistaking him for a deer, because he did not use due diligence to discover his mark. 1 Hale, P. C. 476.

An iron founder being employed by an oilman and dealer in marine stores to make some cannon, to be used on a day of rejoicing, and afterwards to be put into a sailing-boat, after one of them had burst, and had been returned to him in consequence, sent it back in so imperfect a state, that on being fired it burst again, and killed the deceased; on his trial before Bayley, B., Patteson, J., and Gurney, B., he was found guilty of manslaughter. R. v. Carr, 8 C. & P. 163 : 34 E. C. L. R.

Cases of great difficulty and nicety have arisen with regard to the question of malice, where medicines have been carelessly or unskilfully administered by incompetent persons. The law on this subject is thus laid down by Lord Hale: "If a physician gives a person a potion without any intent of doing him any bodily hurt, but with intent to cure or prevent a disease, and, contrary to the expectation of the physician, it kills him, this is no homicide; and the like of a surgeon. And I hold their opinion to be erroneous that think, if it be no licensed surgeon or physician that occasions this mischance, then it is a felony, for physic and salves were before licensed physicians and surgeons, and therefore, if they be not licensed according to the statutes, they are subject to the penalties in the statutes, but God forbid that any mischance of this kind should make any person not licensed guilty of murder or manslaughter."(1) 1 Hale, P. C. 429. Upon the latter point Sir William Blackstone appears to concur in opinion with Lord Hale. If a physician or surgeon, he says, gives his patient a potion or plaster to cure him, which, contrary to expectation, kills him, this is neither murder nor manslaughter, but misadventure, and he shall not be punished criminally, however liable he might formerly have been to a civil action for neglect or ignorance; but it has been held that if he be not a *regular* physician [*677] or surgeon who administers the medicine or performs the operation, *it is manslaughter at the least. Yet Sir M. Hale very justly questions the law of this determination. 4 Bl. Com. c. 14. The correctness of Sir M. Hale's opinion has been recognized in several late cases. Thus, in R. v. Van Butchell, 3 C. & P. 632 : 14 E. C. L. R., Hullock, B., ruled, that it made no difference whether the party was a regular or an irregular surgeon, adding that in remote parts of the country many persons would be left to die, if irregular surgeons were not allowed to practise. The same opinion was expressed by Park, J., in a subsequent case, in which he observed that whether the party was licensed or unlicensed is of no consequence except in this

(1) Commonwealth v. Thompson, 6 Mass. 134; S. C. 2 Wheeler's C. C. 312.

respect, that he may be subject to pecuniary penalties for acting contrary to charters or acts of Parliament. R. v. Long, 4 C. & P. 398 : 19 E. C. L. R. But whether the party be licensed or unlicensed, if he display gross ignorance, or criminal inattention, or culpable rashness, in the treatment of his patient, he is criminally responsible. There is no doubt, says Mr. Baron Hullock, that there may be cases where both regular and irregular surgeons may be liable to an indictment, as there may be cases where from the manner of the operation even malice might be inferred. R. v. Van Butchell, 3 C. & P. 633 : 14 E. C. L. R. ; 4 C. & P. 407 : 19 E. C. L. R. Where a person who, though not educated as a surgeon, had been in the habit of acting as a man midwife, and had unskilfully treated a woman in childbirth, in consequence of which she died, was indicted for the murder, Lord Ellenborough said, there has not been a particle of evidence adduced that the prisoner was guilty of murder, but it was for the jury to consider whether the evidence went so far as to make out a case of manslaughter. To substantiate that charge the prisoner must have been guilty of criminal misconduct, arising either from the grossest ignorance or the most criminal inattention. One or other of these was necessary to make him guilty of that criminal negligence and misconduct which are essential to make out a case of manslaughter. R. v. Williamson, 3 C. & P. 635 : 14 E. C. L. R. This ruling was cited with approbation by Park, J., in R. v. Long, 4 C. & P. 407 : 19 E. C. L. R., where he held that to support the charge of manslaughter it must appear that there was gross ignorance or inattention to human life. In R. v. Long, 4 C. & P. 404, a case was cited by counsel, as having occurred on the northern circuit, where a man who was drunk went and delivered a woman, who, by his mismanagement, died, and he was sentenced to six months' imprisonment. And where a person grossly ignorant undertook to deliver a woman and killed the child in the course of the delivery, it was resolved by the judges that he was rightly convicted of manslaughter. R. v. Senior, 1 Moo. C. C. 346. The rule with regard to the degree of misconduct which will render a person practising medicine criminally answerable is thus laid down by Mr. Justice Bayley. "It matters not whether a man has received a medical education or not. The thing to look at is, whether, in reference to the remedy he has used, and the conduct he has displayed, he has acted with a due degree of caution, or, on the contrary, has acted with gross and improper rashness and want of caution. I have no hesitation in saying, that if a man be guilty of gross negligence in attending to his patient, after he has applied a remedy, or of gross rashness in the application of it, and death ensues in consequence, he will be liable to a conviction for manslaughter." R. v. Long, 4 C. & P. 440. The prisoner was indicted for manslaughter. It appeared that the deceased, a sailor, had been discharged from the Liverpool infirmary as cured, after undergoing *salivation, and that he was recommended by [*678] another patient to go to the prisoner for an emetic, to get the mercury out of his bones. The prisoner was an old woman, residing in Liverpool, who occasionally dealt in medicines. She gave him a solution of corrosive sublimate, one dose of which caused his death. She said she had received the mixture from a person who came from Ireland and had gone back again. Mr. Justice Bayley, in addressing the jury, said, "I take it to be perfectly clear, that if a person, not of medical education, in a case where professional aid ought to be obtained, undertakes to administer medicines which may have a dangerous effect, and thereby occasions death, such person is guilty of manslaughter. He may have no evil intention, and may have a good one, but he has no right to hazard the consequences in a case where medical assistance may be obtained. If he does so, it is at his own peril. It is immaterial whether the person administering the medicine prepares it, or gets it from another." R. v. Simpson,

Wilcock on Laws of Med. Prof., Appendix, 227; 4 C. & P. 407: 19 E. C. L. R., (*n*), 1 Lewin, C. C. 172. The prisoner was indicted for manslaughter. It appeared that the deceased, a child, being affected with a scald head, the prisoner had directed a plaster to be applied, from the effects of which the child is supposed to have died. Bolland, B., addressing the jury, said: "The law, as I am bound to lay it down, as it has been agreed upon by the judges (for cases of this kind have occurred of late more frequently than in former times), is this—if any person, whether he be a regular or licensed medical man or not, professes to deal with the life or health of his majesty's subjects, he is bound to have competent skill to perform the task that he holds himself out to perform, and he is bound to treat his patient with care, attention, and assiduity." R. v. Spiller, 5 C. & P. 333: 24 E. C. L. R. The direction given by Tindal, C. J., in a case of this kind, where the prisoner was charged with neglecting to attend and take due care of a woman during her delivery, was as follows: "You are to say, whether in the execution of the duty which the prisoner had undertaken to perform he is proved to have shown such a *gross* want of care, or such a *gross* and *culpable* want of skill, as any person undertaking such a charge ought not to be guilty of, and that the death of the person named in the indictment was caused thereby." R. v. Ferguson, 1 Lewin, C. C. 181. In a case which occurred before Lord Lyndhurst, C. B., upon an indictment for manslaughter (by administering Morrison's pills), the law on this subject was thus laid down by his lordship: "I agree that in these cases there is no difference between a licensed physician or surgeon, and a person acting as physician or surgeon without a license. In either case, if a party, having a competent degree of skill and knowledge, makes an accidental mistake in his treatment of a patient, through which death ensues, he is not thereby guilty of manslaughter; but if, where proper medical assistance can be had, a person, totally ignorant of the science of medicine, takes upon himself to administer a violent and dangerous remedy to one laboring under disease, and death ensues in consequence of that dangerous remedy having been so administred, then he is guilty of manslaughter. If I had the least doubt of this position, I might fortify it by referring to the opinion of Lord Ellenborough in R. v. Williamson (*ante*, p. 677). I shall leave it to the jury to say whether death was occasioned or accelerated by the medicines administered, and if they say it was, then I shall tell them, secondly, that the [*679] prisoner is *guilty of manslaughter, if they think that in so administering the medicines, he acted either with a criminal intention, or from any gross ignorance." R. v. Webb, 1 Moo. & Rob. 405; 2 Lew. C. C. 196, S. C. The prisoner, who was indicted for manslaughter, had, for nearly thirty years, carried on the business of an apothecary and man-midwife in the county of York, and was qualified by law to carry on that profession. His practice was very considerable, and he had attended the deceased on the birth of all her children. It appeared that on the occasion in question he made use of a metal instrument, known in midwifery by the name of a *vectis*, or *lever*, inflicting thereby such grievous injuries on the person of the deceased as to cause her death within three hours. It was proved by the medical witnesses that the instrument was a very dangerous one, and that at that period of the labor it was very improper to use it at all; and also, that it must have been used in a very improper way, and in an entirely wrong direction. Coleridge, J., told the jury that the questions for them to decide were, whether the instrument had caused the death of the deceased, and whether it had been used by the prisoner with due and proper skill and caution, or with gross want of skill or gross want of attention. No man was justified in making use of an instrument in itself a dangerous one unless he did so with a proper degree of skill and caution. If the jury thought that in this instance

ıe prisoner had used the instrument with gross want of skill, or gross want of cau-on, and that the deceased had thereby lost her life, it would be their duty to find ıe prisoner guilty. The prisoner was convicted. R. v. Spilling, 2 Moo. & R. 107. ı chemist, likewise, who negligently supplies a wrong drug, in consequence of which eath ensues, is guilty of manslaughter. The apprentice to a chemist, by mistake elivered a bottle of laudanum to a customer, who asked for paregoric; and a por-ion of the laudanum being administered to a child, caused its death. The appren-ice being indicted for manslaughter, Bayley, J., directed the jury, that if they hought him guilty of negligence, they should find him guilty of the manslaughter. ı. v. Tessymond, 1 Lewin, C. C. 169. See also R. v. Carr, *ante*, p. 676.

If a man assault another with intent to do him a bodily injury, and death ensue, nalice sufficient to constitute murder will be presumed, provided the act be of such nature as plainly, and in the ordinary course of events, must put the life of the ›arty in danger. 4 Bl. Com. 200. A remarkable case, which may be classed under his head, is mentioned by Mr. Alison. The deceased, a chimney-sweeper's boy, of ›leven years of age, stuck fast in a chimney. The prisoner having fastened ropes ound the leg of the deceased, drew them with such force, that, notwithstanding his ›ries, and the remonstrances of those present, the boy died. Being charged with his as murder, the presiding judge, Lord Justice Clerk, with the concurrence of the ›ourt, laid it down as clear law, that this was an instance of absolute recklessness, ınd utter indifference about the life of the sufferer, and that the law knew no differ-ence between the guilt of such a case and that of an intention to destroy. R. v. Rae, Alison's Prin. Cr. Law Scot. 4.

Proof of malice—provocation in general.] It frequently becomes a most impor-tant question in the proof of malice, whether the act *was done under the [*680] sudden influence of such a degree of provocation as to reduce the crime from murder to manslaughter.(1) The indulgence shown to the first transport of passion in these cases, says Mr. Justice Foster, is plainly a condescension to the frailty of the human frame, to the *furor brevis*, which, while the frenzy lasts, renders the man deaf to the voice of reason. The provocation, therefore, which extenuates in the case of homi-cide must be something which the man is conscious of, which he feels and resents at the instant the fact which he would extenuate is committed, not what time or acci-dent may afterwards bring to light. Foster, 315. Wherever death ensues from the sudden transport of passion or heat of blood, if upon a reasonable provocation, and with-out malice, or if upon sudden combat, it will be manslaughter: if without such provo-cation, or the blood has had reasonable time or opportunity to cool, or there be evidence of express malice, it will be murder; for in no instance can the party killing allevi-ate his case by referring to a previous provocation, if it appear by any means that he acted upon express malice. 1 East, P. C. 232. Where the provocation is sought by the prisoner, it cannot furnish any defence against the charge of murder. Thus, where A. and B. having fallen out, A. says he will not strike, but will give B. a pot of ale to touch him, on which B. strikes, and A. kills him, this is murder. 1 East,

(1) The People, v. Freeland, 6 California, 96; The State v. Curry, 1 Jones's Law, 280; Ray v. The State, 15 Georgia, 535; Hawkins v. The State, 25 Ibid. 207. As to when the character of the deceased may be given in evidence, see The State v. Floyd, 6 Jones's Law, 392; Hioch v. The State, 25 Georgia, 699; The Commonwealth v. Hilliard, 2 Gray, 294; Franklin v. The State, 29 Alabama, 14; The State v. Jackson, 12 Louisiana Annual, 679; The State v. Hicks, 27 Missouri, 588; Dukes v. The State, 11 Indiana, 557; Pfomer v. The People, 4 Parker, C. R. 558; The State v. Hogue, 6 Jones's Law, 381; The State v. Smith, 12 Richardson's Law, 430; The People v. Mur-ray, 10 California, 309.

P. C. 239. A. and B. having a difference, A. bade B. to take a pin out of his (A.'s) sleeve, intending thereby to take an occasion to strike or wound B.; B. did so accordingly; on which A. struck him a blow of which he died. It was held that this was wilful murder; 1, because it was no provocation, since it was done with the consent of A.; and 2, because it appeared to be a malicious and deliberate artifice to take occasion to kill B. 1 Hale, P. C. 457.

Proof of malice—provocation by words or gestures only.] Words of reproach, how grievous soever, are not a provocation sufficient to free the party killing from the guilt of murder; neither are indecent or provoking actions or gestures, expressive of contempt or reproach, sufficient, without an assault upon the person.(1) But a distinction is to be observed, where the party killing upon such provocation makes use of a deadly weapon, or otherwise manifests an intention to kill or do some great bodily harm, in which case it will be murder, and the case where he strikes with a stick or other weapon not likely to kill, and unluckily, and against his intention, does kill, in which latter case it will only be manslaughter. Foster, 290, 291. Where the deceased, coming past the shop of the prisoner, distorted his mouth and smiled at him, upon which the prisoner killed him, it was held to be murder, for it was no such provocation as would abate the presumption of malice in the party killing. R. v. Brain, 1 Hale, P. C. 455. If A. be passing along the street, and B. meeting him (there being a convenient distance between A. and the wall) takes the wall of A., and thereupon A. kills him, this is murder; but if he had jostled A., this jostling had been a provocation, and would have made it manslaughter; so it would if A. riding on the road, B. had whipped the horse of A. out of the track, and then A. had alighted and killed B., which would have been manslaughter. 1 Hale, P. C. 455, 456. Upon the former case it has been observed that it probably supposes considerable violence and insult in the jostling. 1 Russ. by Grea. 514.(*f*) If there be a [*681] chiding between husband and wife, and the husband *thereupon strikes his wife with a pestle, and she dies, this is murder, and the chiding will not be a provocation to reduce it to manslaughter. 1 Hale, P. C. 457. In the following case the distinction taken by Mr. Justice Foster, in the passage cited at the commencement of the present paragraph, came in question. A., drinking in an alehouse, B., a woman, called him "a son of a whore," upon which A. taking up a broomstick at a distance, threw it at her, which hitting her upon the head killed her; and whether this was murder or manslaughter was the question. Two points were propounded to the judges at Serjeant's Inn. 1, whether bare words, or words of this nature, will amount to such a provocation as will extenuate the offence into manslaughter; 2, admitting that it would not, in case there had been a striking with such an instrument as necessarily would have caused death, as stabbing with a sword, or pistolling, yet whether *this* striking, which was so improbable to cause death, will not alter the case. The judges not being unanimous in their opinions upon the point, a pardon was recommended. 1 Hale, P. C. 456. In one case the judges are said to have resolved, that words of menace or bodily harm would come within the reason of such a provocation as would make the offence manslaughter only. R. v. Lord Morely, 1 Hale, P. C. 456. But in another report of the same case this resolution does not appear. Kel. 55. And it seems that in such case the words should be accompanied by some act denoting an intention of following them up by an actual assault. 1 East, P. C. 233; 1 Russ. by Grea. 515. See R. v. Sherwood, *ante*, p. 638.

(1) The State v. Tacket, 1 Hawks. 210.

Proof of malice—provocation—assault.] Although, under circumstances, an assault by the deceased upon the prisoner may be sufficient to rebut the general presumption of malice arising from the killing, yet it must not be understood that every trivial provocation which in point of law amounts to an assault, or even a blow, will as a matter of course reduce the crime to manslaughter. For where the punishment inflicted for a slight transgression of any sort is outrageous in its nature, either in the manner or continuance of it, and beyond all proportion to the offence, it is rather to be considered as the effect of a brutal and diabolical malignity than of human frailty, and is one of the symptoms of that which the law denominates malice, and the crime will amount to murder notwithstanding such provocation. Barbarity, says Lord Holt (R. v. Keate, Comb. 408), will often make malice.(1) 1 East, P. C. 234; 1 Russ. by Grea. 515. There being an affray in the streets, the prisoner, a soldier, ran towards the combatants. The deceased, seeing him, exclaimed, "You will not murder the man, will you?" The prisoner replying, "What is that to you, you bitch?" the deceased gave him a box on the ear, upon which the prisoner struck her on the breast with the pommel of his sword. She fled, and the prisoner pursuing her, stabbed her in the back. Holt, C. J., was first of opinion that this was murder, a single box on the ear from a woman not being a sufficient provocation to kill in this manner, after he had given her a blow in return for the blow on the ear. But it afterwards appearing that the deceased had struck the prisoner a blow in the face with an iron patten, which drew a great deal of blood, it was held only manslaughter. R. v. Stedman, Foster, 292; 1 East, P. C. 234. The smart of the wound, adds Mr. Justice Foster, and the effusion of the blood, might possibly keep his indignation boiling till the moment of the fact. Ibid. A *quarrel arising between [*682] some soldiers and a number of keelmen at Sandgate, a violent affray ensued, and one of the soldiers was very much beaten. The prisoner, a soldier, who had before driven part of the mob down the street with his sword in his scabbard, on his return, seeing his comrade thus used, drew his sword, and bid the mob stand clear, saying he would sweep the street; and on their pressing on him he struck at them with the flat side, and as they fled pursued them. The other soldier in the meantime had got away, and when the prisoner returned he asked whether they had murdered his comrade; but being again several times assaulted by the mob, he brandished his sword, and bid them keep off. At this time the deceased, who from his dress might be mistaken for a keelman, was going along about five yards from the prisoner; but before he passed, the prisoner went up to him, and struck him on the head with the sword, of which he presently died. This was held manslaughter; it was not murder, as the jury had found, because there was a previous provocation, and the blood was heated in the con-

(1) One who is without fault himself when attacked by another, may kill his assailant, if the circumstances be such as to furnish reasonable ground for apprehending a design to take away his life or do him some great bodily harm, and there is also reasonable ground for believing the danger imminent that such design will be accomplished; although it may afterwards turn out that the appearances were false, and there was in fact no such design, nor any danger that it would be accomplished. But this principle will not justify one in returning blows with a dangerous weapon when he is struck with the naked hand, and there is no reason to apprehend a design to do him great bodily harm. Nor will it justify homicide when the combat can be avoided, or when, after it is commenced, the party can withdraw from it in safety before he kills his adversary. Shester v. The People, 2 Comstock, 193.

The necessity that will justify the taking of life need not be actual, but the circumstances must be such as to impress the mind of the slayer with the reasonable belief that such necessity is impending. Oliver v. The State, 17 Alabama, 588.

When upon the trial of an indictment for murder, the prisoner attempts to justify the homicide on the ground that it was committed in self defence, he must show to the satisfaction of the jury that he was in imminent danger, either of death or of some great bodily harm. It is not sufficient that the accused believed that it was necessary to take the life of his assailant in order to protect himself from some great personal injury. People v. Shester, 4 Barbour, 460.

test; nor was it in self defence, because there was no inevitable necessity to excuse the killing in that manner. R. v. Brown, 1 East, P. C. 245.

A gentleman named Luttrell, being arrested for a small debt, prevailed on one of the officers to go with him to his lodgings, while the other was sent for the attorney's bill. Words arose at the lodgings about *civility money*, and Luttrell went up-stairs to fetch money for the payment of debt and costs. He soon returned with a brace of loaded pistols in his bosom, which, on the importunity of his servant, he laid down on the table, saying he did not intend to hurt the officers, but he would not be ill-used. The officer who had been sent for the bill arriving, and some angry words passing, Luttrell struck one of the officers in the face with a walking-cane and drew a little blood, whereupon both of them fell upon him, one stabbed him in nine places, he all the while on the ground begging for mercy, and unable to resist them; and one of them fired one of the pistols at him while on the ground, and gave him his death's wound. This was held manslaughter, by reason of the first assault by the cane. Such is the report of the case given by Sir James Strange, upon which Mr. Justice Foster has observed what an extraordinary case it is—that all these circumstances of aggravation, two to one, being helpless on the ground, and begging for mercy, stabbed in nine places, and then despatched with a pistol,—that all these circumstances, plain indications of a deadly revenge or diabolical fury, should not outweigh a slight stroke with a cane. The learned judge proceeds to state that in the printed trial (St. Tr. 195), there are some circumstances which have been entirely dropped, and others very slightly mentioned by the reporter. 1. Mr. Luttrell had a sword by his side which, after the affray was over, was found drawn and broken. How that happened did not appear in evidence. 2. When Luttrell laid the pistols on the table, he declared that he brought them, because he would not be forced out of his lodgings. 3. He threatened the officers several times. 4. One of the officers appeared to be wounded in the hands with a pistol-shot (both the pistols being discharged in the affray), and slightly on the wrist with some sharp-pointed weapon, and the other was slightly wounded in the hand with a like weapon. 5. The evidence touching Luttrell's begging for mercy was not that he was on the ground begging for mercy, but that on the ground he held up his hands as if begging for [*683] mercy. The chief justice directed the jury, that if they *believed Luttrell endeavoring to rescue himself (which he seemed to think was the case, and which, adds Mr. Justice Foster, probably was the case), it would be justifiable homicide in the officers. However, as Luttrell gave the first blow, accompanied with menaces to the officers, and the circumstance of producing loaded pistols to prevent their taking him from his lodgings, which it would have been their duty to do if the debt had not been paid or bail given, he declared it could be no more than manslaughter. R. v. Reason, Foster, 293; 1 Str. 499; 1 East, P. C. 320.

Two soldiers, having a recruit in a room under their care, who wished to leave them, one of them stationed himself at the door with his sword drawn, to prevent ingress or egress, and a person wishing to enter the room (which was a public house, kept by his father), was resisted by the soldier at the door, whereupon a struggle ensuing, the other soldier coming out struck the party struggling, with his bayonet in the back. Being indicted for stabbing with intent to murder, and convicted, the judges, on a reference to them, held the conviction right, the soldiers having no authority to enlist; and they said that it would have been murder if death had ensued. R. v. Longen, Russ. & Ry. 228.

Under this head may be mentioned the case of peace officers endeavoring to arrest without proper authority, the killing of whom will not, unless the party can retreat,

amount to murder; the attempt to make an unlawful arrest being considered a sufficient provocation. R. v. Curvan, 1 Moo. C. C. 132; and see all the cases stated, *post.*

Proof of malice—provocation—instrument used.] In considering the question of malice where death has ensued after provocation given by the deceased in assaulting the prisoner, or upon other provocation, especial attention is to be paid to the nature of the weapon with which death was inflicted.(1) If it was one likely to produce that result, as used by the prisoner, he will be presumed to have used it with the intention of killing, which will be evidence of malice; if, on the contrary, it was a weapon not likely to produce death, or calculated to give a severe wound, that presumption will be wanting. It must be admitted to be extremely difficult to define the nature of the weapons which are likely to kill (Ld. Rym. 1498); since it is rather in the mode in which the weapon is used, than in the nature of the weapon itself, that the danger to life consists. Accordingly the decisions upon this head are far from being satisfactory, and do not lay down any general rule with regard to the nature of the weapons. In one instance, Mr. Justice Foster takes a nice distinction with regard to the size of a cudgel. The observations arise upon R. v. Rowley, 12 Rep. 17; 1 Hale, P. C. 453; which was as follows: The prisoner's son fights with another boy, and is beaten. He runs home to his father all blood, and the father takes a staff, runs three-quarters of a mile, and beats the other boy, who dies of the beating. This is said to have been ruled manslaughter, *because done in sudden heat and passion.* "Surely," said Mr. Justice Foster, "the provocation was not very grievous: the boy had fought with one who happened to be an overmatch for him, and was worsted. If, upon this provocation, the father, after running three-quarters of a mile, had set his strength against the child, and despatched him with a hedge stake, or any other deadly weapon, or by repeated blows with the cudgel, it would, in my opinion, have *been murder; since any of these circumstances would [*684] have been a plain indication of the *malitia*, the mischievous, vindictive motive before explained." But with regard to these circumstances, with what weapon or to what degree the child is beaten, Coke is totally silent. But Croke (*Cro. Jac.* 296), sets the case in a much clearer light. His words are: "Rowley struck the child with a small cudgel [*Godbold*, 182, calls it a rod], of which stroke he afterwards died." "I think," continues Foster, "it might be fairly collected by Croke's manner of speaking, that the accident happened by a *single stroke* with a cudgel *not likely to destroy*, and that death did not immediately ensue. The stroke was given in heat of blood, and not with any of the circumstances which import the *malitia*, the malignity of heart attending the facts already explained, and therefore manslaughter. I observe Lord Raymond lays great stress on the circumstance that the stroke was with a cudgel not likely to kill." Ld. Raym. 1498; Foster, 294. The nature of the instrument used, as being most material on the question of malice, was much commented upon in the following case. It was found upon a special verdict that the prisoner had directed her daughter-in-law, a child nine years old, to spin some yarn, and upon her return home, finding it badly done, she threw a four-legged stool at the child, and struck her on the right temple, of which the child soon afterwards died. The jury found that the stool was of sufficient size and weight to give a mortal blow, but that the prisoner, when she threw it, did not intend to kill the

(1) Kilpatrick v. The Commonwealth, 7 Casey, 198; The State v. Ward, 5 Harrington, 496; The People v. Butler, 8 California, 435; The State v. West, 6 Jones's Law, 505; The State v. Gillick, 7 Clarke, 287.

deceased. She afterwards threw the body into the river, and told her husband that the child was lost. After argument in the King's Bench (where several formal objections were taken to the special verdict), the case, on account of its difficulty, was referred to the consideration of all the judges, but no opinion was ever delivered, as some of the judges thought it a proper case to recommend a pardon. R. v. Pazel, 1 East, P. C. 236; 1 Leach, 368. Where the prisoner had given a pair of clogs to the deceased, a boy, to clean, and finding them not cleaned, struck him with one of them, of which blow the boy died; this was held to be only manslaughter, because the prisoner could not, from the size of the instrument made use of, have had any intention to take away the boy's life. R. v. Turner, Ld. Raym. 144, 1499. The prisoner, a butcher, seeing some of his sheep getting through the hurdles of their pen, ran towards the boy who was tending them, and taking up a stake that was on the ground, threw it at him. The stake hit the boy on the head, and fractured his skull, of which he soon afterwards died. Nares, J., said to the jury, you will consider whether the stake, which was lying on the ground, was the first thing the prisoner saw in the heat of his passion, is or is not, under such circumstances, and in such a situation, an improper instrument for the purpose of correction. For the using a weapon, from which death is likely to ensue, imports a mischievous disposition, and the law implies that a degree of malice attending the act, which, if death actually happen, will be murder. Therefore, if you should think the stake an improper instrument, you will further consider whether it was used with an intent to kill. If you think it was, you must find the prisoner guilty of murder. But, on the contrary, if you are persuaded that it was not done with an intent to kill, the crime will then amount at most to manslaughter. R. v. Wigg, 1 Leach, 387 (*n*). A. finding a trespasser on his land, in the first transport of his passion, he beats him, and kills him; this has been held [*685] manslaughter. 1 Hale, P. C. 473. But it must be *understood, says Mr. Justice Foster, that he beat him not with a mischievous intention, but merely to chastise and deter him. For if he had knocked his brains out with a bill or hedge-stake, or given him an outrageous beating with an ordinary cudgel, beyond the bounds of a sudden resentment, whereof he had died, it would have been murder. Foster, 291.

The prisoner was indicted for manslaughter. It appeared that he was in the habit of going to a cooper's shop for chips, and was told by the cooper's apprentice that he must not come again. In the course of the same day he came again, and was stopped by the apprentice, upon which he immediately went off, and in passing a work-bench took up a *whittle* (a sharp-pointed knife, with a long handle) and threw it at the apprentice, whose body it entered, and killed him. Hullock, B., said to the jury, if, without adequate provocation, a person strikes another with a weapon likely to occasion death, although he had no previous malice against the party, yet he is to be presumed to have had such malice, from the circumstances, and he is guilty of murder. The jury found the prisoner guilty, and Hullock, B., observed, that had he been indicted for murder, the evidence would have sustained the charge. R. v. Langstaff, 1 Lewin, C. C. 162.

Proof of malice—provocation must be recent.] In order to rebut the evidence of malice, it must appear that the provocation was recent; for in every case of homicide, however great the provocation may be, if there be sufficient time for passion to subside, and for reason to interpose, such homicide will be murder.(1) Foster, 296.

(1) State v. McCants, 1 Spears, 384.
To constitute the crime of murder in the first degree, when the purpose to maliciously kill, with premeditation and deliberation, is formed, the length of time between the design so formed and its execution is immaterial. Shoemaker v. The State, 12 Ohio, 43.

With respect to the interval of time allowed for passion to subside, it has been observed, that it is much easier to lay down rules for determining what cases are without the limits, than how far exactly those limits extend. It must be remembered, that in these cases the immediate object of inquiry is, whether the suspension of reason arising from sudden passion continued from the time of the provocation received to the very instant of the mortal stroke given; for if, from any circumstance whatever, it appears that the party reflected, deliberated, or cooled, any time before the mortal stroke given, or if, in legal presumption, there was time or opportunity for cooling, the killing will amount to murder, it being attributable to malice and revenge, rather than to human frailty. 1 East, P. C. 252; 2 Ld. Raym. 1496. The following are stated as general circumstances amounting to evidence of malice, in disproof of the party's having acted under the influence of passion only: If, between the provocation received and the stroke given, the party giving the stroke fall into other discourse or diversions, and continue so engaged a reasonable time for cooling; or if he take up or pursue any other business or design not connected with the immediate object of his passion, or subservient thereto, so that it may be reasonably supposed that his intention was once called off from the subject of his provocation; again, if it appear that he meditated upon his revenge, or used any trick or circumvention to effect it, for that shows deliberation which is inconsistent with the excuse of sudden passion, and is the strongest evidence of malice; in these cases the killing will amount to murder.(1) It may further be observed, in respect to time, that in proportion to the lapse between the provocation and the stroke, less allowance ought to be made for any excess of retaliation, either in the instrument *or the [*686] manner of it. The more length of time intervening between the injury and the retaliation adds very much to the presumption of malice in law, and is in some cases evidence in itself of deliberation. 1 East, P. C. 252. A leading case on this subject is that of Major Onehy, who was indicted for the murder of a Mr. Gower. A special verdict was found, which stated that the prisoner, being in company with the deceased and three other persons at a tavern, in a friendly manner, after some time began playing at hazard, when Rich, one of the company, asked if any one would set him three half crowns, whereupon the deceased, in a jocular manner, laid down three halfpence, telling Rich he had set him three pieces, and the prisoner at the same time set Rich three half crowns, and lost them to him; immediately after which, the prisoner, in an angry manner, turned to the deceased and said, it was an impertinent thing to set halfpence, and he was an impertinent puppy for so doing, to which the deceased answered, whoever called him so was a rascal. Upon this the prisoner took up a bottle, and with great force threw it at the deceased's head, but did not hit him. The deceased immediately tossed a candlestick or bottle at the prisoner, which missed him; upon which they both rose to fetch their swords, which hung in the room, and the deceased drew his sword, but the prisoner was prevented from drawing his by the company. The deceased then threw away his sword, and the company interposing, they sat down again for the space of an hour. At the expiration of that time the deceased said to the prisoner, "We have had hot words, but you were the aggressor; but I think we may pass it over," and at the same time offered his hand to the prisoner, who replied, "No, damn you, I will have your blood!" The reckoning being paid, all the company, except the prisoner, went out of the room to go home, but he called to the deceased, "Young man, come back, I have something to say to you," on which the deceased came back. The door was im-

(1) Commonwealth v. Green, 1 Ashmead, 289.

mediately closed, and the rest of the company excluded, but they heard a clashing of swords, and the deceased was found to have received a mortal wound. It was also found that at the breaking up of the company the prisoner had his great coat thrown over his shoulders, and that he received three slight wounds in the fight, and the deceased being asked on his death-bed whether he received his wound in a manner among swordsmen called fair, answered, "I think I did." It was further found, that from the throwing of the bottle there was no reconciliation between the prisoner and the deceased. Upon these facts, all the judges were of opinion that the prisoner was guilty of murder, he having acted upon malice and deliberation, and not from sudden passion. R. v. Oneby, 2 Str. 766; 2 Ld. Raym. 1489. It must, I think, says Mr. East, be taken, upon the facts found in the verdict and the argument of the chief justice, that after the door had been shut the parties were upon an equal footing, in point of preparation, before the fight began in which the mortal wound was given. The main point then upon which the judgment turned, and so declared to be, was *express malice*, after the interposition of the company, and the parties had all sat down again for an hour. Under these circumstances, the court were of opinion that the prisoner had had *reasonable time for cooling*, after which, upon an offer of reconciliation from the deceased, he had made use of that bitter and deliberate expression, *he would have his blood!* And again, the prisoner remaining in the room [*687] after the rest of the company *had retired, and calling back the deceased by the contemptuous appellation of *young man*, on pretence of having something to say to him, altogether showed such strong proof of deliberation and coolness as precluded the presumption of passion being continued down to the time of the mortal stroke. Though even that would not have availed the prisoner, under these circumstances, for it must have been implied, according to R. v. Mawgridge (Kel. 128), that he acted upon malice, having in the first instance, before any provocation received, and without warning or giving time for preparation on the part of the deceased, made a deadly assault upon him. 1 East, P. C. 254. The following case will illustrate the doctrine in question: The deceased was requested by his mother to turn the prisoner out of her house, which, after a short struggle, he effected, and in doing so gave him a kick. On the prisoner leaving the house, he said to the deceased, "he would make him remember it," and instantly went up the street to his own lodging, which was distant from two to three hundred yards, where he was heard to go to his bedroom, and, through an adjoining kitchen, to a pantry, and thence to return hastily back again by the same way, to the street. In the pantry the prisoner had a sharp butcher's knife, with which he usually ate. He had also three similar knives there, which he used in his trade of a butcher. About five minutes after the prisoner had left the deceased, the latter followed him for the purpose of giving him his hat, which he had left behind him, and they met about ten yards distant from the prisoner's lodgings. They stopped for a short time, and were heard talking together, but without any words of anger, by two persons who went by them, the deceased desiring the prisoner not to come down to his mother's house that night, and the prisoner insisting that he would. After they had walked on together for about fifteen yards, in the direction of the mother's house, the deceased gave the prisoner his hat, when the latter exclaimed, with an oath, that he would have his rights, and instantly stabbed the deceased with a knife or some sharp instrument in two places, giving him a sharp wound in the shoulder and a mortal wound in the belly. As soon as the prisoner had stabbed the deceased a second time, he said he had served him right, and instantly ran back to his lodgings, and was heard, as before, to pass hastily through his bedroom and kitchen to the pantry, and thence back to the bedroom, where he went to

bed. No knife was found upon him, and the several knives appeared the next morning in their usual places in the pantry. Tindal, C. J., told the jury that the principal question for their consideration would be, whether the mortal wound was given by the prisoner while smarting under a provocation so recent and so strong that he might not be considered at the moment the master of his own understanding; in which case, the law, in compassion to human infirmity, would hold the offence to amount to manslaughter only; or where there has been time for the blood to cool, and for reason to resume its seat, before the mortal wound was given, in which case the crime would amount to wilful murder. That, in determining this question, the most favorable circumstance for the prisoner was the shortness of time which elapsed between the original quarrel and the stabbing of the deceased; but, on the other side, the jury must recollect that the weapon which inflicted the fatal wound was not at hand when the quarrel took place, but was sought for by the prisoner from a distant place. It would be for them to say whether the prisoner had shown thought, *contrivance, and design, in the mode of possessing himself of this weapon, [*688] and again replacing it immediately after the blow was struck; for the exercise of contrivance and design denoted rather the presence of judgment and reason, than of violent and ungovernable passion. The jury found the prisoner guilty of murder. R. v. Hayward, 6 C. & P. 157: 25 E. C. L. R.

"If a person receives a blow and immediately avenges it with any instrument that he may happen to have in his hand, then the offence will be only manslaughter, provided the blow is to be attributed to the passion of anger arising from that previous provocation, for anger is a passion to which good and bad men are both subject. But the law requires two things: first, that there should be that provocation; and secondly, that the fatal blow should be clearly traced to the influence of passion, arising from that provocation." Per Parke, B., R. v. Thomas, 7 C. & P. 817: 32 E. C. L. R. In the same case the learned baron held, that if from the circumstances it appeared that the party, before any provocation given, intended to use a deadly weapon towards any one who might assault him, this would show that a fatal blow given afterwards to a person who struck him ought not to be attributed to the provocation, and the crime would therefore be murder. The prisoner was charged with the wilful murder of his son, John Kirkham, by stabbing him with a knife. A witness, named Chorlton, stated, "I was alarmed on the morning of Saturday, the 24th of June, at about four o'clock, and got up. On entering the prisoner's house, I saw the prisoner and his son on the floor; the son was uppermost, and they were wrestling together. I asked the deceased to get up; he did so, and went to the door. The prisoner then took up a coal-pick (a sort of small pickaxe), which must have been in the room, as he did not leave the room to get it. The prisoner threw the coal-pick at his son, which struck him on the back. The deceased said it hurt him, and the prisoner said he would have his revenge. The coal-pick flew into the street, and the deceased fetched it, and tossed it into the house, but not at the prisoner. The deceased stood at the door with his hands against it, when the prisoner took a knife off the table, and jobbed the deceased with it on the left side. The deceased said, 'Father, you have killed me!' and retreated a few paces into the street, reeling as he went. I told the prisoner he had stabbed his son. He said, 'Joe, I will have my revenge.' The deceased came into the house again, and the prisoner stabbed the deceased again in the left side. The deceased died at seven o'clock the same morning. I think from my first going to the house till the fatal blow was struck was about twenty minutes."

A female, named Wagstaffe, was also examined, who said, "I saw the prisoner on

the Monday before the death of his son. He came to my house drunk, and said he had lost his wife, and that he and his wife had been quarrelling the Saturday before, and if his son John came over the door-sill again he would be his butcher, He said his son took his mother's part. I introduced the name of the deceased by saying, that if he beat his wife his son would take her part, and it was upon that he used the expressions as to the deceased. On the evening before the deceased was killed I saw the prisoner again; he was rather tipsy; I was talking to his wife, who went away when he came up. He said, if his wife talked to me he would hit her, and he added, 'To-morrow is the day of execution, and that day I shall finish their hash.' [*689] I told him if he was sober he would not say so; to this *he made no reply. I begged him to be quiet, and he went into his own house" In her cross-examination this witness stated that the threat "I will be your butcher," is a common threat in that part of the country. Coleridge, J., told the jury, after observing on the declarations of the prisoner spoken to by the last witness, which he did not think entitled to much consideration: "Then I will suppose that all this was purely unpremeditated till Chorlton came, and then the case will stand thus: the father and son have a quarrel; the son gets the father down, the son has the best of it, and the father has received considerable provocation; and if, when he got up, and threw the pick at the deceased, he had at once killed him, I should have said at once that it was manslaughter. Now comes the more important question (the son having given no further provocation), whether in truth that which was in the first instance sufficient provocation, was so recent to the actual deadly blow, that it excused the act that was done; and whether the father was acting under the recent sting, or had had time to cool, and then took up the deadly weapon. I told you just now he must be excused if the provocation was recent, and he acting under its sting, and the blood remained hot; but you must consider all the circumstances, the time which elapses, the prisoner's previous conduct, the deadly nature of the weapon, the repetition of the blows, because though the law condescends to human frailty, it will not indulge human ferocity." The prisoner was found guilty of manslaughter. R. v. Kirkham, 8 C. & P. 115: 34 E. C. L. R. The prisoner, who was charged with murder, was a private of the Coldstream Guards, and was discharged on the 11th October, and on the evening of that day went to the Three Horseshoes, at Hampstead, in company with a person named Burkill and his brother, Richard Smith. There were two more soldiers in the publichouse, and the deceased, James Chaplain, was sitting with them. A dispute arose about paying the reckoning, and a fight took place between the prisoner and a man named Burrows. In the scuffle the deceased jumped over the table and struck the prisoner. The deceased was turned out by the landlord, but admitted again in about ten minutes, and the parties all remained drinking together after that for a quarter of an hour, when the prisoner and his brother went out. The deceased remained about a quarter of an hour after the prisoner, and then left. The prisoner and the deceased were both in liquor. The deceased tried to get out directly after the prisoner and his brother left, but was detained by the persons in the room. As soon as they let him go, he jumped over the table, and went out of the house, saying, as he went, that if he caught them he would serve them out. The deceased was a person who boasted of his powers as a fighter. The deceased followed the prisoner and his brother into a mews not far from the public house where they had been drinking; and a witness who had lived near, stated that he heard a noise and went to the door of his house, and then heard a bayonet fall on the ground, and on going out into Church Lane, heard a person, named Croft, crying out, "Police! police! a man is stabbed!" and on going up found the deceased lying on the ground

wounded. Croft stated, that he was in Field Place, near Church Lane, and heard voices, which induced him to run towards a bar there, and when within a yard of the bar he heard a blow like the blow of a fist; this was followed by other blows. After the blows, he heard a voice say, "Take that," and in half a minute, to the best of his judgment, the same voice said, "He has *stabbed me!" The wounded [*690] man then ran towards him, and he discovered it to be the deceased. He said, "I am stabbed," three times, and soon after fell on the ground; the prisoner was soon after taken into custody, and was then bleeding at the nose. The prisoner had not any side arms; but his brother, who was with him, had a bayonet. For the defence, the prisoner's brother was called as a witness, and stated, when they had got about twenty yards through the bar mentioned in Croft's evidence, he heard somebody say something, but did not take notice of it, and deceased came up, and struck him on the back of the head, which caused him to fall down, and his bayonet fell out of the sheath upon the stones, and the deceased picked it up, and followed the prisoner, who had gone on; there was a great struggle between them, and very shortly after the deceased cried out, "I am stabbed! I am stabbed!" A surgeon was also called, who proved that there were wounds on the prisoner's hands such as would be made by stabs of a bayonet, and that his back was one uniform bruise. Bosanquet, J., in summing up to the jury, said, "Did the prisoner enter into a contest with an unarmed man, intending to avail himself of a deadly weapon? for if he did, it will amount to murder; but if he did not enter into the contest with the intention of using it, then the question will be, did he use it in the heat of passion, in consequence of an attack made upon him? if he did, then it will be manslaughter. But there is another question. Did he use the weapon in defence of his life? Before a person can avail himself of that defence, he must satisfy the jury that that defence was necessary; that he did all he could to avoid it, and that it was necessary to protect his own life, or to protect himself from such serious bodily harm as would give reasonable apprehension that his life was in immediate danger. If he used the weapon, having no other means of resistance, and no means of escape, in such case, if he retreated as far as he could, he will be justified." The prisoner was found guilty of manslaughter, but strongly recommended to mercy. R. v. Smith, 8 C. & P. 160: 34 E. C. L. R.

Proof of malice—provocation—express malice.] As evidence of provocation is only an answer to that presumption of malice which the law infers in every case of homicide, if there is proof of *express malice* at the time of the act committed, the provocation will not reduce the offence from murder to manslaughter.(1) In such a case, not even previous blows or struggling will reduce the offence to homicide. 1 Russ. by Grea. 520. This rule is illustrated by the following case. Richard Mason was indicted and convicted for the wilful murder of William Mason, his brother; but execution was respited to take the opinion of the judges, upon a doubt whether, under the circumstances given in evidence, the offence amounted to murder or manslaughter. The prisoner, with the deceased and some neighbors, were drinking in a

(1) When a deliberate purpose to kill or do great bodily harm is entertained, and there is a consequent unlawful act of killing, the provocation, whatever it may be, which immediately precedes the act, is to be thrown out of the case and goes for nothing, unless it can be shown that this purpose was abandoned before the act was done. State v. Johnson, 1 Iredell's N. C. Rep. 354; State v. Lane, 4 Id. 113.

When there is express malice, no amount of provocation will make the killing manslaughter. Riggs v. The State, 30 Mississippi, 635; Ex parte Wray, Ibid. 673; Cotton v. The State, 31 Ibid. 504. See Quarles v. The State, 1 Sneed, 407.

friendly manner at a public house; till growing warm in liquor, but not intoxicated, the prisoner and the deceased began in idle sport to push each other about the room. They then wrestled one fall; and soon afterwards played at cudgels by agreement. All this time no tokens of anger appeared on either side, till the prisoner, in the cudgel play, gave the deceased a smart blow on the temple. The deceased thereupon grew angry, and throwing away his cudgel, closed with the prisoner, and they fought a short time in good earnest; but the company interposing, they were soon parted. [*691] The prisoner then *quitted the room in anger; and when he got into the street was heard to say, "Damnation seize me, if I do not fetch something, and stick him;" and being reproved for such expressions, he answered, "I'll be damned to all eternity, if I do not fetch something, and run him through the body." The deceased and the remainder of the company continued in the room where the affray happened: and in about half an hour the prisoner returned, having in the meantime changed a slight for a thicker coat. The door of the room being open to the street, the prisoner stood leaning against the door-post, his left hand in his bosom, and a cudgel in his right; looking in upon the company, but not speaking a word. The deceased seeing him in that posture, invited him into the company; but the prisoner answered, "I will not come in." "Why will you not?" said the deceased. The prisoner replied, "Perhaps you may fall on me, and beat me." The deceased assured him he would not, and added, "Besides, you think yourself as good a man as me at cudgels; perhaps you will play at cudgels with me." The prisoner answered, "I am not afraid to do so, if you will keep off your fists." Upon these words the deceased got up, and went towards the prisoner, who dropped the cudgel as the deceased was coming up to him. The deceased took up the cudgel, and with it gave the prisoner two blows on the shoulder. The prisoner immediately put his right hand into his bosom, and drew out the blade of a tuck-sword, crying, "Damn you, stand off, or I'll stab you!" and immediately, without giving the deceased time to stand off, made a pass at him with the sword, but missed him. The deceased thereupon gave back a little, and the prisoner, shortening the sword in his hand, leaped forward towards the deceased, and stabbed him to the heart, and he instantly died. The judges, at a conference unanimously agreed, "that there are in this case so many circumstances of deliberate malice and deep revenge on the prisoner's part, that his offence cannot be less than wilful murder." R. v. Mason, Foster, 132; 1 East, P. C. 239.

Proof of malice—cases of mutual combat.] The rules with regard to the proof of malice in cases of mutual combat, are not in all respects the same with those which have been already stated with regard to cases of provocation in general, and as the former are of very frequent occurrence it may be convenient to consider them under one head.

In this class of cases the degree or species of provocation does not enter so deeply into the merits of the question, as in those which have been just noticed, and in the former it has been held that where upon words of reproach, or indeed any other sudden provocation, the parties come to blows, and a combat ensues, no undue advantage being taken, or sought on either side, if death ensue, this amounts to manslaughter only. Nor is it material what the cause be, whether real or imagined, or who draws or strikes first, provided the occasion be sudden, and not urged as a cloak for pre-existing malice. 1 East, P. C. 241. Many, says Lord Hale, who were of opinion that bare words of slighting, disdain, or contumely, would not of themselves make such a provocation as to lessen the crime into manslaughter, were yet of this opinion,

that if A. gives indecent language to B., and B. thereupon strikes A., but not mortally, and then A. strikes B. again, and B. kills A., this is manslaughter; for the second stroke made a new provocation, and so it was but a sudden falling out; and *though B. gave the first stroke, and after a blow received from A., B. gives [*692] him a mortal stroke, this is but manslaughter; according to the proverb, the *second blow makes the affray;* and this, adds, Lord Hale, was the opinion of myself and others. 1 Hale, P. C. 456; Foster, 295. But if B. had drawn his sword and made a pass at A., *his sword then undrawn*, and thereupon A. had drawn, and a combat had ensued, in which A. had been killed, this would have been murder; for B. by making his pass, *his adversary's sword undrawn*, showed that he sought his blood, and A.'s endeavor to defend himself, which he had a right to do, will not excuse B. But if B. had first drawn and forborne till his adversary had drawn too, it had been no more than manslaughter. Foster, 295; 1 East, P. C. 242.

With regard to the use of deadly weapons in a case of mutual combat, the rule was laid down by Mr. Justice Bayley, in the following case. The prisoner and Levy quarrelled, and went out to fight. After two rounds, which occupied little more than two minutes, Levy was found to be stabbed in a great many places, and of one of those stabs he almost instantly died. It appeared that nobody could have stabbed him but the prisoner, who had a clasp knife before the affray. Bayley, J., told the jury, that if the prisoner used the knife privately from the beginning, or if, before they began to fight, he placed the knife so that he might use it during the affray, and used it accordingly, it was murder; but that if he took to the knife after the fight began, and without having placed it to be ready during the affray, it was only manslaughter. The jury found the prisoner guilty of murder. R. v. Anderson, 1 Russ. by Grea. 531. Another later case exhibited nearly similar circumstances. The prisoner returning home was overtaken by the prosecutor. They were both intoxicated, and a quarrel ensuing the prosecutor struck the prisoner a blow. They fought for a few minutes, when the prisoner ran back a short distance, and the prosecutor pursued and overtook him. On this the prisoner, who had taken out his knife, gave the prosecutor a cut across the abdomen. The prisoner being indicted for cutting the prosecutor with intent to murder him, Parke, J., left it to the jury whether the prisoner ran back with a malicious intention of getting out his knife to inflict an injury on the prosecutor, and so gain an advantage in the conflict; for if he did, notwithstanding the previous fighting between them on equal terms, and the prosecutor having struck the first blow, he was of opinion that if death had ensued, the crime of the prisoner would have been murder; or whether the prisoner *bonâ fide* ran away from the prosecutor with intent to escape from an adversary of superior strength, but finding himself pursued, drew his knife to defend himself; and in the latter case, if the prosecutor had been killed, it would have been manslaughter only. R. v. Kessal, 1 C. & P. 437: 12 E. C. L. R. In the following case the use of a deadly weapon during a fight was held to be no evidence of malice, the prisoner happening to have the knife in his hand at the commencement of the affray. William Snow was indicted for the murder of Thomas Palmer. The prisoner, who was a shoemaker, lived in the neighborhood of the deceased. One evening the prisoner, who was much in liquor, passed accidentally by the house of the deceased's mother, near which the deceased was at work. He had a quarrel with him there, and after high words they were going to fight, but prevented by the mother, who hit the prisoner in the face and threw water over him. The prisoner went into his *house, but came [*693] out in a few minutes, and set himself down upon a bench before his gate, with a shoemaker's knife in his hand, paring a shoe. The deceased on finishing his work, re-

turned home by the prisoner's house, and called out to him as he passed, "Are not you an aggravating rascal?" The prisoner replied, "What will you be when you are got from your master's feet?" on which the deceased took the prisoner by the collar, and dragging him off the bench, they both rolled into the cart-way. While they were struggling and fighting, the prisoner underneath the deceased, the latter cried out, "You rogue, what do you do with that knife in your hand?" and caught at his arm to secure it; but the prisoner kept his hand striking about, and held the deceased so hard with his other hand that he could not get away. The deceased, however, at length made an effort to disengage himself, and during the struggle, received the mortal wound in his left breast, having before received two slight wounds. The jury found the prisoner guilty of murder; but judgment was respited to take the opinion of the judges, who (in the absence of De Grey, C. J.), were unanimously of opinion that it was only manslaughter. They thought that there was not sufficient evidence that the prisoner lay in wait for the deceased with a malicious design to provoke him, and under that color to revenge his former quarrel by stabbing him, which would have made it murder. On the contrary, he had composed himself to work at his own door, in a summer's evening; and when the deceased passed by provoked him neither by word nor by gesture. The deceased began first by ill language, and afterwards by collaring him and dragging him from his seat, and rolling him in the road. The knife was used openly, before the deceased came by, and not concealed from the bystanders; though the deceased in his passion did not perceive it till they were both down; and though the prisoner was not justifiable in using such a weapon on such an occasion, yet it being already in his hand, and the attack upon him very violent and sudden, they thought it only amounted to manslaughter, and he was recommended for a pardon. R. v. Snow, 1 East, P. C. 244, 245.

Not only will the premeditated use of deadly weapons, in cases of mutual combat, render the homicide murder, but the combat itself may be of such a nature as to make it murder if death ensue. The prisoner was indicted for manslaughter, and the evidence was, that he and the deceased were "fighting up and down," a brutal and savage practice in the north of England. Bayley, J., said to the jury, fighting "up and down" is calculated to produce death, and the foot is an instrument likely to produce death. If death happens in a fight of this description it is murder, and not manslaughter. The prisoner being convicted, Bayley, J., told him that if he had been charged with murder, the evidence adduced would have sustained the indictment. R. v. Thorpe, 1 Lewin, C. C. 171; see R. v. Murphy, 6 C. & P. 103: 25 E. C. L. R.

In order to bring the case within the rule relating to mutual combats so as to lessen the crime to manslaughter, it must appear that no undue advantage was sought or taken on either side. Foster, 295. To save the party making the first assault upon an insufficient legal provocation from the guilt of murder, the occasion must not only be sudden, but the party assaulted must be upon an equal footing, in point of defence at least, at the outset; and this is peculiarly requisite where the attack is made with [*694] deadly or dangerous *weapons. 1 East, P. C. 242. Where persons fight on fair terms, says Mr. Justice Bayley, "and merely with fists, where life is not likely to be at hazard, and the blows passing between them are not likely to occasion death, if death ensues, it is manslaughter; and if persons meet originally on fair terms, and after an interval, blows having been given, a party draws, in the heat of blood, a deadly instrument, and inflicts a deadly injury, it is manslaughter only. But if a party enters into a contest dangerously armed, and fights under an *unfair advantage*, though mutual blows pass, it is not manslaughter, but murder." R. v. Whiteley, 1 Lewin, C. C. 173.

The lapse of time, also, which has taken place between the origin of the quarrel and the actual contest, is in these cases a subject of great consideration, as in the following instance. The prisoner was indicted for the wilful murder of William Harrington. It appeared that the prisoner and the deceased, who had been for three or four years upon terms of intimacy, had been drinking together at a public house, on the night of the 27th of February, till about twelve o'clock; that about one they were together in the street, when they had some words, and a scuffle ensued, during which the deceased struck the prisoner in the face with his fist and gave him a black eye. The prisoner called for the police, and on a policeman coming, went away. He, however, returned again, between five and ten minutes afterwards, and stabbed the deceased with a knife on the left side of the abdomen. The prisoner's father proved that the knife, a common bread and cheese knife, was one which the prisoner was in the habit of carrying about with him, and that he was rather weak in his intellect, but not so much so as not to know right from wrong. Lord Tenterden, in summing up, said, "It is not every slight provocation, even by a blow, which will, when the party receiving it strikes with a deadly weapon, reduce the crime from murder to manslaughter. But it depends upon the time elapsing between the blow and the injury; and also, whether the injury was inflicted with an instrument at the moment in possession of the party, or whether he went to fetch it from another place. It is uncertain, in this case, how long the prisoner was absent. The witness says from five to ten minutes, according to the best of his knowledge. Unless attention is particularly called to it, it seems to me that evidence of time is very uncertain. The prisoner may have been absent less than five minutes. There is no evidence that he went anywhere for the knife. The father says that it was a knife he carried about with him; it was a common knife, such as a man in the prisoner's situation in life might have; for aught that appears, he might have gone a little way from the deceased, and then returned still smarting under the blow he had received. You will also take into consideration the previous habits and connection of the deceased and the prisoner in respect to each other. If there had been any old grudge between them, then the crime which the prisoner committed might be murder. But it seems they had been long in habits of intimacy, and on the very night in question, about an hour before the blow, they had been drinking in a friendly way together. If you think that there was not time and interval sufficient for the passion of a man, proved to be of no very strong intellect, to cool, and for reason to regain her dominion over his mind, then you will say that the prisoner is guilty only of manslaughter; but if you think that the act was the act of a wicked, malicious, and diabolical mind (which, under the circumstances, I *think you hardly would), then you will find him [*695] guilty of murder." The jury found the prisoner guilty of manslaughter. R. v. Lynch, 5 C. & P. 324: 24 E. C. L. R.

In cases of mutual combat, evidence is frequently given of old quarrels between the parties, for the purpose of showing that the person killing acted from malice towards the deceased, but it is not in every case of an old grudge that the jury will be justified in finding malice. Thus, where two persons who have formerly fought in malice, are afterwards, to all appearance, reconciled, and fight again on a fresh quarrel, it shall not be presumed that they were moved by the old grudge: Hawk. P. C. b. 1, c. 31, s. 30; unless it appear that the reconciliation was pretended only. 1 Hale, P. C. 452. If, says Lord Hale, A. sues B., or threatens to sue him, this alone is not sufficient evidence of malice prepense, though possibly they meet and fall out and fight, and one kills the other, if it happens upon sudden provocation; but this may, by circumstances, be heightened into malice prepense, as if A., without any other

provocation, strikes B. upon account of the difference in law, or lies in wait to kill him, or comes with a resolution to strike or kill him. 1 Hale, P. C. 451.

Proof of malice—cases of mutual combat—duelling.] Deliberate duelling, if death ensues, is in the eye of the law, murder, for duels are generally founded in deep revenge. And though a person should be drawn into a duel, not on a motive so criminal, but merely upon the punctilio of what the swordsmen falsely call honor, that will not excuse him. For he that deliberately seeks the blood of another, in a private quarrel, acts in defiance of all laws, human and divine, whatever his motive may be. But if, upon a sudden quarrel, the parties fight upon the spot, or if they presently fetch their weapons, and go into the field and fight, and one of them falls, it will be only manslaughter, because it may be presumed that the blood never cooled. It will, however, be otherwise, if they appoint to fight the next day, or even upon the same day, at such an interval as that the passion might have subsided, or if, from any circumstance attending the case, it may be reasonably concluded that their judgment had actually controlled the first transport of passion before they engaged. The same rule will hold if, after a quarrel, they fall into other discourse or diversions, and continue so engaged a reasonable time for cooling. Foster, 297. It seems agreed, says Hawkins, that wherever two persons in cool blood meet, and fight on a precedent quarrel, and one of them is killed, the other is guilty of murder, and cannot help himself by alleging that he was first struck by the deceased, and that he had often declined to meet him, but was prevailed upon by his importunity, or that it was his intention only to vindicate his reputation, or that he meant not to kill, but only to disarm his adversary, for since he deliberately engaged in an act highly unlawful, he must at his peril abide the consequences. Hawk. P. C. b. 1, c. 31, s. 21. It is said by Lord Hale, that if A. and B. meet deliberately to fight, and A. strikes B., and pursues him so closely that B., in safeguard of his own life, kills A., this is murder in B., because their meeting was a compact and an act of deliberation, and therefore all that follows thereupon is presumed to be done in pursuance thereof, and thus is Dalton (cap. 92, p. 241) to be understood. 1 Hale, P. C. 452. But yet, *quære*, adds Lord Hale, whether if B. had really and *bonâ fide* declined to fight, ran away [*696] as far as he could (suppose it half a mile), *and offered to yield, yet A., refusing to decline it, had attempted his death, and B. after all this kills A. in self-defence, whether it excuses him from murder? But if the running away were only a pretence to save his own life, but was really designed to draw out A. to kill him, it is murder. Ibid. Blackstone has noticed this doubt, but has given no opinion upon the subject: 4 Com. 185; but Mr. East has argued at some length in support of the proposition that such homicide will not amount to murder, on the ground that B., by retreating, expressly renounces the illegal combat, and gives reasonable grounds for inducing the belief that he no longer seeks to hurt his opponent, and that the right of self-defence ought not therefore to be withheld from him. 1 East, 285. But if B. does not retreat *voluntarily*, but is driven to retreat by A., in such case the killing would be murder. Thus it is said by Hawkins, that if a man assault another with malice prepense, and after be driven by him to the wall, and kill him there, in his own defence, he is guilty of murder in respect of his first intent. Hawk. P. C. b. 1, c. 31, s. 26.

In cases of deliberate duelling, in which death ensues, not only is the principal who inflicts the wound guilty of murder, but also the second, and it has been doubted whether the second of the party killed is not also guilty of the same offence. For the latter position, Lord Hale cites the book of 22 Edw., 3 Coron. 262, but he adds

that he thinks the law too much strained in that case, and that though a great misdemeanor, it is not murder. 1 Hale, P. C. 442. But see R. v. Cuddy, 1 C. & K. 210: 47 E. C. L. R., where it was held by Williams, J. (Rolfe, B., being present), that where two persons go out to fight a deliberate duel, and death ensues, all persons who are present, encouraging and promoting that death, will be guilty of murder. And the person who acted as the second of the deceased person in such duel may be convicted of murder, on an indictment charging him with being present, aiding and abetting the person by whose act the death of his principal was occasioned.

The prisoners were indicted for the murder of Charles Flower Mirfin, who was killed in a duel by a Mr. Elliott. Neither of the prisoners acted as a second on the occasion, but there was evidence to show that they and two other persons went to the ground in company with Mr. Elliott, and that they were present when the fatal shot was fired. Vaughan, B., told the jury, "When, upon a previous arrangement, and after there has been time for the blood to cool, two persons meet with deadly weapons, and one of them is killed, the party who occasions the death is guilty of murder; and the seconds also are equally guilty. The question then is, did the prisoners give their aid and assistance by their countenance and encouragement of the principals in this contest?" After observing that neither prisoner had acted as a second, the learned judge continued, "If, however, either of them sustained the principal by his advice or presence, or if you think he went down for the purpose of encouraging and forwarding the unlawful conflict, although he did not say or do anything, yet if he was present, and was assisting and encouraging at the moment when the pistol was fired, he will be guilty of the offence imputed by this indictment." The prisoners were found guilty. R. v. Young, 8 C. & P. 644: 34 E. C. L. R.

Peace officers and private persons killed or killing others in apprehending them.] If, as is frequently the case, the apprehension and *detainer of one person by [*697] another be lawful, then two consequences follow which are important with reference to the crime of murder: First, if the party apprehended resist with violence, and in so doing kill the party apprehending him, it is murder or manslaughter; secondly, if the party apprehending, in repressing the violence of the party apprehended, necessarily kill him, it is excusable.

The right of private persons and of constables to apprehend without warrant has already been considered. *Supra*, pp. 240, *seq.*

If the apprehension be under a warrant, and the warrant be legal and be rightly executed, every person will be bound to obey it, whether or no he be guilty of the charge which gave rise to the issue of the warrant or not.

Peace officer killed or killing others in apprehending them—when the peace officer is protected.] A peace officer is to be considered as acting strictly in discharge of his duty, not only while executing the process intrusted to him, but likewise while he is coming to perform, and returning from the performance of his duty. He is under the protection of the law, *eundo, morando, et redeundo.* And, therefore, if coming to perform his office he meets with great opposition and retires, and in the retreat is killed, this will amount to murder. Foster, 308; 1 Hale, P. C. 463. Upon the same principle, if he meets with opposition by the way, and is killed before he comes to the place (such opposition being intended to prevent his performing his duty, a fact to be collected from the evidence), it will also amount to murder. Foster, 309.

The authority of a constable or other peace officer ceases with the limits of his dis-

trict, and if he attempts to execute process out of the jurisdiction of the court or magistrate by whose orders he acts, and is killed, it is only manslaughter, as in the case of void process. 1 Hale, P. C. 314. So where a plaintiff attempted to execute a writ without a *non omittas* clause, within an exclusive liberty, Holroyd held him a trespasser, and the defendant who had wounded him in resisting, and who was indicted for maliciously cutting, with intent, &c., was acquitted. R. v. Mead, 2 Stark. N. P. C. 205: 3 E. C. L. R.

But if the warrant be directed to a particular constable by name, and it is executed by him within the jurisdiction of the court or magistrate issuing the same, although it be out of the constable's village, that is sufficient. 1 East, P. C. 314; Hawk. P. C. b. 2, c. 13, s. 27. By the 5 Geo. 4, c. 18, s. 6, reciting, that warrants addressed to constables, &c., of parishes, &c., in their character of and as constables, &c., of such respective parishes, &c., cannot be lawfully executed by them out of the precincts thereof respectively, it is enacted, "that it shall be lawful to and for each and every constable, and to and for each and every headborough, tithingman, borseholder, or other peace officer for every parish, township, hamlet, or place, to execute any warrant or warrants of any justice or justices of the peace, or of any magistrate or magistrates, within any parish, hamlet, township, or place, situate, lying, or being within the jurisdiction for which such justice or justices, magistrate or magistrates, shall have acted when granting such warrant or warrants, or when backing or indorsing any such warrant or warrants, in such and the like manner as [*698] if such warrant or warrants had been addressed to such constable, *headborough, tithing-man, borseholder, or other peace officer, specially, by his name or names, notwithstanding the parish, township, hamlet, or place, in which such warrant or warrants shall be executed, shall not be the parish, township, hamlet, or place for which he shall be constable, headborough, tithing-man, or borseholder, or other peace officer, provided that the same be within the jurisdiction of the justice or justices, magistrate or magistrates, so granting such warrant or warrants, or within the jurisdiction of the justice or justices, magistrate or magistrates, by whom any such warrant or warrants shall be backed or indorsed." See 11 & 12 Vict. c. 42.

Where a constable having a warrant to arrest the prisoner gave it to his son, and the latter attempted to apprehend the prisoner, the constable then being in sight, but a quarter of a mile off, Parke, B., held that the arrest was illegal. R. v. Patience, 7 C. & P. 775: 32 E. C. L. R.

In general, where it becomes necessary to prove that the deceased, or the prosecutor, or other person was a constable, it will be sufficient to prove that he acted in that character, which will be *primâ facie* evidence of his regular appointment, without its production. *Vide ante*, pp. 6 & 17.

Where it becomes necessary to show the warrant or writ upon which a constable or other officer has acted, it is sufficient to produce the warrant or writ itself, without proving the judgment or decreee upon which it is founded. Foster, 311, 312; 1 East, P. C. 310. But it is not sufficient to prove the sheriff's warrant to the officer, without producing the writ of *capias, &c.*, upon which it issued. R. v. Mead, 2 Stark. N. P. C. 205: 3 E. C. L. R.; 2 Stark. Ev. 518, 2d ed. Where it is requisite to prove that the party was acting under an authority derived from the articles of war, a copy of the articles, printed by the king's printer, must be produced. In several instances, prisoners have been acquitted on a charge of murder for want of such evidence. 2 Stark. Ev. 519, 2d ed.

Peace officers killed or killing others in apprehending them—regularity of pro-

cess.] Where a peace officer, or other person, having the execution of process, cannot justify without a reliance on such process, it must appear that it is legal.(1) But by this it is only to be understood that the process, whether by writ or warrant, be not defective in the frame of it, and issue, in the ordinary course of justice, from a court or magistrate having jurisdiction in the case.(2) Though there may have been error or irregularity in the proceedings previous to the issuing of the process, yet if the sheriff or other minister of justice be killed in the execution of it, it will be murder; for the officer to whom it is directed must, at his peril, pay obedience to it; and, therefore, if a *ca. sa.* or other writ of the kind issue, directed to the sheriff, and he or any of his officers be killed in the execution of it, it is sufficient, upon an indictment for the murder, to produce the writ or warrant, without showing the judgment or decree. R. v. Rogers, Foster, 312. So in case of a warrant obtained from a magistrate by gross imposition and false information touching the matters suggested in it. R. v. Curtis, Foster, 135, 311. So, though the warrant itself be not in strictness lawful, as if it express not the cause particularly enough, yet if the matter be *within the jurisdiction of the party granting the warrant, the killing of the [*699] officer in the execution of his duty is murder; for he cannot dispute the validity of the warrant, if it be under the seal of the justice, &c. 1 Hale, P. C. 460. In all kinds of process, both civil and criminal, the falsity of the charge contained in such process, that is, the injustice of the demand in one case, or the party's innocence in the other, will afford no matter of alleviation for killing the officer; for every man is bound to submit himself to the regular course of justice. 1 East, P. C. 310; 1 Hale, P. C. 457.

The provisions with regard to the issuing and service of warrants, and the duties generally of justices out of sessions, with respect to persons charged with indictable offences, are now embodied in the statute 11 & 12 Vict. c. 42.

If the process be defective in the frame of it, as if there be a mistake in the name or addition of the party, or if the name of the party or of the officer be inserted without authority, and after the issuing of the process, and the officer in attending to execute it be killed, this is only manslaughter in the party whose liberty is invaded. Foster, 312; 1 East, P. C. 310. The prisoner, who had been arrested and rescued, declared that if Welsh, the officer, attempted to arrest him again, he would shoot him. A writ of rescue was made out and carried to the office of Mr. Deacle, who acted for the under-sheriff of the county, to have the warrants made out. The under-sheriff's custom was to deliver to Deacle sometimes blank warrants, sometimes blank pieces of paper, under the seal of the office, to be afterwards filled up as occasion should require. Deacle made out a warrant against the prisoner on one of these blank pieces of paper, and delivered it to Welsh, who inserted therein the names of two other persons, on the 12th of July. In executing this warrant, one of these persons, in getting into the house to assist in the arrest, was shot by the prisoner. Upon a reference to the judges, they certified that the offence in point of law amounted only to manslaughter. R. v. Stockley, 1 East, P. C. 310. So where the name of another sheriff's officer was inserted in a sheriff's warrant, after it had been signed and sealed, the arrest by the substituted officer was held illegal. R. v. Stevenson, 19 St. Tr. 846. But where the name of an officer is inserted before the warrant is sent out of the sheriff's office, it seems the arrest will not be illegal, on the ground that the war-

(1) The Commonwealth v. Drew et al., 4 Mass. 391.

(2) Although a warrant for an arrest be not strictly legal, yet if the matter be within the jurisdiction of the magistrate who issued it, the killing of an officer in its execution is murder. Boyd v. The State, 17 Georgia, 194.

rant was sealed before the name of the officer was inserted. 1 Russ. by Grea. 620. Thus, where the names of two officers were interlined in a writ of possession, after it was sealed, but before it left the sheriff's office, and in executing it one of the officers was wounded, the party wounding having been indicted under 43 Geo. 3, c. 58, and convicted, the judges held the conviction right. R. v. Harris, 1 Russ. by Grea. 620. But where a magistrate kept a number of blank warrants ready signed, and, on being applied to, filled up one of them and delivered it to an officer, who in attempting to make the arrest was killed, it was held that this was murder in the party killing. Per Lord Kenyon, R. v. Inhab. of Winwick, 8 T. R. 454.

A justice's warrant, commanding a constable to apprehend and bring before him the body of A. to answer all such matters and things as on her majesty's behalf shall be objected against him, on oath, by B., for an assault committed upon B., on, &c., [*700] is bad; as *not showing any information on oath upon which the warrant issues. 1 Q. B. 889 : 41 E. C. L. R.

Under this head it may properly be considered how far any defect in the frame of the process, or any illegality in the arrest, will be a defence to a third person interfering to prevent it, and killing the officer in so doing (1) The question is put by Mr. East in this form. How far the mere view of a person under arrest, or about to be arrested, supposing it to be illegal, *is of itself* such a provocation to a bystander as will extenuate his guilt in killing the officer, in order to set the party free, or prevent the arrest? In the following case it was held by seven of the judges against five, that it was such a provocation. One Bray, constable of St. Margaret's, Westminster, came into St. Paul's, Covent Garden, and without warrant took up one Ann Dekins, as a disorderly person, though she was innocent. The prisoners, strangers to Dekins, meeting her in Bray's custody, drew their swords, and assaulted Bray to rescue her; but on his showing his staff, and declaring he was about the Queen's business, they put up their swords, and he carried her to the round-house in Covent Garden. Soon afterwards the prisoners drew their swords and assaulted Bray, in order to get the woman discharged. Whereupon Bray called Dent to his assistance, to keep the woman in custody, and to defend himself from the violence of the prisoners, when one of the prisoners, before any stroke received, gave Dent a mortal wound. All the judges, except one, agreed that Bray acted without any authority; but that one thought showing his staff was sufficient, and that with respect to the prisoners, he was to be considered as a constable *de facto*. But the main point upon which they differed was, whether the illegal imprisonment of a stranger was, under these circumstances, a sufficient provocation to bystanders; or, in the language of Lord Holt, a provocation to all the subjects of England. Five judges held the case to be murder, and thought that it would have been a sufficient provocation to a relation or a friend, but not to a stranger. The other seven judges who held it to be manslaughter, thought that there was no ground for making such a distinction, and that it was a provocation to all, whether strangers or others, so as to reduce the offence to manslaughter, it being a sudden action, without any precedent malice or apparent design of doing hurt, but only to prevent the imprisonment of the woman, and to rescue one who was unlawfully restrained of her liberty. R. v. Tooley, 2 Lord Raym. 1296; 1 East, P. C. 325. The resolution of the seven judges in this case has been commented upon with much force by Mr. Justice Foster. The prisoners, he observes, upon the first meeting, drew their swords upon the constables, who were unarmed, but put them up, appearing, on cool reflection, to be pacified. At the second meeting the constable received his death-

(1) The Commonwealth v. Drew et al., 4 Mass. 391.

wound, before any blow given or offered by him or his party; that there was no pretence of a rescue; for, before the second encounter, the woman had been lodged in the round-house, which the soldiers could not hope to force; so that the second assault upon the constable seemed rather to be grounded upon resentment, or a principle of revenge for what had passed, than upon any hope to rescue the woman. He concludes with expressing an opinion, that the doctrine advanced in this case is utterly inconsistent with the known rules of law, touching a sudden provocation in the case of homicide, and, which is of more *importance, inconsistent with the [*701] principles upon which all civil government is founded, and must subsist. Foster, 314, 315; 1 East, P. C. 326. In a recent case also, upon R. v. Tooley being cited, Alderson, J., observed that it had been overruled. R. v. Warner, 1 Moo. C. C. 388.

The majority of the judges, in the preceding case, appear to have grounded their opinion upon two former decisions. The first of these is thus stated by Kelynge: Berry and two others pressed a man without authority. The man quietly submitted, and went along with them. The prisoner, with three others, seeing them, instantly pursued them, and required to see their warrant; on which Berry showed them a paper, which the prisoner and his companions said was no warrant, and immediately drawing their swords to rescue the impressed man, thrust at Berry. On this, Berry and his two companions drew their swords, and a fight ensued, in which Hugget killed Berry. R. v. Hugget, Kel. 52. Lord Hale's report of this case is more brief. A press-master seized B. for a soldier, and with the assistance of C. laid hold on him; D. finding fault with the rudeness of C., there grew a quarrel between them, and D. killed C. By the advice of all the judges, except very few, it was ruled that this was but manslaughter. 1 Hale, P. C. 465. The judges were, however, divided in opinion, four holding that it was murder, eight that it was manslaughter. Foster, 314. Mr. Justice Foster is inclined to rest the authority of this case upon the ground of its having been a sudden quarrel and affray, causing a combat between the prisoner and the assistant of the press-master; and he observes that Hale, who, at the conference, concurred in opinion with those who held it to be manslaughter only, says nothing touching the provocation which an act of oppression towards individuals might be supposed to give to the bystanders. He admits, however, that the case, as reported in Kelynge, does indeed turn upon the illegality of the trespass, and the provocation such an act of oppression may be presumed to give to every man, be he stranger or friend, out of mere compassion, to attempt a rescue. Foster, 314. The other case, referred to in R. v. Tooley, was that of Sir Henry Ferrers. Sir Henry Ferrers being arrested for debt upon an illegal warrant, his servant, in attempting to rescue him, as was pretended, killed the officer. But, upon the evidence, it appeared that Sir H. Ferrers, upon the arrest, obeyed, and was put into a house before the fighting between the officer and his servant, and the servant was acquitted of the murder and manslaughter. R. v. Ferrers, Cro. Car. 371. Upon this case Mr. Justice Foster observes, that from the report, it does not appear upon what provocation the quarrel and affray began, and that it is highly probable that no rescue was thought of or attempted. Foster, 313.

This doctrine underwent some discussion in a later case. The prisoner was tried at the Old Bailey for the murder of an assistant to a constable, who had come to arrest a man named Farmello (with whom the prisoner cohabited), as a disorderly person, under 19 Geo. 2, c. 10. Farmello, though not an object of the act, made no resistance, but the prisoner immediately, on the constable and his assistant requiring Farmello to go along with them, without any request to desist, and without speaking, stabbed the assistant. Hotham, B., said it was a very different case from what it

would have been if the blow had been given by Farmello himself. If he, when the [*702] constable *entered the room with an insufficient warrant, had immediately, in his own defence, rather than suffer himself to be arrested, done the deed, the homicide would have been lessened to the crime of manslaughter. The offence also might have been of a different complexion in the eye of the law, if the prisoner had been the lawful wife of Farmello; but standing in the light she did, she was to be considered an absolute stranger to him, a mere stander-by, a person who had no right whatever to be in any degree concerned for him. Thus, being a stranger, and having, before any person had been touched, and when the officers had only required Farmello to go with them, and without saying a word to prevent the intended arrest, stabbed the assistant, she was guilty of murder. He then adverted to R. v. Hugget and R. v. Tooley (*supra*), and observed, that the circumstances there were extremely different from those of the present case. Mr. Justice Gould and Mr. Justice Ashurst concurred in this opinion; but it was thought fit that the jury should find a special verdict, as the case was one of great importance. A special verdict was accordingly found, and the case was subsequently argued before ten of the judges, but no judgment was given, the prisoner either being discharged or having made her escape from prison during the riots in 1780. It is said that the judges held the case to be manslaughter only. R. v. Adey, 1 Leach, 206; 1 East, P. C. 329 (*n*); 1 Russ. by Grea. 635 (*n*), citing R. v. Porter, 9 C. & P. 778: 38 E. C. L. R.

Although it is intimated by Lord Hale, as well as by Hotham, B., in the preceding case, that a distinction may exist between the case of servants and friends, and that of a mere stranger, yet it must be confessed, says Mr. East, that the limits between both are nowhere accurately defined. And after all, the nearer or more remote connection of the parties with each other, seems more a matter of observation to the jury, as to the probable force of the provocation and the motive which induced the interference of a third person, than as furnishing any precise rule of law, grounded on such a distinction. 1 East, P. C. 292; 1 Russ. by Grea. 591.

Peace officers killed or killing others in apprehending them—notice of their authority.] With regard to persons who, in the right of their offices, are conservators of the peace, and in that right alone interfere in the case of riots and affrays, it is necessary, in order to make the offence of killing them amount to murder, that the parties killing them should have some notice with what intent they interpose, otherwise the persons engaged may, in the heat and bustle of the affray, imagine that they came to take a part in it. But in these cases a smaller matter will amount to a due notification. It is sufficient if the peace be commanded, or the officer in any other manner declare with what intent he interposes. And if the officer be within his proper district, and known or generally acknowledged to bear the office which he assumes, the law will presume that the party killing had due notice of his intent, especially if it be in the day-time. In the night, some further notification is necessary; and commanding the peace, or using words of the like import, notifying his business, will be sufficient. Foster, 310.

A bailiff or constable, sworn in at the leet, is presumed to be known to all the inhabitants or residents who are bound to attend at the leet, and are consequently [*703] bound to take notice that he is a constable: *1 Hale, P. C. 461; and in such case, the officer, in making the arrest, is not bound to show the warrant. Id. 459. But if the constable be appointed in some other way, from which the notoriety of his character could not be presumed, some other circumstances would be required to found the presumption of knowledge. And in the night-time some notification would

be necessary in the case of a leet constable. But whether in the day or night-time, it is sufficient if he declares himself to be the constable or commands the peace in the king's name. 1 Hale, P. C. 461. Where a man, assisting two serjeants-at-mace in the execution of an escape warrant, had been killed, a point was reserved for the opinion of the judges, whether or not sufficient notice of the character in which the constable came had been given. It appeared that the officers went to the shop where the party against whom they had a warrant and the prisoner, who was with him, were, and calling out to the former, informed him that they had an escape warrant against him, and required him to surrender, otherwise they should break open the door. In proceeding to do so, the prisoner killed one of the serjeant's assistants. Nine of the judges were of opinion that no precise form of words was required; that it was sufficient that the party had notice that the officer came not as a mere trespasser, but claiming to act under a proper authority. The judges who differed thought that the officers ought to have declared in an explicit manner what sort of warrant they had. They said that an escape does not *ex vi termini*, or in notion of law, imply any degree of force or breach of the peace, and consequently the prisoner had not due notice that they came under the authority of a warrant grounded on a breach of the peace; and they concluded that, for want of this due notice, the officers were not to be considered as acting in the discharge of their duty. R. v. Curtis, Foster, 135.

With regard to a *private bailiff* or *special bailiff*, it must either appear that the party resisting was aware of his character, or there must be some notification of it by the bailiff, as by saying *I arrest you*, which is of itself sufficient notice; and it is at the peril of the party if he kills him after these words, or words to the same effect, and it will be murder. 1 Hale, P. C. 461; R. v. Mackally, 9 Co. 69, b; 1 Russ. by Grea. 627. It is said also, that a private bailiff ought to show the warrant upon which he acts, if it is demanded. 1 Russ. by Grea. 627; citing 1 Hale, P. C. 583, 588, 589. It seems, however, that this must be understood of a demand made, after submitting to the arrest. The expression in Hale (459) is, "such person must show his warrant, or signify the contents of it;" and it appears, from the authority of the same writer, *supra*, that even the words, "I arrest you," are a sufficient signification of the officer's authority.

Peace officers killed or killing others in apprehending them—mode of executing their duty.] In cases of *felony actually* committed, if the offender will not suffer himself to be arrested, but stands upon his own defence, or flies, so that he cannot possibly be apprehended alive by those who pursue him, whether public officers or private persons, with or without a warrant, he may be lawfully killed by them.(1) Hawk. P. C. b. 1, c. 28, s. 11. Where, says Mr. Justice Foster, a felony is committed, and the felon flies from justice, and a dangerous wound is given, it is the duty of every man to use his best *endeavors for preventing an escape; and [*704] if, in the pursuit, the party flying is killed, *where he cannot be otherwise overtaken*, it is justifiable homicide. Foster, 271.

In case an innocent person is *indicted for felony*, and will not suffer himself to be arrested by the officer *who has a warrant for that purpose*, he may be lawfully killed by him, if he cannot otherwise be taken; for there is a charge against him on record, to which, at his peril, he is bound to answer. Hawk. P. C. b. 1, c. 28, s. 12. It

(1) A well-grounded belief that a felony is about to be committed, will extenuate a homicide committed in prevention of the felony, but not a homicide committed in pursuit by an individual of his own accord. State v. Rutherford, 1 Hawks, 457.

seems, however, that a constable, or other peace officer, is bound to arrest a person *indicted* of felony *without a warrant*, and that therefore, if it be not possible otherwise to apprehend him, he will be justified in killing him, although he have no warrant. See 1 East, P. C. 300.

Whether or not a peace officer who attempts, without a warrant, to apprehend a person on *suspicion of felony*, will be justified in killing him, in case he cannot otherwise apprehend him, is a case requiring great consideration. Even in the instance of breaking open the outward door of a house, a peace officer is not justified, unless he is acting under a warrant, in proceeding to that extremity: Foster, 321, and *vide post*, p. 705; still less could he be justified in a matter concerning life. However, according to Lord Hale, the officer would be justified in killing the party if he fly, and cannot otherwise be apprehended. 2 Hale, P. C. 72, 80.

In cases of *misdemeanors*, the law does not admit the same severe rule as in that of felonies. The cases of arrests for misdemeanors and in civil proceedings are upon the same footing. Foster, 271. If a man charged with a misdemeanor, or the defendant in a civil suit, flies, and the officer pursues, and in the pursuit kills him, it will be murder. 1 Hale, P. C. 481; Foster, 451. Or rather, according to Mr. Justice Foster, it will be murder or manslaughter, as circumstances may vary the case. For if the officer, in the heat of the pursuit, and merely to overtake the defendant, should trip up his heels, or give him a stroke with an ordinary cudgel, or other weapon not likely to kill, and death should ensue, it seems that this would amount to no more than manslaughter, and in some cases not even to that offence. But if he had made use of a deadly weapon, it would have amounted to murder. Foster, 271.

If persons engaged in a riot, or forcible entry, or detainer, stand in their defence, and continue the force in opposition to the command of a justice of the peace, &c., or resist such justice endeavoring to arrest them, the killing of them may be justified, and so perhaps may the killing of any dangerous rioters by private persons, who cannot otherwise suppress them, or defend themselves from them. Hawk. P. C. b. 1, c. 28, s. 14.

It is to be observed, that in all the above cases where the officer is justified by his authority, and exercises that authority in a legal manner, if he be resisted, and in course of that resistance is killed, the offence will amount to murder.

With regard to the point of time at which a constable or other peace officer is justified, in case of resistance, in resorting to measures of violence, it is laid down, that although in the case of common persons, it is their duty, when they are assaulted, to fly as far as they may, in order to avoid the violence, yet a constable or other peace officer, if assaulted in the execution of his duty, is not bound to give way, [*705] and if he kills his assailant, it is adjudged homicide in self-defence. *1 Hale, P. C. 481. This rule holds in the case of the execution of civil process, as well as in apprehensions upon a criminal charge. Hawk. P. C. b. 1, c. 28, s. 17. But though it be not necessary that the officer should retreat at all, yet he ought not to come to extremities upon every slight interruption, nor without a reasonable necessity. Therefore, when a collector, having distrained for duty, laid hold of a maid-servant who stood at the door to prevent the distress being carried away, and beat her head and back several times against the door-post, of which she died; although the court held her opposition to them to be a sufficient provocation to extenuate the homicide, yet they were clearly of opinion that the prisoner was guilty of manslaughter, in so far exceeding the necessity of the case. And where no resistance at all is made, and the officer kills, it will be murder. So if the officer kills the party after the resistance

is offered, and the necessity has ceased, it is manslaughter at least; and if the blood had time to cool, it would, it seems, be murder. 1 East, P. C. 297.

In respect to the time of executing process, it may be done at night as well as by day; and therefore killing a bailiff, or other officer, under pretence of his coming at an unseasonable hour, would be murder. But since the statute 29 Car. 2, c. 7, s. 6, all process warrants, &c., served or executed on a Sunday are void, except in cases of treason, felony, or breach of the peace, and therefore an arrest on any other account, made on that day, is the same as if done without any authority at all. 1 East, P. C. 324. But see now 11 & 12 Vict. c. 42, s. 4.

In executing their duty, it often becomes a question in what cases constables and other peace officers are justified in breaking open windows and doors. In no case whatever is an officer justified in breaking an outward door or window, unless a previous notification has been given, and a demand of entrance made and refused. Foster, 320; Hawk. P. C. b. 2, c. 14, s. 1.

Where a felony has been actually committed, or a dangerous wound given, a peace officer may justify breaking an entrance door to apprehend the offender without any warrant, but in cases of misdemeanors and breach of the peace, a warrant is required; it likewise seems to be the better opinion that mere suspicion of felony will not justify him in proceeding to this extremity, unless he be armed with a warrant. Foster, 320, 321; Hawk. P. C. b. 2, c. 14, s. 7; 1 Russ. by Grea. 628; *sed vide*, 1 Hale, P. C. 583; 2 Id. 92.

In cases of writs, an officer is justified in breaking an outer door upon a *capias*, grounded on an indictment for any crime whatever, or upon a *capias* to find sureties for the peace, or the warrant of a justice for that purpose. Hawk. P. C. b. 2, c. 14, s. 3. So upon a *capias utlagatum*, or *capias pro fine:* Id. 1 Hale, P. C. 459; or upon an *habere facias possessionem:* 1 Hale, P. C. 458; or upon the warrant of a justice of the peace for levying a forfeiture in execution of a judgment or conviction: Hawk. P. C. b. 2, c. 14, s. 5.

If there be an affray in a house, and manslaughter or bloodshed is likely to ensue, a constable having notice of it, and demanding entrance, and being refused, and the affray continuing, may break open the doors to keep the peace. 2 Hale, P. C. 95; Hawk. P. C. b. 2, c. 14, s. 8. And if there be disorderly drinking or noise in a house at an unseasonable hour of the night, especially in inns, taverns, or ale-houses, the constable or his watch demanding entrance, *and being refused, may break [*706] open the doors to see and suppress the disorder. 2 Hale, P. C. 95; 1 East, P. C. 322. So if affrayers fly to a house, and he follows them with fresh suit, he may break open the doors to take them. Hawk. P. C. b. 1, c. 63, s. 16. But it has been doubted whether a constable can safely break open doors in such a case without a magistrate's warrant, and it is said, that at least there must be some circumstances of extraordinary violence to justify him in so doing. 1 Russ. by Grea. 294 (*n*).

In civil suits, an officer cannot justify the breaking open an outward door or window to execute the process; if he do break it open, he is a trespasser. In such case, therefore, if the occupier resist the officer, and in the struggle kill him, it is only manslaughter. For every man's house is his castle for safety and repose to himself and his family. It is not murder, because it was unlawful for the officer to break into the house; but it is manslaughter, because he knew him to be a bailiff. Had he not known him to be a bailiff, it would have been no felony, because done in his house. 1 Hale, P. C. 458. This last instance, says Mr. East, which is set in opposition to the second, must be understood to include at least a reasonable ground of suspicion that the party broke the house with a felonious intent, and that the party

did not know, or had reason to believe, that he was only a trespasser. 1 East, P. C. 321, 322.

The privilege is confined to the *outer doors* and windows only—for if the sheriff or a peace officer enter a house by the outer door, being open, he may break open the inner doors, and the killing in such case would be murder. 1 Hale, P. C. 458. If the party whom the officer is about to arrest, or the goods which he is about to seize, be within the house at the time, he may break open any inner doors or windows to search for them, without demanding admission. Per Gibbs, J., Hutchinson v. Birch, 4 Taunt. 619. But it seems that if the party against whom the process has issued be not within the house at the time, the officer must demand admittance before he will be justified in breaking open an inner door. Ratcliffe v. Burton, 3 Bos. & Pul. 223. So if the house be that of a stranger, the justification of the officer will depend upon the fact of the goods, or the persons against whom he is proceeding, being in the house at the time. Cooke v. Birt, 5 Taunt. 765: 1 E. C. L. R.; Johnson v. Leigh, 6 Taunt. 240; 1 Russ. by Grea. 621. An officer attempting to attach the goods of the prisoner in his dwelling-house, put his hand over the hatch of the door which was divided into two parts, the lower hatch being closed and the higher open. A struggle ensued between the officer and a friend of the prisoner, in the course of which the officer having prevailed, the prisoner shot at and killed him, and this was held murder. R. v. Baker, 1 East, P. C. 323. In the above case there was proof of a previous resolution in the prisoner to resist the officer whom he afterwards killed. 1 East, P. C. 323.

The privilege likewise extends only to those cases where the occupier or any of his family, who have their domestic or ordinary residence there, are the objects of the arrest; and if a stranger, whose ordinary residence is elsewhere, upon pursuit, takes refuge in the house of another, such house is no castle of his, and he cannot claim the benefit of sanctuary in it. Foster, 320, 321; 1 East, P. C. 323. But this must be taken subject to the limitation already expressed in regard to breaking open inner doors in such cases, viz., that the officer will only be justified by the fact of the [*707] person sought *being found there. *Supra*, 1 East, P. C. 324; 1 Russ. by Grea. 631 (*n*).

The privilege is also confined to arrests *in the first instance;* for if a man legally arrested (and laying hands on the prisoner, and pronouncing the words of arrest, constitute an actual arrest) escape from the officer, and take shelter in his own house, the officer may, upon fresh pursuit, break open the outer door, in order to retake him, having first given due notice of his business, and demanded admission, and having been refused. If it be not, however, on fresh pursuit, it seems that the officer should have a warrant from a magistrate. 1 Hale, P. C. 459; Foster, 320; 1 East, P. C. 324.

Peace officers killed or killing others in apprehending them—mode (where an officer is killed) in which that killing has been effected.] It is a matter of very serious consideration, whether in all cases where a peace officer or other person is killed while attempting to enforce an illegal warrant, such killing shall, under circumstances of great cruelty or unnecessary violence, be deemed to amount to manslaughter only. In R. v. Curtis, Foster, 135, *ante*, p. 703, the prisoner being in the house of a man named Cowling, who had made his escape, swore that the first person who entered to retake Cowling should be a dead man, and, immediately upon the officers breaking open the door, struck one of them on the head with an axe and killed him. This was held murder, and a few of the judges were of opinion, that even if the offi-

cers could not have justified breaking open the door, yet that it would have been a bare trespass in the house of Cowling, without any attempt on the property or person of the prisoner; and admitting that a trespass in the house, with an intent to make an unjustifiable arrest of the owner, could be considered as some provocation to a by-stander, yet surely knocking a man's brains out, or cleaving him down with an axe, on so slight a provocation, savored rather of brutal rage, or, to speak more properly, of diabolical mischief, than of human frailty, and it ought always to be remembered, that in all cases of homicide upon sudden provocation, the law indulges to human frailty, and to that alone. So in R. v. Stockley, *ante*, p. 696, the fact that the prisoner deliberately resolved upon shooting Welsh, in case he offered to arrest him again, was, it has been argued, sufficient of itself to warrant a conviction for murder, independently of the legality of the warrant. 1 East, P. C. 311.

When a bailiff, having a warrant to arrest a man, pressed early into his chamber with violence, but not mentioning his business, and the man not knowing him to be a bailiff, nor that he came to make an arrest, snatched down a sword hanging in his chamber, and stabbed the bailiff, whereof he died; this was held not to be murder, for the prisoner did not know but that the party came to rob or kill him, when he thus violently broke into his chamber without declaring his business. 1 Hale, P. C. 470. A bailiff having a warrant to arrest C. upon a *ca. sa.* went to his house and gave him notice. C. threatened to shoot him if he did not depart, but the bailiff, disregarding the threats, broke open the windows, upon which C. shot and killed him. It was ruled, 1, that this was not murder, because the bailiff had no right to break the house; 2, that it was manslaughter, because C. knew him to be a bailiff; but, 3, had he not known him to be a bailiff, it had been no felony, because done in defence *of his house. R. v. Cook, 1 Hale, P. C. 458; Cro. Car. 537; W. [*708] Jones, 429.

These decisions would appear to countenance the position, that where an officer attempts to execute an illegal warrant, and is in the first instance resisted with such violence by the party that death ensues, it will amount to manslaughter only. But it should seem that in analogy to all other cases of provocation, this position requires some qualification. If it be possible for the party resisting to effect his object with a less degree of violence than the infliction of death, a great degree of unnecessary violence might, it is conceived, be evidence of such malice as to prevent the crime from being reduced to manslaughter. In R. v. Thompson, 1 Moo. C. C. 80, where the officer was about to make an arrest on an insufficient charge, the judges adverted to the fact that the prisoner was in such a situation that he could not get away. In these cases, it would seem to be the duty of the party whose liberty is endangered to resist the officer with as little violence as possible, and that if he uses great and unnecessary violence, unsuited both to the provocation given and to the accomplishment of a successful resistance, it will be evidence of malice sufficient to support a charge of murder. So also where, as in R. v. Stockley (*ante*, p. 699), and in R. v. Curtis (*ante*, p. 703), the party appears to have acted from motives of express malice, there seems to be no reason for withdrawing such from the operation of the general rule (*vide ante*, p. 690), that provocation will not justify the party killing, or prevent his offence from amounting to murder, where it is proved that he acted at the time from express malice. And of this opinion appears to be Mr. East, who says, "It may be worthy of consideration whether the illegality of an arrest does not place the officer attempting it exactly on the same footing as any other wrong-doer." 1 East, P. C. 328.

It may be remarked, that the question is fully decided in the Scotch law, the rule

being as follows: In resisting irregular and defective warrants, or warrants executed in an irregular way, or upon the wrong person, it is murder if death ensue to the officer by the assumption of lethal weapons, where no great personal violence has been sustained. Alison's Princ. Cr. Law of Scotl. 25. If, says Baron Hume, instead of submitting for the time, and looking for redress to the law, he shall take advantage of the mistake to stab or shoot the officer, when no great struggle has yet ensued, and no previous harm of body has been sustained, certainly he cannot be found guilty of any lower crime than murder. 1 Hume, 250. The distinction appears to be, says Mr. Alison, that the Scotch law reprobates the *immediate* assumption of lethal weapons in resisting an illegal warrant, and will hold it as murder if death ensue by such immediate use of these, the more especially if the informality or error was not known to the party resisting; whereas the English practice makes such allowance for the irritation consequent upon the irregular interference with liberty, that it accounts death inflicted under such circumstances as manslaughter only. Alison's Princ. Cr. Law of Scotl. 28; see also 1 Russ. by Grea. 621 (*n*).

In case of death ensuing, where resistance is made to officers in the execution of their duty, it sometimes becomes a question how far the acts of third persons, who take a part in such resistance, or attempt to rescue the prisoner, shall be held to affect the latter. If the party who is arrested yield himself, and make no resistance, [*709] but others *endeavor to rescue him, and he do no act to declare his joining with them, if those who come to rescue him kill any of the bailiffs, it is murder in them, but not in the party arrested; otherwise, if he do any act to countenance the violence of the rescuers. R. v. Stanley, Kel. 87; 1 Russ. by Grea. 536. Jackson and four other robbers being pursued by the hue and cry, Jackson turned round upon his pursuers, the rest being in the same field, and refusing to yield, killed one of them. By five judges who were present this was held murder, and inasmuch as all the robbers were of a company, and made a common resistance, and one animated the other, all those who were of the company in the same field, though at a distance from Jackson, were all principals, viz., present, aiding and abetting. They also resolved, that one of the malefactors being apprehended a little before the party was hurt, and being in custody when the stroke was given, was not guilty, unless it could be proved that after he was apprehended he had animated Jackson to kill the party. 1 Hale, P. C. 464. Where A. beat B., a constable, in the execution of his duty, and they parted, and then C., a friend of A., fell upon the constable, and killed him in the struggle, but A. was not engaged in the affair, after he parted from B., it was held that this was murder only in C., and A. was acquitted, because it was a sudden quarrel, and it did not appear that A. and C. came upon any design to ill-use the constable. Anon. 1 East, P. C. 296.

It is matter of fact, for the jury in these cases, to determine in what character the third party intervened. If he interfered for the purpose of aiding the person in custody to rescue himself, and in so doing killed the bailiff, it would be murder, but if, not knowing the cause of the struggle, he interposed with intent to prevent mischief, it would not amount to murder. 1 East, P. C. 318; 1 Russ. by Grea. 365. See Kel. 86; Sid. 159.

The prisoners were indicted for murder. It appeared that a body of persons had assembled together, and were committing a riot. The constables interfering for the purpose of dispersing the crowd and apprehending the offenders, resistance was made to them by the mob, and one of the constables was beaten severely, and afterwards died. The prisoners all took part in the violence used, some by beating him with sticks, some by throwing stones, and some by striking him with their fists. Alder-

son, B., told the jury that in considering the case, they would have to determine whether all the prisoners had the common intent of attacking the constables; if so, each of them was responsible for all the acts of all the others done for that purpose, and if all the acts done by each if done by one man would together show such violence, and so long continued, that from them the jury might infer an intention to kill the constable, it would be murder in them all; but if they could not infer such an intention that they ought to find them guilty of manslaughter. The prisoners were convicted of the latter offence. R. v. Macklin, 2 Lewin, C. C. 225.

Impressment of seamen.] Whether persons in her majesty's navy, acting in the impressment of seamen, are to be held to enjoy, in the execution of their duty, the same privilege as a peace officer acting by virtue of a warrant, does not seem to be well settled. It is clear, however, that in order to justify the act there must be a warrant, and that it must be executed by a proper officer. It is, however, laid down *by Mr. East, that if there be a proper officer, with a legal warrant, to im- [*710] press, and the party endeavored to be taken, being a fit object for that service, refuse to submit, and resist and kill the officer, or any of his assistants, they doing no more than is necessary to impress the mariner, it will be murder. 1 East, P. C. 308. On the other hand, if the party attempted to be pressed be killed in such a struggle, it seems justifiable, provided the resistance could not be otherwise overcome; and the officer need not give way, but may freely repel force by force. Id. The following is one of the few cases to be found on this subject, and it can scarcely be said to recognize any principle with regard to the practice of impressment. An officer in the impress service put one of his seaman on board a boat belonging to one William Collyer, a fisherman, with intent to bring it under the stern of another vessel, in order to see if there were any fit objects for the impress service on board. The boat steered away in another direction; and the officer pursued in another vessel for three hours, firing several shots at her with a musket loaded with ball, *for the purpose of hitting the halyards and bringing the boat to*, which was found to be the usual way, one of which shots unfortunately killed Collyer. The court said it was impossible for it to be more than manslaughter. This, it may be presumed, was on the ground that the musket was not levelled at the deceased, nor any bodily hurt intended to him. But inasmuch as such an act was calculated to breed danger, and not warranted by law, though no bodily hurt was intended, it was manslaughter; and the defendant was burned in the hand. R. v. Phillip, Cowper, 832; 1 East, P. C. 308. The following cases only establish the position, that the impressment of persons without a warrant is an illegal proceeding, and that the parties concerned do not enjoy the protection afforded to ministers of the law in the execution of their duty. The lieutenant of a press-gang, to whom the execution of a warrant was properly deputed, remained in King Road in the port of Bristol, while his boat's crew went some leagues down the channel by his directions to press seamen. It was held that this impressment was illegal, and one of the press-gang being killed, in the furtherance of that service, by a mariner, in a vessel which they had boarded with intent to press such persons as they could meet with, it was ruled to be only manslaughter, though no personal violence had been offered by the press-gang. R. v. Broadfoot, Foster, 154. So where the mate of a ship and a party of sailors, without the captain, who had the warrant, or the lieutenant, who was deputed to execute it, impressed a man, and on his resisting, the prisoner, one of the party, struck him a violent blow with a large stick, of which he died some days afterwards, it was adjudged murder. R. v. Dixon, 1 East, P. C. 313. In this case the party attempted to be impressed was not a mariner,

and the attempt to impress him was therefore illegal on that ground, as upon the ground that neither the captain nor lieutenant was present. 1 East, P. C. 313. A press warrant had been directed to Lieutenant Wm. Palmer, enjoining all mayors, &c., to assist him and *those employed by him* in the execution thereof. Palmer gave verbal orders to the prisoners and several others to impress certain seafaring men, but the delegation was held to be clearly bad, and the execution of the warrant by the prisoners, Palmer not being there, to be illegal, though it was proved to be the constant custom of the navy to delegate the authority in this manner. R. v. Borthwick, 1 Dougl. 267; 1 East, P. C. 313.

[*711] *A sailor in the royal navy, on duty as a sentinel, has no authority to fire upon persons approaching the ship against orders. The prisoner was sentinel on board the Achille, when she was paying off. The orders to him from the preceding sentinel were to keep off all boats, unless they had officers with uniforms in them, or unless the officers on deck allowed them to approach, and he received a musket, three blank cartridges, and three balls. Some boats pressing forwards, he called upom them repeatedly to stop; but one of them persisted, and came close under the ship. He then fired at a man who was in the boat and killed him. It was put to the jury whether he did not fire under the mistaken impression that it was his duty, and they found that he did. But on a case reserved, the judges resolved unanimously, that it was, nevertheless, murder. They thought it, however, a proper case for pardon; and further, they were of opinion that if the act had been necessary for the preservation of the ship, as if the deceased had been stirring up a mutiny, the sentinel would have been justified. R. v. Thomas, 1 Russ. by Grea. 614.

Killing in defence of person or property.] The rule of law upon this subject is thus laid down by Mr. East: A man may repel force by force in defence of his person, habitation, or property, against one who manifestly intends or endeavors by *violence* or *surprise* to commit a known felony, such as rape, robbery, arson, burglary, or the like. In these cases he is not obliged to retreat, but may pursue his adversary until he has secured himself from all danger, and if he kill him in so doing it is justifiable self-defence; as on the other hand, the killing by such felons of any person so lawfully defending himself, will be murder. But a bare fear of any of these offences, however well grounded, as that another lies in wait to take away the party's life, unaccompanied by any overt act indicative of such an intention, will not warrant him in killing that other by way of precaution, there being no actual danger at the time.(1) 1 East, P. C. 271, 272. Not only is the party himself whose person or

(1) The belief that a person designs to kill me will not prevent my killing him from being murder, unless he is making some attempt to execute his design, or at least is in an apparent situation to do so, and thereby iaduces me reasonably to think that he iatends to do it immediutely. State v. Scott, 4 Iredell's N. C. Law Rep. 409.

Whenever there is reasonable ground to believe that there is a design to destroy life, to rob, or to commit a felony, a killing to arrest such a design is justifiable; but it is for the jury to judge of the reasonableness of such apprehension. The State v. Harris, 1 Jones's Law, 190; Dill v. The State, 25 Alabama, 15; Dyson v. The State, 26 Mississippi, 362.

A person having reasonable apprehension of great personal violence, involving imminent peril to life or limb, may protect himself even at the risk of his assailant's life, if necessary. Holmes v. The State, 23 Alabama, 17; Carroll v. The State, Ibid. 28; see Stewart v. The State, 1 Ohio State Rep. 66; Reppy v. The State, 2 Head, 217; Payne v. The Commonwealth, 1 Metcalf, 370; The People v. Cole, 4 Parker, C. R. 35; Pond v. The People, 8 Michigan, 150; Dupree v. The State, 33 Alabama, 380; Logue v. The Commonwealth, 2 Wright (Penna.), 265; Hinton v. The State, 24 Texas, 454; Schiner v. The People, 23 Illinois, 17; Maher v. The People, 24 Ibid. 241; The State v. O'Connor, 31 Missouri, 389; Rapp v. The Commonwealth, 14 B. Monroe, 614; McAuley v. The State, 3 Iowa, 435; Keener v. The State, 18 Georgia, 194; Teal v. The State, 22 Georgia, 75; Staten v. The State, 30 Mississippi, 619; Meredith v. The Commonwealth, 18 B. Monroe, 49; The State v. Swift, 14 Louisiana Annual, 827.

When a man expects to be attacked, the right to defend himself does not arise until he has done

property is the object of the felonious attack, justified in resisting in the manner above mentioned, but a servant of any other person may lawfully interpose, in order to prevent the intended mischief. Thus, in the instances of arson and burglary, a lodger may lawfully kill the assailant in the same manner as the owner himself might do, but subject to the same limitations. (*Sed vide post*, p 716.) In this case there seems to be no difference between the case of the person assaulted and those who come in aid against such felons. The legislature itself seems to have considered them on the same footing, for in the case of the Marquis de Guiscard, who stabbed Mr. Harley while sitting in council, they discharged the party who gave the mortal wound from all manner of prosecution on that account, and declared the killing to be a lawful and necessary action. (9 Anne, c. 16.) 1 East, P. C. 289; Foster, 274; R. v. Cooper, Cro. Car. 544.

With regard to the nature of the intended offence, to prevent which it is lawful instantly to use the last violence, and to put the assailant to death, it is only to such crimes as in their nature betoken an urgent necessity, which admits of no delay, that the rule extends. Of this nature are what have been termed *known* felonies, in contra-distinction as it seems to such secret felonies as may be committed without violence to the person, such as picking the pocket, &c. Foster, 274; *1 East, [*712] P. C. 273. Where an attempt is made to murder, or to rob, or to ravish, or to commit burglary, or to set fire to a dwelling-house, if the attack be made by the assailant with violence and by surprise, the party attacked may lawfully put him to death. Ibid.

A statute passed in the 24 Hen. 8 (c. 5), upon this subject, in affirmance of the common law, after reciting that it had been doubted whether, if any person should attempt feloniously to rob or murder any persons in or near any common, highway, cartway, or footway, or in their mansions, messuages, or dwelling-places, or attempt to break any dwelling-house in the night-time, and should happen in such felonious intent to be slain by those whom they should attempt so to rob or murder, by any person being in their dwelling-house attempted to be broken open, the person so happening to slay the person so attempting to commit murder or burglary, should forfeit goods and chattels, enacts that if any person or persons be indicted or appealed of or for the death of any such evil-disposed person or persons attempting to rob, murder, or burglariously to break mansion-houses, as is above said, the person or persons so indicted or appealed thereof, and of the same by verdict so found and tried, shall not forfeit or lose any lands, tenements, goods, or chattels, for the death of any such evil-disposed person in such manner slain, but shall be thereof and for the same fully acquitted and discharged. Though the statute only mentions certain cases, it must not be taken to imply an exclusion of any other instances of justifiable homicide, which stand upon the same footing of reason and justice. Thus the killing of one who attempts the wilful burning of a house is free from forfeiture, without the aid of the

everything to avoid that necessity. The People v. Sullivan, 3 Selden, 396; Mitchell v. The State, 22 Georgia, 211; Lyon v. The State, Ibid. 399; McPherson v. The State, Ibid. 478; The State v. Ingold, 4 Jones's Law, 216; Colton v. The State, 31 Mississippi, 504; The People v. Hurley, 8 California, 390; The State v. Thompson. 9 Iowa, 188; The State v. Baker, 1 Jones's Law, 267; United States v. Mingo, 2 Curtis, C. C. 1; Haynes v. The State, 17 Georgia, 465.

As to threats by deceased, see Keener v. The State, 18 Georgia, 194; Atkins v. The State, 16 Arkansas, 568; The State v. Hays, 23 Missouri, 287; Wall v. The State, 18 Texas, 682; Lingo v. The State, 29 Georgia, 470; Dupree v. The State, 33 Alabama, 380; Newcomb v. The State, 37 Mississippi, 383; Coker v. The State, 20 Arkansas, 53; The People v. Lombard, 17 California, 316; Campbell v. The People, 16 Illinois, 17; Landes v. The State, 12 Texas, 462.

When he who kills another seeks and provokes an assault on himself, in order to have a pretext for stabbing an adversary, and does, on being assaulted, stab and kill him, such killing is not excusable homicide in self-defence. Stewart v. The State, 1 Ohio State Rep. 66.

statute; and though it only mentions the breaking a house in the night-time (which must be intended a breaking accompanied with a felonious intent), yet a breaking in the daytime with a like purpose must be governed by the same rule. 1 East, P. C. 272, 273.

The rule extends to felonies only. Thus, if one comes to beat another, or to take his goods as a trespasser, though the owner may justify a battery for the purpose of making him desist, yet if he kill him, it will be manslaughter. 1 Hale, P. C. 485, 486; 1 East, P. C. 272.(1)

It is not essential that an actual felony should be about to be committed in order to justify the killing. If the circumstances are such as that, after all reasonable caution, the party suspects that the felony is about to be immediately committed, he will be justified in making the resistance, as in the following case: Levet being in bed and asleep, his servant, who had procured Frances Freeman to help her in her work, went to the door, about twelve o'clock at night, to let her out, and conceived she heard thieves about to break into the house. Upon this she awakened her master, telling him what she apprehended. He took a drawn sword, and the servant fearing that Freeman should be seen, hid her in the buttery. Mrs. Levet seeing Freeman in the buttery, and not knowing her, conceived her to be the thief, and called to her husband, who entered the buttery in the dark, and thrusting before him with his sword, struck Freeman under the breast, of which wounds she instantly died. This was ruled to be misadventure only. R. v. Levet, Cro. Car. 538; 1 Hale, P. C. 42, 474. Possibly, says Mr. Justice Foster, this might have been ruled manslaughter, due circumspection not having been used. Foster, 299.

[*713] *Whether a person who is *assaulted* by another will be justified in using, in the first instance, such violence in his resistance as will produce death, must depend upon the nature of the assault, and the circumstances under which it is committed. It may be of such a character that the party assailed may reasonably apprehend death, or great violence to his person, as in the following case: Ford being in possession of a room at a tavern, several persons persisted in having it, and turning him out, but he refused to submit, when they drew their swords upon Ford and his company, and Ford, drawing his sword, killed one of them, and it was adjudged justifiable homicide. Both in Kelynge and in Foster a *quære* is added in this case. But Mr. East observes, that though the assailants waited till Ford had drawn his sword (which by no means appears), yet if more than one attacked him at the same time (and as he was the only one of the party who seems to have resisted, such probably was the case), the determination seems to be maintainable. R. v. Ford, Kel. 51; 1 East, P. C. 243. So in R. v. Mawgridge, great violence was held justifiable in the case of a sudden assault. Mawgridge, upon words of anger, threw a bottle with great force at the head of Cope, and immediately drew his sword. Cope returned a bottle at the head of Mawgridge, which it was lawful for him to do in his own defence, and wounded him, whereupon Mawgridge stabbed Cope, which was ruled to be murder; for Mawgridge, in throwing the bottle, showed an intention to do some great mischief, and his drawing immediately showed that he intended to follow up the blow. R. v. Mawgridge, Kel. 121; 2 Lord Raym. 1489; Foster, 296. Upon this case, Mr. East has made the following remarks: The words previously spoken by Cope could form no justification for Mawgridge, and it was reasonable for the former to

(1) If one man deliberately kills another to prevent a mere trespass on his property, whether that trespass could or could not be otherwise prevented, it is murder; and consequently an assault, with intent to kill, cannot be justified on the ground that it was necessary to prevent a trespass on property. State v. Morgan, 3 Iredell's N. C. Law Rep. 186.

suppose his life in danger, when attacked with so dangerous a weapon, and the assault followed up by another act indicating an intention of pursuing his life, and this at a time when he was off his guard, and without any warning. The latter circumstance furnishes a main distinction between this case and that of death ensuing from a combat where both parties engage upon equal terms, for then, if upon a sudden quarrel, and before any dangerous blow given or aimed at either of the parties, the one who first has recourse to a deadly weapon suspend his arm till he has warned the other, and given him time to put himself upon his guard, and afterwards they engage upon equal terms; in such case it is plain that the intent of the person making such assault is not so much to destroy his adversary, at all events, as to combat with him, and run the hazard of losing his own life at the same time. And that would fall within the same common principle which governs the case of a sudden combat upon heat of blood. But if several attack a person at once with deadly weapons, as may be supposed to have happened in Ford's case (*supra*), though they wait till he be upon his guard, yet it seems (there being no compact to fight) that he would be justified in killing any of the assailants in his own defence, because so unequal an attack resembles more a desire of assassination than of combat. 1 East, P. C. 276.

An assault with intent to *chastise*, although the party making the assault has no legal right to inflict chastisement, will not justify the party assaulted in killing the assailant. The prisoner, who was indicted for the murder of his brother, appeared to have come home drunk on the night in question. His father ordered him to go to *bed, but he refused, upon which a scuffle ensued between them. The de- [*714] ceased, a brother of the prisoner, who was in bed, hearing the disturbance, got up, threw the prisoner on the ground, and fell upon him, and beat him, the prisoner not being able to avoid his blows, or to make his escape. As they were struggling together, the prisoner gave his brother a mortal wound with a penknife. This was unanimously held by the judges to be manslaughter, as there did not appear to be any inevitable necessity so as to excuse the killing in that manner. The deceased did not appear to have aimed at the prisoner's life, but only to chastise him for his misbehavior to his father. R. v. Nailor, 1 East, P. C. 277. The circumstances in the following case were very similar. The prisoner and the brother of the prosecutor were fighting, on which the prosecutor laid hold of the prisoner to prevent him from hurting his brother, and held him down, but did not strike him, and the prisoner stabbed him with a knife above the knee. The prisoner being indicted for stabbing, under the 9 Geo. 4, c. 31, Mr. Justice James Parke said: The prosecutor states that he was merely restraining the prisoner from beating his brother, which was proper on his part. If you are of opinion that he did nothing more than was necessary to prevent the prisoner from beating his brother, the crime of the prisoner, if death had ensued, would not have been reduced to manslaughter; but if you think that the prosecutor did more than was necessary to prevent the prisoner from beating his brother, or that he struck the prisoner any blows, then I think that it would. You will consider whether anything was done by the prosecutor more than was necessary, or whether he gave any blows before he was struck. R. v. Bourne, 5 C. & P. 120: 24 E. C. L. R. At the conference of the judges upon R. v. Nailor (*supra*), Powell, J., by way of illustration, put the following case: If A. strike B. without any weapon, and B. retreat to a wall, and there stab A., it will be manslaughter, which Holt, C. J., said was the same as the principal case, and that was not denied by any of the judges. For it cannot be inferred from the bare act of striking, without some dangerous weapon, that the intent of the aggressor rose so high as the death of the party struck, and unless there be a plain manifestation of a felonious intent, no *assault*,

however violent, will *justify* killing the assailant under the plea of necessity. 1 East, P. C. 277. But in order to render the killing in these cases justifiable, it must appear that the act was done from mere necessity, and to avoid the immediate commission of the offence.(1) Thus a person who, in the case of a mutual conflict, would excuse himself upon the ground of self-defence, must show that before the mortal stroke given, he had declined any further combat, and retreated as far as he could with safety, and that he had killed his adversary through mere necessity, and to avoid immediate death. If he fail in either of these circumstances, he will incur the penalty of manslaughter. Foster, 277.

Again, to render the party inflicting death under the foregoing circumstances justifiable, it must appear that he was wholly without any fault imputable to him by law in bringing the necessity upon himself. Therefore, where A., with many others, had, on pretence of title, forcibly ejected B. from his house, and B. on the third night returned with several persons with intent to re-enter, and one of B.'s friends attempted to fire the house, whereupon one of A.'s party killed one of B.'s with a gun, it was [*715] held manslaughter in A., because *the entry and holding with force were illegal. Hawk. P. C. b. 1, c. 28, s. 22.

It is to be observed, that killing in defence of the person will amount either to justifiable or *excusable homicide*, or *chance-medley*, as the latter is termed, according to the circumstances of the case. Self-defence, upon chance-medley, implies that the party, when engaged in a sudden affray, quits the combat before a mortal wound is given, and retreating as far as he can with safety, urged by necessity, kills his adversary for the preservation of his own life. Foster, 276. It has been observed, that this case borders very nearly upon manslaughter, and that in practice the boundaries are in some instances scarcely perceptible. In both cases it is presumed that the passions have been kindled on both sides, and that blows have passed between the parties; but in manslaughter, it is either presumed that the combat has continued on both sides till the mortal stroke was given, or that the party giving such stroke was not at that time in imminent danger of death. Foster, 276, 277. The true criterion between manslaughter and excusable homicide, or chance-medley, is thus stated by Sir William Blackstone. When both parties are actually combating at the time the mortal stroke is given, the slayer is guilty of manslaughter; but if the slayer has not begun to fight, or (having begun) endeavors to decline any further struggle, and afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide, excusable by self-defence. 4 Bl. Com. 184. In all cases of excusable homicide, in self-defence, it must be taken that the attack was made upon a sudden occasion, and not premeditated, or with malice. For if one attack another with a dangerous weapon, unprepared, with intent to murder him, that would stand upon a different ground; and in that case, if the party whose life was sought killed the other, it would be in self-defence, properly so called. But if the assault be *open malice*, and the flight be feigned as a pretence for carrying that malice into execution, it would undoubtedly be murder; for the flight rather aggravates the crime, as it shows more deliberation. 1 East, P. C. 282.

Where a trespass is committed merely against the property of another, and without any felonious intent, the law does not admit the force of the provocation to be sufficient to warrant the owner of the property to make use, in repelling the trespasser, of any deadly or dangerous weapon.(2) Thus, if upon the sight of a person breaking

(1) The State v. Wells, 1 Coxe, 424.

(2) State v. Zellers, 2 Halst. 220; Smith's Case, 3 Rogers's Rec. 77; Commonwealth v. Drew et al., 4 Mass. 391.

his hedges, the owner were to take up a hedge-stake and knock him on the head, and kill him, this would be murder; because the violence was much beyond the provocation. Foster, 291; 1 East, P. C. 288, *vide supra*. However provoking the circumstances of the trespass may be, they will not justify the party in the use of deadly weapons. Lieutenant Moir, having been greatly annoyed by persons trespassing upon his farm, repeatedly gave notice that he would shoot any one who did so, and at length discharged a gun at a person who was trespassing, and wounded him in the thigh, which led to erysipelas, and the man died. He had gone home for a gun on seeing the trespasser, but no personal contest had ensued. Being indicted for murder, he was found guilty and executed. R. v. Moir, 1828. See this case, as stated in R. v. Price, 7 C. & P. 178: 32 E. C. L. R. But if the owner use only a weapon not likely to cause death, and with intent only to chastise the trespasser, and death ensue, this will be manslaughter only. Foster, 291; 1 East, P. C. 288.

*Where a person is set to watch premises in the night, and shoots at and [*716] kills another who intrudes upon them, the nature of the offence will depend upon the reasonable ground which the party had to suspect the intentions of the trespasser. Any person, said Garrow, B., in a case of this kind, set by his master to watch a garden or yard, is not at all justified in shooting at, or injuring in any way, persons who may come into those premises even in the night; and if he saw them go into his master's hen-roost, he would still not be justified in shooting them. He ought first to see if he could not take measures for their apprehension. But here the life of the prisoner was threatened; and if he considered his life in actual danger, he was justified in shooting the deceased as he has done; but if, not considering his own life in danger, he rashly shot this man, who was only a trespasser, he will be guilty of manslaughter. R. v. Scully, 1 C. & P. 319: 12 E. C. L. R.(1)

The rules, with regard to the defence of the possession of a house, are thus laid down. If A., in defence of his house, kill B., a trespasser, who endeavors to make an entry upon it, it is at least common manslaughter, unless indeed there were danger of his life. But if B. had entered the house, and A. had gently laid his hands upon him to turn him out, and then B. had turned upon him and assaulted him, and A. had killed him (not being otherwise able to avoid the assault, or retain his lawful possession), it would have been in self-defence. So if A. had entered upon him, and assaulted him first, though his entry were not with intent to murder him, but only as a trespasser, to gain the possession, in such a case, A., being in his own house, need not fly as far as he can, as in other cases of self-defence, for he has the protection of his house to excuse him from flying, as that would be to give up the possession of his house to his adversary. But in this case the homicide is excusable rather than *justifiable*. 1 East, P. C. 287; 1 Hale, P. C. 445; R. v. Cook, Cro. Car. 537, *ante*, p. 708.

In the following case, Bayley, J., seems to have been of opinion that a *lodger* does not enjoy the privilege which, as above stated, is possessed by the owner of a house, of standing to its protection without retreating. Several persons tried to break open the door of a house in which the prisoner lodged. The prisoner opened the door, and he and the parties outside began to fight. The prisoner was taken into the house again by another person, but the parties outside broke open the door in order

(1) If one man deliberately kill another to prevent a mere trespass upon property, whether such trespass could or could not be otherwise prevented, it is murder. Harrison v. The State, 24 Alabama, 67; Noles v. The State, 26 Ibid, 31. If the trespass is forcible, the owner may resist the entry, but may not kill the assailant, until it be necessary to prevent a felonious destruction of property, or to defend himself against loss of life or great bodily harm. Carroll v. The State. 23 Alabama, 28; The State v. McDonald, 4 Jones's Law, 19; The People v. Horton, 4 Michigan, 67.

to get at the prisoner, and a scuffle again ensued, in which the deceased was killed by the prisoner with a pair of iron tongs. There was a back door through which the prisoner might have escaped, but it did not appear that he knew of it, having only come to the house the day before. Bayley, J., said, If you are of opinion that the prisoner used no more violence than was necessary to defend himself from the attack made upon him, you will acquit him. The law says a man must not make an attack upon others unless he can justify a full conviction in his own mind that, if he does not do so, his own life will be in more danger. If the prisoner had known of the back door, it would have been his duty to go out backwards, in order to avoid the conflict. R. v. Dakin, 1 Lewin, C. C. 166. *Sed vide ante*, p. 711.

Upon an indictment for manslaughter it appeared, that the deceased and his servant insisted on placing corn in the prisoner's barn, which she refused to allow; they [*717] exerted force, a scuffle ensued, in *which the prisoner received a blow on the breast: whereupon she threw a stone at the deceased, upon which he fell down, and was taken up dead. Holroyd, J., said, "The case fails on two points: it is not proved that the death was caused by the blow, and if it had been, it appears that the deceased received it in an attempt to invade the prisoner's barn against her will. She had a right to defend the barn, and to employ such force as was reasonably necessary for that purpose, and she was not answerable for any unfortunate accident that might happen in so doing." The prisoner was acquitted. R. v. Hinchcliffe, 1 Lewin, C. C. 161. So where the owner of a public house was killed in a struggle between him and those who unlawfully resisted his turning them out of his house, it was held murder. Two soldiers came at eleven o'clock at night to a publican's and demanded beer, which he refused, alleging the unreasonableness of the hour, and advised them to go to their quarters, whereupon they went away, uttering imprecations. In an hour and a half afterwards, when the door was opened to let out some company detained on business, one of the soldiers rushed in, the other remaining without, and renewed his demand for beer, to which the landlord returned the same answer. On his refusing to depart, and persisting in having some beer, and offering to lay hold of the deceased, the latter at the same instant collared him, and the one pushing, the other pulling towards the outer door, the landlord received a violent blow on the head from some sharp instrument from the other soldier, which occasioned his death. Buller, J., held this to be murder in both, notwithstanding the previous struggle between the landlord and one of them: for the landlord did no more than he lawfully might, which was no provocation for the cruel revenge taken, more especially as there was reasonable evidence of the prisoner's having come a second time, with a deliberate intention to use personal violence, in case their demand was not complied with. R. v. Willoughby, 1 East, P. C. 288. See also R. v. Archer, *ante*, p. 644.

The following case illustrates various points which may arise in questions respecting the defence of property. The prisoners were indicted for murder: Meade for having shot one Law with a pistol, and Belt as having been present aiding and abetting him. It appeared that Meade had rendered himself obnoxious to the boatmen at Scarborough, by giving information to the excise of certain smuggling transactions in which some of them had been engaged; and the boatmen, in revenge, having met with him on the beach, ducked him, and were in the act of throwing him into the sea, when he was rescued by the police. The boatmen, however, as he was going away, called to him, that they would come at night and pull his house down. His house was about a mile from Scarborough. In the middle of the night a great number of persons came about his house, singing songs of menace, and using violent

language, indicating that they had come with no friendly or peaceable intention; and Meade, under an apprehension, as he alleged, that his life and property were in danger, fired a pistol, by which Law, one of the party, was killed. The only evidence against Belt was, that he was in the house when the pistol was fired, and a voice having been heard to cry out "fire," it was assumed that it was his voice. Per Holroyd, J., to the jury—A civil trespass will not excuse the firing of a pistol at a trespasser in sudden resentment or anger. If a person takes forcible possession of another man's close, so as to be guilty of a breach of the peace, it is more *than a trespass. So, if a man with force invades and enters into the [*718] dwelling of another. But a man is not authorized to fire a pistol on every intrusion or invasion of his house. He ought, if he has a reasonable opportunity, to endeavor to remove him without having recourse to the last extremity. But the making an attack upon a dwelling, and especially at night, the law regards as equivalent to an assault on a man's person; for a man's house is his castle, and therefore, in the eye of the law, it is equivalent to an assault, but no words or singing are equivalent to an assault, nor will they authorize an assault in return. If you are satisfied that there was nothing but the song, and no appearance of further violence—if you believe that there was no reasonable ground for apprehending further danger, but that the pistol was fired for the purpose of killing, then it is murder. There are cases where a person in the heat of blood kills another, that the law does not deem it murder, but lowers the offence to manslaughter; as where a party coming up by way of making an attack, and without there being any previous apprehension of danger, the party attacked, instead of having recourse to a more reasonable and less violent mode of averting it, having an opportunity so to do, fires on the impulse of the moment. If, in the present case, you are of opinion that the prisoners were really attacked, and that Law and his party were on the point of breaking in, or likely to do so, and execute the threats of the day before, they were perhaps justified in firing as they did; if you are of opinion that the prisoners intended to fire over and frighten, then the case is one of manslaughter, and not of self-defence. With regard to Belt, there is no evidence, one way or the other, whether there was or was not any other person in the house with Meade, although there is no doubt that he was there; you are not, however, to assume, in a case where a man's life is at stake, that because a man's voice was heard, it was the voice of Belt. R. v. Meade, 1 Lewin, C. C. 184.

Proof in cases of felo de se.] It is only necessary in this place to notice the law with respect to *self-murder*, so far as it affects third persons. If one person persuade another to kill himself, and the latter do so, the party persuading is guilty of murder; and if he persuade him to take poison, which he does in the absence of the persuader, yet the latter is liable as a principal in the murder.(1) 1 Hale, P. C. 431; 4 Rep. 18, b. The prisoner was indicted for the murder of a woman by drowning her. It appeared that they had cohabited for several months previous to the woman's death, who was with child by the prisoner. Being in a state of extreme distress, and unable to pay for their lodgings, they quitted them on the evening of the day in which the deceased was drowned, and had no place of shelter. They passed the evening together at the theatre, and afterwards went to Westminster Bridge to drown themselves in the Thames. They got into a boat, and afterwards went into another boat, the water where the first boat was moored not being of sufficient depth to drown them. They talked together for some time in the boat into which they had got, the

(1) The Commonwealth v. Brown, 13 Mass. 356, S. C. 3 Wheeler's C. C. 226.

prisoner standing with his foot on the edge of the boat, and the woman leaning upon him. The prisoner then found himself in the water, but whether by actually throwing himself in, or by accident, did not appear. He struggled and got back into the [*719] boat again, and then found that the woman was gone. *He endeavored to save her, but could not get to her, and she was drowned. In his statement before the magistrate he said, he intended to drown himself, but dissuaded the woman from following his example. The judge told the jury, that if they believed the prisoner only intended to drown himself, and not that the woman should die with him, they should acquit the prisoner; but if they both went to the water for the purpose of drowning themselves, each encouraging the other in the commission of a felonious act, the survivor was guilty of murder. He also told the jury, that though the indictment charged the prisoner with throwing the deceased into the water, yet if he were present at the time she threw herself in, and consented to her doing it, the act of throwing was to be considered as the act of both, and so the case was reached by the indictment. The jury stated their opinion to be, that both the prisoner and the deceased went to the water for the purpose of drowning themselves, and the prisoner was convicted. On a reference to the judges, they were clear, that if the deceased threw herself into the water by the encouragement of the prisoner, and because she thought he had set her the example in pursuance of the previous agreement, he was principal in the second degree, and guilty of murder; but as it was doubtful whether the deceased did not fall in by accident, it was not murder in either, and the prisoner was recommended for a pardon. R. v. Dyson, Russ. & Ry. 523. The prisoner was charged with murder by giving and administering laudanum to one Emma Crips, which she swallowed, and by reason thereof died. It appeared from the prisoner's statement, and from the other evidence in the case, that he and the deceased, who had been living together as man and wife, being in great distress, agreed to poison themselves, and that they both took laudanum. The woman was found dead next morning, the prisoner having previously gone out. Patteson, J., held, on the authority of R. v. Dyson, *supra*, and of an older case which he cited, that if two persons mutually agree to commit suicide together, and the means employed to produce death only take effect on one, the survivor will, in point of law, be guilty of the murder of the one who died. The prisoner was convicted. R. v. Alison, 8 C. & P. 418.

If a woman takes poison with intent to procure a miscarriage, and dies of it, she is guilty of self-murder, and a person who furnishes her with poison for that purpose will, if absent when she took it, be an accessory before the fact only, and as he could not have been tried as such before 7 Geo. 4, c. 64, s. 9, he is not triable for a substantive felony under that act. An accessory before the fact to self-murder was not triable at common law, because the principal could not be tried, nor is he now triable under 7 Geo. 4, c. 64, s. 9, for that section does not make accessories triable except in cases in which they might have been tried before. R. v. Russell, 1 Moo. C. C. 356; R. v. S. P. Leddington, 9 Carr. & P. 79: 38 E. C. L. R.

Accessories.] Where a person is charged as an accessory after the fact, to a murder, the question for a jury is, whether such person, knowing the offence had been committed, was either assisting the murderer to conceal the death, or in any way enabling him to evade the pursuit of justice. R. v. Greenacre, 8 C. & P. 35: 34 E. C. L. R. See R. v. Tyler, 8 C. & P. 616, and R. v. Manning, 2 C. & K. 903: 61 E. C. L. R. See generally as to accessories, *ante*, p. 168.

*MURDER—ATTEMPTS TO COMMIT.

Injuries to person with intent to murder.] By the 24 & 25 Vict. c. 100, s. 11, "Whosoever shall administer to or cause to be administered to or to be taken by any person any poison or other destructive thing, or shall by any means whatsoever wound or cause any grievous bodily harm to any person with intent in any of the cases aforesaid to commit murder, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Blowing up building with intent to murder.] See *supra*, p. 532.

Setting fire to or casting away a ship with intent to murder.] By s. 13, "Whosoever shall set fire to any ship or vessel or any part thereof, or any part of the tackle, apparel, or furniture thereof, or any goods or chattels being therein, or shall cast away or destroy any ship or vessel, with intent in any of such cases to commit murder, shall be guilty of felony." The same punishment as in s. 11.

Attempt to poison, shoot, &c., with intent to murder.] By s. 14, "Whosoever shall attempt to administer to or shall attempt to cause to be administered to or to be taken by any person any poison or other destructive thing, or shall shoot at any person, or shall, by drawing a trigger or in any other manner, attempt to discharge any kind of loaded arms at any person, or shall attempt to drown, suffocate, or strangle any person, with intent, in any of the cases aforesaid, to commit murder, shall, whether any bodily injury be effected or not, be guilty of felony." The same punishment as in s. 11.

By any other means attempting to commit murder.] By s. 15, "Whosoever shall, by any means other than those specified in any of the preceding sections of this act, attempt to commit murder, shall be guilty of felony." The same punishment as in s. 11.

What are loaded arms.] See s. 19, *supra*, p. 274.

Proof of intent to murder.] In order to bring the case within the above sections it must be proved that the prisoner intended by the act charged to cause the death of the suffering party. This will appear either from the nature of the act itself, or from the expressions and conduct used by the prisoner. R. v. Cruse, 8 C. & P. 541: 34 E. C. L. R.; R. v. Jones, 9 C. & P. 258: 38 E. C. L. R.

It will be an offence within these sections if the party shoot at A. with intent to murder B. R. v. Holt, 7 C. & P. 518: 32 E. C. L. R.

Form of indictment.] A prisoner was indicted under the 7 Wm. *4 & 1 [*721] Vict. c. 85, s. 2, for inflicting an injury dangerous to life with intent to commit murder. The indictment stated that the prisoner feloniously, and of his malice aforethought, did assault C. H. and did cause unto C. H. "a certain bodily injury danger-

ous to the life of her the said C. H., by then and there feloniously with his hands and fists, beating and striking the said C. H. in and upon the head and back of her the said C. H., and then and there with the left foot of him the said T. C., feloniously kicking the said C. H. in and upon the back of her the said C. H., and then and there with his hands feloniously seizing and lifting the said C. H., and then and there feloniously striking the head of the said C. H. against a certain wooden beam of a certain ceiling there, and then and there feloniously with his arms and hands lifting up the said C. H., and with great force and violence casting down, flinging, and throwing the said C. H. upon and against a certain brick floor there, with intent, in so doing, her, the said C. H. then and there, and thereby feloniously, wilfully, and of his malice aforethought, to kill and murder." On demurrer to the indictment, on the ground that it did not state what bodily injury had been inflicted, the judges held that the description of the means used in the indictment necessarily involved the nature and situation of the bodily injury, and that the indictment was therefore good, even assuming that it was necessary to state the nature and situation of the injury. R. v. Cruse, 8 C. & P. 541: 34 E. C. L. R.; S. C. 2 Moo. C. C. 53. In Arch. Cr. Pl., 15th ed., p. 560, a form of indictment is given in which neither the nature or situation of the wound, nor the means of death are stated. That the means used need not be stated has been decided: R. v. Briggs, 1 Moo. C. C. 318; nor is it customary in indictments for *wounding* with intent to maim, disfigure, &c., to state the nature or situation of the wound.

[*722] *OFFENCES CONNECTED WITH NAVAL, MILITARY, AND OTHER STORES.

By the 9 & 10 Wm. 3, c. 41, s. 1, it is made an offence, punishable by a fine of 200*l.*, for any unauthorized person, "to make any stores of war or naval stores whatsoever, with the marks usually used to and marked upon his majesty's said warlike and naval or ordnance stores; that is to say, any cordage of three inches and upwards wrought with a white thread laid the contrary way, or any smaller cordage, to wit, from three inches downwards, with a twine in lieu of a white thread laid the contrary way as aforesaid, or any canvas wrought or unwrought with a blue streak in the middle, or any other stores with the broad arrow by stamp, band, or otherwise." Power to mitigate this penalty is given by the 9 Geo. 1, c. 8. By s. 2, it is provided, "that such person or persons, in whose custody, possession, or keeping, such goods or stores marked as aforesaid shall be found, not being employed as aforesaid, and such person or persons who shall conceal such goods or stores marked as aforesaid being indicted and convicted of such concealment, or of having such goods found in his custody, possession, or keeping, shall forfeit such goods, and the sum of 200*l.*, together with the costs of prosecution, one moiety to his majesty, and the other moiety to the informer, to be recovered as aforesaid, and shall also suffer imprisonment until payment and performance of the said forfeiture, unless such person shall, upon his trial, produce a certificate under the hand of three or more of his majesty's principal officers or commissioners of the navy, ordnance, or victuallers, expressing the numbers, quantities, or weights of such goods, as he or she shall then be indicted for, and the occasion and

reason of such goods coming to his or her hands or possession." By s. 4, "The said principal officers or commissioners of the navy, ordnance, or victualling-office for the time being, may sell and dispose of any of the stores aforesaid, so marked as aforesaid, as they did or might have done before the making of this act; and that such person or persons as heretofore have, or shall hereafter buy any such stores, or other stores so marked as aforesaid, of the said principal or commanders, or by their order, may keep and enjoy the same without incurring the penalty of this act, or any law to the contrary whatsoever, upon producing a certificate or certificates under the hand and seal of three or more of the said principal officers or commissioners of the navy, ordnance, or victualling-office, that they bought such goods from them the said principal officers or commissioners, or from such person or persons as did buy the said stores from the said principal officers or commissioners, at any time before such stores were found in their custody; in which certificate or certificates the quantities of such stores shall be expressed, and the time when and where bought of the said commissioners, who, or any three or more of them, for the time being, are hereby empowered and directed, from time to time, to give to such person or persons, who *shall desire the [*723] same, and have bought, and shall hereafter buy any of the aforesaid stores, within thirty days after the sale and the delivery of the said stores so sold, or to be sold as aforesaid." By the 17 Geo. 2, c. 40, s. 10, after reciting that doubts had arisen as to the trial of offences against the above acts, it is enacted, "that it shall and may be lawful to and for any judge, justice, or justices at the assizes, or justices of the peace at the general quarter sessions to be holden for any county, city, borough, or town corporate, to hear, try, and determine, by indictment or otherwise, all or any of the crimes or offences mentioned in the said recited acts; and that the said judges, justice, or justices of assize, or justices of the peace, as aforesaid, before whom such offender or offenders shall be indicted or tried and convicted of all or any of the crimes or offences in the said recited acts mentioned, may impost any fine not exceeding the sum of 200*l.* on such offender or offenders; one moiety to be paid to his majesty, and the other moiety to the informer; and may mitigate the said penalty and forfeitures inflicted by the said recited acts, or either of them; and to commit the offender or offenders so convicted and fined to the common gaol of the county or place where the offence shall be committed, there to remain, without bail or mainprize, until payment be made of the penalty and forfeitures imposed by this or the said former acts, or mitigated as aforesaid; or, in lieu thereof, to punish such offender or offenders in the premises corporeally, by causing him, her, or them to be publicly whipped, and committed to some house of correction or public workhouse, there to be kept to hard labor for the space of three months, or less time, as to such judge, justice, or justices of assize, or justices of peace, shall in his or their discretion seem meet; anything in the said recited acts or in any other act to the contrary notwithstanding."

By the 39 & 40 Geo. 3, c. 89, s. 1, "Every person or persons (such person or persons not being a contractor or contractors, or employed as in the 9 & 10 Wm. 3, c. 41, is mentioned) who shall willingly or knowingly sell or deliver, or cause or procure to be sold or delivered, to any person or persons whatsoever, or shall willingly or knowingly receive or have in his, her, or their custody, possession, or keeping, any stores of war, naval ordnance, or victualling stores, or any goods whatsoever, marked as in the said recited acts (the 9 & 10 Wm. 3; 9 Geo. 1, c. 8; and 17 Geo. 2, c. 40, s. 10) are expressed, or any canvas, marked either with a blue streak or in the middle, or with a blue streak in a serpentine form, or any bewper, otherwise called bunting, wrought with one or more streaks of raised tape (the said stores of war, or naval

ordnance, or victualling stores, or goods above mentioned, or any of them, being in a raw or uncovered state, or being new, or not more than one-third worn), and such person or persons shall conceal such stores or goods, or any of them, marked as aforesaid, shall be deemed receivers of stolen goods, knowing them to have been stolen, and shall, on being convicted thereof in due form of law, be transported beyond the seas for the term of fourteen years, in like manner as other receivers of stolen goods are directed to be transported by the laws and statutes of the realm, unless such person or persons shall, upon his, her, or their trial, produce a certificate under the hands of three or more of his majesty's principal officers or commissioners of the navy, ordnance, or victualling, expressing the numbers, quantities, or weights of such stores or goods as he, she, or they shall then be indicted for, and the occasion [*724] and reason of such *stores or goods coming to his, her, or their hands or possession." By s. 2, "Such person or persons (not being a contractor or contractors or employed as aforesaid) in whose custody, possession, or keeping, any of the said stores called canvas, marked with a blue streak in a serpentine form, or bewper, otherwise called bunting, wrought as above mentioned, shall be found (such canvas or bewper, otherwise called bunting, not being charged to be new, or not more than one-third worn), and all and every person or persons who shall be convicted of any offence contrary to so much of the 9 & 10 Wm. 3, c. 41, as relates to the making or having in possession, or concealing any of his majesty's warlike or naval, or ordnance stores, marked as therein specified, shall, besides forfeiting such stores, and the sum of 200*l.*, together with costs of suit as therein mentioned, be corporeally punished by pillory, whipping, and imprisonment, or by any or either of the said ways and means, in such manner and for such space of time as to the judge or justices before whom such offender or offenders shall be convicted, shall seem meet, anything in the last-mentioned act or in the 9 Geo. 1, c. 8, or the 17 Geo. 2, c. 40, to the contrary thereof in anywise notwithstanding: provided always, that it shall and may be lawful to and for such judge or justices to mitigate the said penalty of 200*l.*, as he or they shall see cause." By s. 3, "Nothing in this act or in the 9 & 10 Wm. 3, c. 41, shall extend, or be deemed, taken, or construed to extend to exempt from the operation of this act, or of the said recited act respectively, any person or persons, being a contractor or contractors, or employed as in the said last-mentioned act is mentioned, except only so far as concerns stores or goods marked as aforesaid which shall be *bonâ fide* provided, made up, or manufactured by such person or persons, or by their order, and which shall not have been before delivered in to his majesty's stores, unless, having been so delivered, they shall have been sold or returned to such person or persons by the commissioners of his majesty's navy, ordnance, or victualling respectively." By s. 4, "If any person or persons shall, from and after the passage of this act, wilfully and fraudulently destroy, beat out, take out, cut out, deface, obliterate, or erase, wholly or in part, any of the marks in the 9 & 10 Wm. 3, c. 41, or in this act mentioned, or any other mark whatsoever denoting the property of his majesty, his heirs or successors, in or to any warlike, naval, ordnance, or victualling stores, or cause, procure, employ, or direct any other person or persons so to do, for the purpose of concealing his majesty's property in such stores, such person or persons shall be deemed guilty of felony, and shall, on being convicted thereof, be transported to parts beyond the seas for the term of fourteen years, in like manner as other felons are directed to be transported by the laws and statutes of the realm." By s. 5, "If any person or persons, who shall hereafter be convicted of any offence contrary to this act, for which he shall not have been transported beyond the seas, or contrary to the 9 & 10 Wm. 3, c. 41, shall be guilty of a second offence either contrary to that act or to this present act, which

would not otherwise, as the first offence, subject him, her, or them to transportation, and shall be thereof legally convicted, such person or persons shall, by judgment of the court wherein he, she, or they shall be so convicted, be transported to parts beyond the seas for the term of fourteen years, in like manner as other offenders may be transported by the laws and statutes of this realm now in force. By *s. 7 it [*725] is provided that the court may mitigate the punishment of transportation for any of the offences mentioned in the act, "by causing the offender or offenders to be set on the pillory, publicly whipped, fined, or imprisoned, or by all or any one or more of the said ways and means, as such court in its discretion shall think fit; one moiety of which fine (if any imposed) shall be to his majesty, his heirs and successors, and the other moiety thereof to the informer, and also to order such offender or offenders to be imprisoned until such fine be paid." By s. 11, any commissioner of the navy, or any justice of the peace, may grant warrants for searching houses, &c., where oath is made that there is reason to suspect stores belonging to his majesty are concealed; and if any stores or goods, marked as hereinbefore, or in the 9 & 10 Wm. 3, c. 41, mentioned, shall be found, the offender shall be dealt with according to law, "and that in case, upon any such search, or upon any seizure whatsoever of stores or goods marked as aforesaid, any naval, ordnance, or victualling stores, not so marked as aforesaid, shall be found, which may reasonably be suspected to belong to his majesty, the party or parties in whose possession or keeping the same shall be found, shall be required to give to the commissioner or justice of the peace respectively, before whom the said stores or goods shall and may be brought, an account to the satisfaction of such commissioner or justice that the same were not embezzled or stolen from any of his majesty's ships or vessels, yards, store-houses, or other places, or that, if the same were embezzled or stolen, the same had come to the possession of the said party or parties honestly, and without any knowledge or suspicion that the same had been embezzled or stolen; on failure whereof, by a reasonable time to be set by such commissioner or justice of the peace, the said stores or goods shall thereupon become forfeited, and such party or parties shall be deemed and adjudged guilty of a crime and a misdemeanor." By s. 12, persons deputed by the commissioners of the navy, ordnance, or victualling, may detain any craft in which may be suspected to be contained any naval, ordnance, or victualling stores, and the parties shall be dealt with according to law with respect to marked stores, "and in respect to any of such stores and things which shall not be so marked, but which shall nevertheless be reasonably suspected to be the property of his majesty, the said person or persons on whom the same shall be found shall be required to give an account, to the satisfaction of such commissioner or justice, that the same were not embezzled or stolen, as aforesaid, or that if they were embezzled or stolen, the same had come to his or their possession honestly, and without any knowledge or suspicion that the same had been embezzled or stolen; on failure whereof, by a reasonable time to be set as aforesaid, the said last-mentioned stores or things shall thereupon become forfeited, and the said person or persons so apprehended shall be deemed and adjudged guilty of a misdemeanor." By s. 16, persons guilty of any of the misdemeanors aforesaid shall, for the first offence, forfeit 40*s.*; for the second, 5*l.*; for the third, 10*l.*; which fines may be levied by distress, to be applied, one-half to the informer, and one-half to the treasurer of the navy or ordnance for the time being; and if sufficient distress cannot be found, the offender (who is to be kept in custody) may be committed to prison for three months, or until payment. By s. 18, any commissioner of the navy, ordnance, or victualling, or justice of the peace, may determine any complaint for unlawfully selling or receiving, or having in possession, stores not

exceeding the value of *20s., and may fine the offender 10*l.*, to be levied as in the last section. By s. 24, it is provided, that nothing in this act contained shall prevent parties accused of selling, or having in their possession, or receiving stores, from being prosecuted as receivers of stolen goods under this act, or under the 9 & 10 Wm. 3, c. 41, or the 9 Geo. 1, c. 8, or the 17 Geo. 2, c 40, so as the offender be not twice punished for the same offence. By s. 25, the commissioners of the navy, ordnance, or victualling, for the time being, may sell and dispose of any of the stores marked as aforesaid, and the buyers may keep them, without incurring any penalty, on producing a certificate or certificates, under the hand and seal of three or more of the said commissioners, that they bought such goods or stores from them at any time before they sold or delivered the same, or before the same were found in their custody, or a certificate from such person or persons as shall appear to have bought the said stores from them the said commissioners, that the stores so sold or delivered by them, or so found in their custody, were the stores, or part of the stores, so bought of the commissioners as aforesaid, in which certificate or certificates the quantities of such stores shall be expressed, and the time when and where bought of the said commissioners, who, or any three or more of them for the time being, and also of person or persons after selling the same, are empowered and directed from time to time to give such certificate to such person or persons as shall desire the same, and have bought, or shall hereafter buy any of the aforesaid stores, within thirty days after the sale and delivery thereof. By s. 26, a penalty of 200*l.*, and corporeal punishment, as in s. 21, is imposed on persons giving false certificates.

By the 54 Geo. 3, c. 60, it is enacted that all the provisions relating to cordage, wrought either with a white thread laid the contrary way, or with a twine laid to the contrary way, contained in the 9 & 10 Wm. 3, c. 41, and the 39 & 40 Geo. 3, c. 89, shall extend to "cordage wrought with one or more worsted threads."

By the 55 Geo. 3, c. 127, s. 2, all the provisions contained in the 9 & 10 Wm. 3, c. 41, the 9 Geo. 1, c. 8, the 17 Geo. 2, c. 40, and the 39 & 40 Geo. 3, c. 89, which relate to naval, ordnance, and victualling stores, "shall extend, and be construed to extend, to all public stores whatsoever under the care, superintendence, or control of any officer or person in the service of his majesty, his heirs, or successors, or employed in any public department or office, either marked with the marks or any of them in the said recited acts, or any of them specified, or with the broad arrow and the letters B. O., or with the crown and the broad arrow, or with his majesty's arms, or with the letters G. R., to denote the property of his majesty, his heirs or successors therein, and to all and every person and persons not authorized by the proper officer or officers, person or persons, in his majesty's service in that behalf so to do, using any such marks, or making any goods marked with such marks, or any of them, and to all and every person and persons in whose custody, possession, or keeping any such public stores so marked as aforesaid shall be found, or who shall willingly or knowingly receive or have in his, her, or their custody, possession, or keeping, or who shall conceal any such public stores so marked as aforesaid, unless such person or persons shall, upon his, her, or their trial, produce a certificate or certificates, under the hand or hands of the proper officer or officers, person or persons in his majesty's [*727] service authorized to grant the *same of such and the like nature as the certificate in the 9 & 10 Wm. 3, c. 41, and 39 & 40 Geo. 3, c. 89, mentioned, and to all and every person and persons who shall wilfully and fraudulently destroy, beat out, take out, cut out, deface, obliterate, or erase, wholly or in part, any of the said marks, or cause, procure, employ, or direct any other person or persons so to do, for the purpose of concealing the property of his majesty, his heirs, or successors therein,

as fully and effectually to all intents and purposes as if all the same pains, penalties, &c., in the said several acts contained, so far as the same severally relate to his majesty's naval, ordnance, and victualling stores, and the punishment of persons offending as therein mentioned, were herein and hereby severally repeated and re-enacted in respect of all other public stores whatsoever."

By the 4 Geo. 4, c. 53, "Every person who shall be lawfully convicted of stealing or embezzling his majesty's ammunition, sails, cordage, or naval or military stores, or of procuring, counselling, aiding, or abetting any such offender, shall be liable, at the discretion of the court, to be transported beyond the seas for life, or for any term not less than seven years, or to be imprisoned only, or to be imprisoned and kept to hard labor in the common gaol or house of correction, for any term not exceeding seven years."

What amounts to a guilty possession.] There is an anonymous case by Mr. Justice Foster, which was decided on the second section of the 9 & 10 Wm. 3, c. 41, in which a widow woman was indicted under that section for having in her possession several pieces of canvas marked in the manner described in the act. The defendant did not attempt to show that she was within the exception of the act, as being a person employed to make canvas for the use of the navy; nor did she offer to produce any certificate from any officer of the crown touching the occasion and reason of such canvas coming into her possession; but her defence was that it was bought at a public auction, and that such sales frequently took place, where similar articles were sold in large and small lots; and that the canvas in question had been made up for table linen and sheeting, and had been in common use in the defendant's family for a considerable time before her husband's death, and upon his death came to the defendant, and had been used in the same public manner by her to the time of the prosecution. This sort of evidence was strongly opposed by the counsel for the crown, who insisted that, as the act allows but of one excuse, the defendant, unless she could avail herself of that, could not resort to any other. But Mr. Justice Foster was of opinion, that though the clause of the statute which directs the sale of these things hath not pointed out any other way for indemnifying the buyer than the certificate; and though the second section seems to exclude any other excuse for those in whose custody they shall be found, yet still the circumstances attending every case ought to be taken into consideration, otherwise a law calculated for wise purposes may be made a handmaid to oppression. Things of this kind were frequently exposed to public sale, and though the act points out an expedient for the indemnity of the buyers, yet probably few buyers, especially where small quantities have been purchased, have used the caution suggested by the act. If the defendant's husband really bought the linen at a public sale, but neglected to take a certificate, or did not preserve it, it would be contrary to natural justice after this *length of time [*728] to punish her for his neglect. He therefore thought the evidence given by the defendant proper to be left to the jury, and directed them that, if upon the whole of the evidence they thought the defendant came into the possession of them without any fraud or misbehavior on her part, they should acquit her. Anon. Fost. App. 439. This decision was followed by Lord Kenyon in R. v. Banks, 1 Esp. 142, where the prisoner was indicted for having marked naval stores in his possession; where that learned judge said, that it was clear that in prosecutions under this statute it was sufficient for the crown to prove the finding of the stores with the king's mark in the defendant's possession, to call upon him to account for that possession, and the manner of his coming by them; so that of course the *onus* lay upon the defendant.

But that it could not bear a question, but that the defendant had other means of showing that he had lawfully become possessed of them than by the production of the certificate from the navy board. These decisions were referred to and approved by Coltman, J., in R. v. Wilmett, 3 Cox, C. C. 281, and by Watson, B., and Hill, J., in R. v. Cohen, 8 Cox, C. C. 41.

The goods will be construed to be in the custody and possession of the prisoner, though they may never have been in his actual possession, or on his premises, if they have been under his control, and disposed of by him; as where goods were received at a railway station, and while they were there the prisoner made inquiries about them, and directed how and to whom they were to be delivered; this was held by the Court of Criminal Appeal to be sufficient evidence to support a conviction. R. v. Sunley, 1 Bell, C. C. 145.

Upon an indictment under the 9 & 10 Wm. 3, c. 41, s. 2, charging the defendant with having been found in possession of naval stores marked with a broad arrow, it was proved that the defendant was an ironmonger, and delivered to the captain of a vessel a cask of copper bolts, some of which were marked with the broad arrow. Before the vessel sailed the police seized the cask and found it to contain 150 copper bolts. The jury, in answer to questions put to them, found that the prisoner was in possession of bolts marked with the broad arrow, but that they (the jury) had not sufficient evidence before them to show that the prisoner knew they were so marked. But they also found that the prisoner had reasonable means of knowing that the bolts were so marked. The Court of Criminal Appeal held that on these findings the prisoner was entitled to be acquitted. R. v. Heep, 1 L. & C. C. C. 44; S. C. 30 L. J. M. C. 170.

As to embezzlement of stores belonging to Chelsea Hospital, see 7 Geo 4, c. 16; as to stores belonging to Greenwich Hospital, see 54 Geo. 3, c. 127, and 10 Geo. 4, c. 26.

[*729] *NUISANCE.

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A PUBLIC or common nuisance is such an inconvenient or troublesome offence as annoys the whole community in general, and not merely some particular person; and therefore this is indictable. 4 Bl. Com. 167. It may be both indictable and actionable. Rose v. Graves, 5 M. & Gr. 613: 44 E. C. L. R.

Proof of the public nature of the nuisance.] The existence of the matter as a *public* nuisance depends upon the number of persons annoyed, and is a fact to be judged of by a jury. R. v. White, 1 Burr. 337. Thus where a tinman was indicted for the noise made by him in carrying on his trade, and it appeared that it only affected the inhabitants of three sets of chambers in Clifford's Inn, and that the noise might be partly excluded by shutting the windows; Lord Ellenborough ruled that the indictment could not be maintained, as the annoyance, if anything, was a private nuisance. R. v. Lloyd, 4 Esp. 200. But a nuisance near the highway, whereby the air thereabouts is corrupted, is a public nuisance. R. v. Pappineau, 2 Str. 686.

Making great noises in the night, as with a speaking-trumpet, has been held to be an indictable offence, if done to the disturbance of the neighborhood. R. v. Smith, 1 Str. 704. So keeping dogs, which make noises in the night, is said to be indictable. 2 Chitty's Cr. Law, 647.

*So the keeping of hogs in a town is not only a nuisance by statute 2 W. & [*730] M. sess. 2, c. 8, s 20, but also at common law. R. v. Wigg, 2 Ld. Raym. 1163.

It is now settled that the circumstance, that the thing complained of furnishes, upon the whole, a greater convenience to the public than it takes away, is no answer to an indictment for a nuisance; see *ante*, p. 538.(1)

What the legislature declares to be a public nuisance is indictable as such. R. v. Crawshaw, 9 W. R. 38; R. v. Gregory, 5 Barn. & Adol. 555: 27 E. C. L. R.

Proof of the degree of annoyance which will constitute a public nuisance.] It is a matter of some difficulty to define the degree of annoyance which is necessary to constitute a public nuisance. Upon an indictment for a nuisance, in making great quantities of offensive liquors near the king's highway, it appeared in evidence that the smell was not only intolerably offensive, but also noxious and hurtful, giving many persons headaches. It was held, that it was not necessary that the smell should be unwholesome, but that it was enough if it rendered the enjoyment of life and property uncomfortable.(2) R. v. White, 1 Burr. 333. So it is said that the carrying on of an offensive trade is indictable, where it is destructive of the health of the neighborhood, or renders the houses untenantable or uncomfortable. R. v. Davey, 5 Esp. 217. So it was ruled, by Abbott, C. J., in the case of an indictment for carrying on the trade of a varnish maker, that it was not necessary that a public nuisance should be injurious to health; that if there were smells offensive to the senses, it was enough, as the neighborhood had a right to pure and fresh air. R. v. Neil, 2 C. & P. 485: 12 E. C. L. R.(3)

As will be seen from R. v. Lister, *infra*, p. 770, though no actual annoyance have taken place, yet, if the lives and property of the public are endangered, as by the keeping of large quantities of inflammable or explosive substances in a crowded neighborhood, an indictment for a nuisance will lie.

Proof—with regard to situation.] A question of considerable difficulty frequently presents itself, as to the legality of carrying on an offensive trade in the neighborhood of similar establishments, and as to the length of time legalizing such a nuisance. Where the defendant set up the business of a melter of tallow in a neighborhood where other manufactories were established, which emitted disagreeable and noxious smells, it was ruled that he was not liable to be indicted for a nuisance, unless the

(1) Resp. v. Caldwell, 1 Dall. 150; Hart et al. v. The Mayor, &c., of Albany, 9 Wend. 571, 582.
(2) Prout's Case, 4 Rogers's Rec. 87. (3) Case of Lynet et al., 6 Rogers's Rec. 61.

annoyance was much increased by the new manufactory. R. v. Nevill, Peake, 91. And it has also been ruled, that a person cannot be indicted for *continuing* a noxious trade which has been carried on in the same place for nearly fifty years. R. v. Nevill, Peake, 93. But upon this case it has been observed, that it seems hardly reconcilable with the doctrine, that no length of time can legalize a public nuisance, although it may supply an answer to an action by a private individual. 1 Russ. by Grea. 320; *vide post.* It should seem, continues the same writer, that, in judging whether a thing is a public nuisance or not, the public good it does may, in some cases, where the public health is not concerned, be taken into consideration, to see if it outweighs [*731] the public annoyance. With regard to offensive works, though they may *have been originally established under circumstances which would *prima facie* protect them against a prosecution for a nuisance, it seems that a wilful neglect to adopt established improvements which would make them less offensive, may be indictable. 1 Russ. by Grea. 320.

Upon an indictment for carrying on the business of a horse-boiler, it appeared that the trade had been carried on for many years before the defendants came to the premises; but its extent was much greater under them. For the defendants, it was shown that the neighborhood was full of horse-boilers and other noxious trades, and evidence was given of the trade being carried on in an improved manner. Lord Tenterden, observing that there was no doubt that this trade was in its nature a nuisance, said, that considering the manner in which the neighborhood had always been occupied, it would not be a nuisance, unless it occasioned more inconvenience as it was carried on by the defendants than it had done before. He left it, therefore, to the jury to say whether there was any increase of the nuisance; if, in consequence of the alleged improvements in the mode of conducting the business, there was no increase of annoyance, though the business itself had increased, the defendants were entitled to an acquittal; if the annoyance had increased, this was an indictable nuisance, and the defendants must be convicted. R. v. Watt, Moo. & Mal. N. P. C. 281: 22 E. C. L. R.

If a noxious trade is already established in a place, remote from habitations and public roads, and persons afterwards come and build houses within the reach of its noxious effects; or if a public road be made so near it, that the carrying on of the trade become a nuisance to the persons using the road; in those cases the party is entitled to continue his trade, because it was legal before the erecting of the houses in the one case, and the making of the road in the other. Per Abbott, C. J., R. v. Cross, 2 C. & P. 483: 12 E. C. L. R.

Proof—with regard to length of time.] No length of time will legitimate a nuisance; and it is immaterial how long the practice has prevailed.(1) Though twenty years' user may bind the right of an individual, yet the public have a right to demand the suppression of a nuisance, though of long standing. Weld v. Hornby, 7 East, 199. Thus upon an indictment for continuing a stell fishery across the river at Carlisle, though it appeared that it had been established for a vast number of years, yet Mr. Justice Buller held that it continued unlawful, and gave judgment that it should be abated. Anon. cited by Lord Ellenborough, 3 Camp. 227. So it is a public nuisance to place a woodstack in the street of a town before a house, though it is the ancient usage of the town, and leaves sufficient room for passengers, for it is against law to prescribe for a nuisance. Fowler v. Sanders, Cro. Jac. 446. In one case,

(1) Mills v. Hall, 9 Wend. 315.

however, Lord Ellenborough ruled, that length of time and acquiescence might excuse what might otherwise be a common nuisance. Upon an indictment for obstructing a highway by depositing bags of clothes there, it appeared that the place had been used as a market for the sale of clothes for above twenty years, and that the defendant put the bags there for the purpose of sale. Under these circumstances, Lord Ellenborough said, that after twenty years' acquiescence, and it appearing to all the world that there was a market or fair kept at the place, he could not hold a man to be criminal who came there under a belief that *it was such a fair or market [*732] legally instituted. R. v. Smith, 4 Esp. 111.

Proof of particular nuisances—highways.] See *supra*, tit. Highways.

Proof of particular nuisances—particular trades.] Certain trades, producing noxious and offensive smells, have been held to be nuisances, when carried on in a populous neighborhood, as making candles in a town by boiling stinking stuff, which annoys the whole neighborhood with stenches. R. v. Tohayle, cited Cro. Car. 510; but see 2 Roll. Ab. 139; Hawk. P. C. b. 1, c. 75, s. 10. And it seems that a brewhouse erected in such an inconvenient place that the business cannot be carried on without greatly incommoding the neighborhood, may be indicted as a common nuisance; and so in the case of a glass-house or a swine-yard. Hawk. P. C. b, 1, c. 75, s. 10; R. v. Wigg, 2 Ld. Raym. 1163. So a manufactory for making spirit of sulphur, vitriol, and aquafortis, has been held indictable. R. v. White, 1 Burr. 333. So a tannery where skins are steeped in water, by which the neighboring air is corrupted. R. v. Pappineau, 3 Str. 686.(1)

A very important question relating to indictable nuisances was fully discussed in R. v. Lister, Dear. & B. C. C. 209; S. C. 26 L. J. M. C. 196. There the defendants were indicted for a public nuisance in keeping and storing large quantities of wood naphtha and rectified spirits of wine in a warehouse in the city of London. It appeared that the quantities so stored were from 4000 to 5000 gallons of naphtha, and from 40,000 to 50,000 gallons of spirits of wine. The operation of mixing the two together was carried on upon the premises. The naphtha was kept in the warehouse in carboys, holding twelve gallons each, and carefully stocked till required for the purpose of being mixed. It is very inflammable, more so than spirits, or even than gunpowder itself; passing into vapor at a heat of 140° Fahr.; and, if inflamed, water would not extinguish it, except in enormous proportions relatively to the quantity of inflamed naphtha. There was no dispute that a fire arising, and communicating with these premises and the naphtha there kept, could not be quenched, and that the consequences to the neighborhood would be very disastrous; but it was proved that it was the practice never to allow any light of any kind to be taken into the warehouse, and that unless they were ignited, this quantity of naphtha and spirits would produce no danger. The case was twice argued, and ultimately the judges all agreed, that as from the nature and quantity of the substance, a real danger to the lives and property of the public was created, the defendants had committed an

(1) Any trade or business carried on in a populous neighborhood or near a public road, which produces noxious or offensive smells, to the annoyance of the public, is indictable as a common nuisance, even though the smells should not be injurious to health, but only offensive to the senses. The State v. Wetherall, 5 Harrington, 437.

Carrying on an offensive trade for twenty years in a place remote from buildings and public roads, does not entitle the owner to continue it in the same place after houses have been built and roads laid out in the neighborhood to the occupants of and travellers upon which it is a nuisance. The Commonwealth v. Upton, 6 Gray, 473.

indictable offence, and that the circumstances, as above stated, warranted the jury in finding them guilty.

In this case several decisions were referred to, in which it had been held that manufacturing or keeping large quantities of gunpowder in towns, or closely inhabited places, was an indictable offence at common law. See R. v. Williams, 1 Russ. 321; R. v. Taylor, 2 Str. 1167; Crowder v. Finbler, 19 Ves. 617; and these cases are confirmed by the above decision.

The manufacturing and keeping of gunpowder is regulated by the 12 Geo. 3, c. [*733] 61. By the 10 Wm. 3, s. 7, making, selling, or exposing *for sale any fireworks, or throwing them, or firing them into any public street or highway, is declared to be a common nuisance.

See further as to explosive substances, *supra*, tit., Gunpowder.

Proof of particular nuisances—corrupting the waters of public rivers.] In R. v. Medley, 6 C. & P. 292: 25 E. C. L. R., the chairman, deputy-chairman, superintendent, and engineer of the Equitable Gas Company were found guilty upon an indictment for conveying the refuse of gas into the Thames, whereby the fish were destroyed, and the water was rendered unfit for drink, &c. Lord Denman, C. J., told the jury, that the question for them was, whether the special acts of the company amounted to a nuisance.

Proof of particular nuisances—railways—steam engines, &c.] Where an act of Parliament gave a company power to make a railway, and another act gave unqualified power to use locomotive steam engines on the railway, and the railway was constructed in some parts within five yards of a highway; upon an indictment for a nuisance, stating that horses passing along the highway were terrified by the engines, it was held that this interference with the rights of the public must be presumed to have been sanctioned by the legislature, and that the benefit derived by the public from the railway showed that there was nothing unreasonable in the act of Parliament giving the powers. R. v. Pease, 4 B. & Ad. 30: 24 E. C. L. R. See *post*, title Railways. But where the defendant, the proprietor of a colliery, without the authority of an act of Parliament, made a railway from his colliery to a seaport town, upon the turnpike way, which it narrowed in some places, so that there was not room for two carriages to pass, although he gave the public (paying a toll) the use of the railway, yet it was held that the facility thereby afforded to traffic was not such a convenience as justified the obstruction of the highway. R. v. Morris, 1 B. & Ad. 441: 20 E. C. L. R.

The proceedings in indictments for nuisances by steam engines are regulated by the 1 & 2 Geo. 4, c. 41 (U. K.). By s. 1, the court by which judgment ought to be pronounced in case of a conviction upon any such indictment (viz. for a nuisance arising from the improper construction or negligent use of furnaces employed in the working of steam engines), is authorized to award such costs as shall be deemed proper and reasonable to the prosecutor, such award to be made before or at the time of pronouncing final judgment. And by the second section, if it shall appear to the court by which judgment ought to be pronounced that the grievance may be remedied by altering the construction of the furnace, it shall be lawful, without the consent of the prosecutor, to make such order touching the premises as shall by the court be thought expedient for preventing the nuisance in future, before passing final sentence. By the third section the act is not to extend to furnaces erected for the purposes of working mines.

Proof of particular nuisances—acts tending to produce public disorder—acts of public indecency.] Common stages for rope-dancers, and common gaming-houses, are nuisances in the eye of the law, not only because they are great temptations to idleness, but because they are apt to draw together great numbers of disorderly persons, to the inconvenience of the neighborhood.(1) Hawk. P. C. b. 1, c. 75, s. 6. *So collecting together a number of persons in a field, for the purpose of [*734] pigeon shooting, to the disturbance of the neighborhood, is a public nuisance. R. v. Moore, 3 B. & Ad. 184: 5 E. C. L. R.; see this case more fully, *post*, p. 737.

It is upon this same principle that many of the acts after-mentioned have been held to be public nuisances.

What outrages public decency, and is injurious to public morals, is indictable as a misdemeanor.(2) Hawk. P. C. b. 1, c. 75, s. 4; 1 Russ. by Grea. 326. Thus bathing in the open sea, where the party can be distinctly seen from the neighboring house, is an indictable offence, although the houses had been recently erected, and until their erection, it had been usual for men to bathe in great numbers at the place in question: "for," said McDonald, C. B., "whatever place becomes the habitation of civilized men, there the laws of decency must be enforced." R. v. Cruden, 2 Camp. 89; R. v. Sedley, Sid. 168.

An indecent exposure in a place of public resort, if actually seen only by one person, no other person being in a position to see it, is not a common nuisance. R. v. Webb, 1 Den. C. C. R. 338; S. C. 18 L. J. M. C. 39.

The prisoner was indicted for an indecent exposure in an omnibus, several passengers being therein. The indictment contained two counts; one laid the offence as having been committed in an omnibus, and the other in a public highway. It was held that an omnibus was sufficiently a public place to sustain the indictment. R. v. Holmes, 1 Dears, C. C. R. 207; S. C. 22 L. J. M. C. 122.

Proof of particular nuisances—disorderly inns.] Every one, at common law, is entitled to keep a public inn (but if he sells ale, wine, or spirits, he comes within the licensing statutes; and may be indicted and fined, as guilty of a public nuisance, if he usually harbor thieves, or suffer frequent disorders in his house, or take exorbitant prices, or refuse to receive a traveller as a guest into his house, or to find him in victuals, upon the tender of a reasonable price. Hawk. P. C. b. 1, c. 78, s. 1, 2; R. v. Iven, 7 C. & P. 213: 32 E. C. L. R.; Hawthorn v. Hammond, 1 C. & K. 404: 47 E. C. L. R. It is said also, that setting up a new inn, where there is already a sufficient number of ancient and well governed inns, is a nuisance. Id. 3 Bac. Ab. Inns, (A.); 1 Russ. by Grea. 322.(3)

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(1) A person who collects together a large crowd in the public highways and streets of a city by means of "violent and indecent language addressed to persons passing along the highway," thereby obstructing the free passage of the street, is indictable for committing a common nuisance. Barker v. The Commonwealth, 7 Harris, 412.

Profane swearing in public is indictable as a common nuisance. The State v. Graham, 3 Sneed, 134. As to indecent exposure, see the Commonwealth v. Haynes, 2 Gray, 72.

The public utterance, in a large assembly of males and females, of grossly obscene language is a misdemeanor indictable at common law. The State v. Appling, 25 Mississippi, 315. See McJunkins v. The State, 10 Indiana, 140; The State v. Gardner, 28 Missouri, 90.

(2) Knowles v. The State, 3 Day's Cases, 103.

(3) As to disorderly houses, see 1 Wheeler's C. C. 290. May be proved by general reputation. Rathbone's Case, 1 Rogers's Rec. 27. But see Commonwealth v. Stewart, 1 Serg. & R. 342. The keeping of a disorderly house must be laid as a common nuisance. Hunter v. The Commonwealth, 2 Serg. & Rawle, 298.

A bowling-alley kept for *gain* or *hire* is a public nuisance at common law, though gambling be expressly prohibited. Tanner v. The Trustees of Albion, 5 Hill, 121; Commonwealth v. Goding, 3 Metcalf, 130.

By the 22 & 23 Vict. c. 17, *supra*, p. 178, no indictment is to be preferred for keeping a gaming-house, or a disorderly house, without previous authorization.

The quarter sessions for a borough have jurisdiction to try an indictment for keeping a disorderly house, and the provisions of the 25 Geo. 2, c. 36, s. 5, do not confine it to the assizes or the quarter sessions for the county. R. v. Charles, 10 W. R. 62.

Proof of particular nuisances—gaming-houses] In R. v. Dixon, 10 Mod. 336, it was held that the keeping of a gaming-house was an offence at common law as a nuisance. The keeping a common gaming-house is an indictable offence, for it not only is an encouragement to idleness, cheating, and other corrupt practices, but it tends to produce public disorder by congregating numbers of people. Hawk. P. C. b. 1, c. 75, s. 6; 1 Russ. by Grea. 325. A *feme covert* may be convicted of this offence. Hawk. P. C. b. 1, c. 92, s. 30. Keeping a common gaming-house, and for [*735] lucre and hire unlawfully *causing and procuring divers evil disposed persons to frequent and come to play together a certain game called *rouge et noir*, and permitting the said idle and evil disposed persons to remain, playing at the said game, for divers large and excessive sums of money, is a sufficient statement of an offence indictable at common law: R. v. Rogier, 1 B. & C. 272: 8 E. C. L. R.; and per Holroyd, J., it would have been sufficient merely to have alleged that the defendant kept a common gaming house. Ibid. So in R. v. Mason, 1 Leach, 548, Grose, J., seemed to be of opinion that the keeping of a common gaming-house might be described generally. See also, R. v. Taylor, 3 B. & C. 502: 10 E. C. L. R. It seems that the keeping of a *cockpit* is not only an indictable offence at common law, but such places are considered gaming-houses within the statute 32 Hen. 8, c. 9. Hawk. P. C. b. 1, c. 92, s. 92.

The proceedings against persons keeping gaming-houses, bawdy-houses, or disorderly houses, are facilitated by the statute 25 Geo. 2, c. 36, by the eighth section of which it is enacted, that any person who shall appear, act, or behave as the master or mistress, or as the person having the care, government, or management of any bawdy-house, gaming-house, or other disorderly house, shall be deemed and taken to be the keeper thereof, and shall be liable to be prosecuted and punished as such, notwithstanding he or she shall not in fact be the real owner or keeper thereof. By section 9, inhabitants of the parish or place, though bound by recognizance, may give evidence upon the prosecution. By section 10, no indictment shall be removed by *certiorari*. This clause does not prevent the crown from removing the indictment. R. v. Davies, 5 T. R. 636; see also *supra*, p. 527.

After an indictment has been preferred by a private prosecutor, the court will allow any other person to go on with it, even against the consent of the prosecutor. R. v. Wood, 3 B. & Ad. 657: 23 E. C. L. R.

No indictment for keeping a disorderly house can be removed by *certiorari*, whether the indictment be at the prosecution of the constable under 25 Geo. 2, c. 36, or at the instance of a private individual. R. v. Sanders, 9 Q. B. 235: 58 E. C. L. R.; S. C. 15 L. J. M. C. 158.

By the 10 & 11 Wm. 3, c. 17, s. 1, all lotteries are declared to be a public nuisance. See R. v. Crawshaw, *supra*, p. 730. By the 9 & 10 Vict. c. 48, certain associations for the distribution of works of art are legalized. See also the 21 & 22 Vict. c. 102.

See generally the 22 & 23 Vict. c. 17, *supra*, p. 178.

Proof of particular nuisances—bawdy-houses.] The keeping of a bawdy-house is a common nuisance, both on the ground of its corrupting public morals and of its endangering the public peace, by drawing together dissolute persons.(1) Hawk. P. C. b. 1, c. 74, s. 1; 5 Bac. Ab. Nuisances (A.); 1 Russ. by Grea. 322. A *feme covert* is punishable for this offence as if she were sole (2) Ibid. R. v. Williams, 1 Salk. 383. And a lodger, who keeps only a single room for the use of bawdry, is indictable for keeping a bawdy-house: see R. v. Pierson, 2 Ld. Raym. 1197; but the bare solicitation of chastity is not indictable.(3) Hawk. P. C. b. 1, c. 74, s. 1. Though the charge in the indictment is general, yet evidence may be given of particular facts, and of the particular time of these facts, see Clarke v. Periam, 2 Atk. 339, it being, in fact, a cumulative offence. It is not necessary to prove who frequents the house, which in many cases it might *be impossible to do, but if unknown persons [*736] are proved to have been there, conducting themselves in a disorderly manner, it will maintain the indictment. J'Anson v. Stuart, 1 T. R. 754; 1 Russ. by Grea. 326. The proceedings in prosecutions against bawdy-houses are facilitated by the statute 25 Geo. 2, c. 36, *supra*.

See the 22 & 23 Vict. c. 17, *supra*, p. 178.

Proof of particular nuisances—play-houses, &c.] Play-houses having been originally instituted with the laudable design of recommending virtue to the imitation of the people, and exposing vice and folly, are not nuisances in their own nature, but may become so by drawing together numbers of people, to the inconvenience of the neighborhood. Hawk. P. C. b. 1, c. 75, s. 7; see 2 B. & Ad. 189: 22 E. C. L. R.

Players, plays, and play-houses are now put under regulations by the 6 & 7 Vict: c. 68, pursuant to the second section of which all theatres which are not authorized by letters-patent from the crown, or by license from the lord chamberlain or the justices of the peace, are unlawful.

By the 25 Geo. 2, c. 36, any house, room, garden, or other place kept for public dancing, music, or other public entertainment of the like kind, in the cities of London or Westminster, or within twenty miles thereof, without a license from the magistrates, shall be deemed a disorderly house, and the keeper is subject to the penalty of 100*l.*, and is otherwise punishable as the law directs in cases of disorderly houses. A room used for public music or dancing is within the statute, although it is not exclusively used for those purposes, and although no money be taken for admission; but the mere accidental or occasional use of the room, for either or both of those purposes, will not be within the act. Per Lord Lyndhurst, C. B., Gregory v. Tuffs, 6 C. & P. 271: 25 E. C. L. R.; see also Gregory v. Tavernor, Ibid. 280.

Proof of particular nuisances—dangerous animals.] Suffering fierce and dangerous animals, as a fierce bulldog, which is used to bite people, to go at large, is an indictable offence. 4 Burn's Justice, 578. But where the animal is not of such a de-

(1) Darling v. Hubbell, 9 Conn. 350. Letting a house to a woman of ill-fame, knowing her to be such, is an indictable offence at common law. Commonwealth v. Harrington, 3 Pick. 26; see Brooks v. The State, 2 Yerger, 482.

Every act done in furtherance of a misdemeanor is not the subject of an indictment; but to constitute it such, it must tend directly and immediately, if not necessarily, to the commission of the misdemeanor. Hence, the renting of a house to a woman of ill-fame, with the intent that it shall be kept for the purpose of public prostitution, is not an offence punishable by indictment, though it be so kept afterward. Cowen, J., dissented, holding that the lessor of a house demised and kept for such purposes, might be indicted as the keeper of it. Rockway v. The People, 2 Hill, 558.

(2) Commonwealth v. Lewis, 1 Metcalf, 151.

(3) *Contra*, State v. Avery, 7 Conn. 267.

scription as in general, from its ferocity, to endanger the persons of those it meets, in order to maintain an indictment, it must be shown that the owner was aware of the ferocity of that particular animal. 2 Ld. Raym. 1582.

Proof of particular nuisances—contagion, and unwholesome provisions.] It is an indictable offence to expose a person having a contagious disease, as the small-pox, in public. R. v. Vantandillo, 4 M. & S. 73; R. v. Bronett, Id. 272. See also the 3 & 4 Vict. c. 29, s. 8, which subjects to punishment, by summary conviction, persons inoculating or otherwise producing small-pox. It is a nuisance for a common dealer in provisions to sell unwholesome food, or to mix noxious ingredients in the provisions which he sells. R. v. Dixon, 3 M. & S. 11.

Proof of particular nuisances—eavesdropping, common scold.] Eavesdroppers, or such as listen under walls or windows, or the eaves of houses, to hear discourses, and thereupon frame slanders and mischievous tales, are common nuisances, and indictable, and may be punished by fine, and finding sureties of their good behavior.(1) [*737] *4 Bl. Com. 167; Burn's Justice, Eavesdroppers; 1 Russ. by Grea. 302.(2)

So a common scold is indictable as a common nuisance, and upon conviction, may be fined or imprisoned, or put into the ducking-stool.(3) Hawk. P. C. b. 1, c. 75, s. 14; 4 Bl. Com. 168. The particulars need not be set forth in the indictment: Hawk. P. C. b. 2, c. 25, s. 59; nor is it necessary to prove the particular expressions used; it is sufficient to give in evidence generally that the defendant is always scolding. Per Buller, J., J'Anson v. Stuart, 1 T. R. 754.

Proof of the liability of the defendant.] A man may be guilty of a nuisance by the act of his agent or servant. Thus it has been ruled that the directors of a gas company are liable for an act done by their superintendent and engineer, under a general authority to manage their works, though they are personally ignorant of the particular plan adopted, and though such plan be a departure from the original and understood method, which the directors had no reason to suppose discontinued. R. v. Medley, 6 C. & P. 292: 25 E. C. L. R. See this case, *ante*, p. 753.

The indictment charged the defendant with keeping certain inclosed lands, near the king's highway, for the purpose of persons frequenting the same to practice rifle-shooting and to shoot at pigeons with fire-arms; and that he unlawfully and injuriously caused divers persons to meet there for that purpose, and suffered and caused a great number of idle and disorderly persons, armed with fire-arms, to meet in the highways, &c., near the said inclosed grounds, discharging fire-arms, making a great noise, &c., by which the king's subjects were disturbed and put in peril. At the trial it was proved that the defendant had converted his premises, which were situate at Bayswater, in the county of Middlesex, near the public highway there, into a shooting-ground, where persons came to shoot with rifles at a target, and also at pigeons; and that as the pigeons which were fired at frequently escaped, persons collected outside of the ground, and in the neighboring field, to shoot at them as they strayed, causing a great noise and disturbance, and doing mischief by the shot. It was held, that the evidence supported the allegation that the defendant caused such persons to assemble,

(1) The offence of riding or going armed with unusual and dangerous weapons, to the terror of the people, is an offence at common law. State v. Huntley, 3 Iredell's N. C. Law Rep. 418.

(2) State v. Williams, 2 Tenn. Rep. 108.

(3) Case of Greenwault et al., 4 Rogers's Rec. 174; Field's Case, 6 Ibid. 90; James v. The Commonwealth, 12 Serg. & Rawle, 220. But the punishment by the ducking-stool cannot be inflicted in Pennsylvania. Ibid.

discharging fire-arms, &c., inasmuch as their so doing was a probable consequence of his keeping ground for shooting pigeons in such a place. R. v. Moore, 3 B. & Ad. 184: 23 E. C. L. R.

If the owner of land erect a building which is a nuisance, or of which the occupation is likely to produce a nuisance, and let the land, he is liable to an indictment for such nuisance being continued or created during the term. So he is, if he let a building which requires particular care to prevent the occupation from being a nuisance, and the nuisance occur for want of such care on the part of the tenant.

If a party buy the reversion during a tenancy, and the tenant afterwards, during his term, erect a nuisance, the reversioner is not liable for it; but if such reversioner re-let, or having an opportunity to determine the tenancy, omit to do so, allowing the nuisance to continue, he is liable for such continuance. Per Littledale, J. And such purchaser is liable to be indicted for the continuance of the nuisance, if the original reversioner would have been liable, though the purchaser has had no opportunity of putting an end to the *tenant's interest, or abating the nuisance. R. v. Ped- [*738] ley, 1 Ad. & E. 822: 28 E. C. L. R.(1)

On an indictment for a nuisance in carrying on an offensive trade, a conviction of the defendant before justices for an offence against the 16 & 17 Vict. c. 128, s. 1, committed at the same place, and in the course of the same trade, but anterior to the period comprised in the indictment, is not admissible in evidence, as the offence in the two cases is not necessarily the same. And *quære*, per Lord Campbell, C. J., and Coleridge, J., whether it would be admissible, even if the offence were the same. *Semble*, per Wightman, J., that it would. R. v. Fairie, 8 Ell. & Black. 486: 92 E. C. L. R.

Punishment and abatement of the nuisance.] The punishment imposed by law on a person convicted of a nuisance is fine and imprisonment; but as the removal of the nuisance is of course the object of the indictment, the court will adapt the judgment to the circumstances of the case. If the nuisance, therefore, is alleged in the indictment to be still continuing, the judgment of the court may be that the defendant shall remove it at his own cost. 1 Hawk. c. 75, s. 14. But where the existence of the nuisance is not averred in the indictment, then the judgment of abatement would not be proper, for it would be absurd to give judgment to abate a thing which does not appear to exist. R. v. Stead, 8 T. R. 142; and see R. v. Justices of Yorkshire, 7 T. R. 468. And where the court are satisfied that the nuisance is effectually removed before judgment is prayed upon the indictment, they will in that case also refuse to give judgment to abate it. R. v. Incledon, 13 East, 127. When judgment of abatement is given, it is only to remove or pull down so much of the thing that actually causes the nuisance: as, if a house be built too high, the judgment is to pull down only so much of it as is too high. And the like where the defendant is convicted of a nuisance in carrying on an offensive trade, in which case the judgment is not to pull down the building where the trade is carried on, but only to prevent the defendant from using it again for the purpose of the offensive trade. R. v. Pappineau, 1 Str. 686; see 9 Co. 53; Co. Ent. 92 *b*.(2)

Where a defendant had entered into a recognizance to appear at the assizes and

(1) To maintain an indictment against one for a nuisance, it is not enough merely to show him to be the owner of the land upon which it exists, but it must appear that he either erected or continued it, or in some way sanctioned its erection or continuance. The People v. Townsend, 3 Hill, 479.

(2) When it is the wrongful use of a building that constitutes a nuisance, the remedy is to stop such use, not tear down or demolish the building. Barclay v. The Commonwealth, 1 Casey, 503.

plead to an indictment for nuisance, and at the time of the assizes he was on the continent in ill health, the nuisance having been abated, and the prosecutor being willing to consent to an acquittal, Patteson, J., after conferring with Erskine, J., under these circumstances, allowed a verdict of not guilty to be taken. R. v. Macmichael, 8 C. & P. 755 : 34 E. C. L R.

The 18 & 19 Vict. c. 21, consolidates and amends the Nuisances Removal and Diseases Prevention Acts of 1848 and 1849. Sect. 8 defines what shall be deemed nuisances within the provisions of that act, and sect. 27 gives a summary remedy in cases of nuisances arising from the carrying on of noxious trades and manufactures.

See further, titles Bridges, Highways.

[*739] *OATHS—UNLAWFUL.

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Statutes.] THE offence of taking or administering unlawful oaths is provided against by the 37 Geo. 3, c. 123 (E.), and the 52 Geo. 3, c. 104 (E.).

By the former of these statutes (sect. 1), it is enacted, "That any person or persons who shall, in any manner or form whatsoever, administer, or cause to be administered, or be aiding or assisting at, or present at, and consenting to the administering or taking of any oath or engagement, purporting or intending to bind the person taking the same, to engage in any mutinous or seditious purpose, or to disturb the public peace, or to be of any association, society, or confederacy, formed for any such purpose; or to obey the order or commands of any committee or body of men not lawfully constituted, or of any leader or commander, or other person not having authority by law for that purpose; or not to inform or give evidence against any associated confederate or other person; or not to reveal or discover any unlawful combination or confederacy; or not to reveal or discover any illegal act done, or to be done; or not to reveal or discover any illegal oath or engagement, which may have been administered or tendered to, or taken by such person or persons, or to or by any other person or persons, or the import of any such oath or engagement, shall, on conviction, be adjudged guilty of felony, and be transported for any term not exceeding seven years, and every person who shall *take* such oath or engagement not being compelled thereto," is subject to the same punishment. See R. v. Mark, 3 East, 157.

By the 52 Geo. 3, c. 104, s. 1, "Every person who shall in any manner or form whatsoever administer, or cause to be administered, or be aiding or assisting at, the administering of any oath or engagement, purporting or intending to bind the person taking the same to commit any treason, or murder, or any felony punishable by law with death, shall, on conviction, be adjudged guilty of felony [and suffer death as a felon, without benefit of clergy], and every person who shall *take* any such oath or engagement, not being compelled thereto, shall, on conviction, be adjudged guilty of felony, and be transported for life, or for such term of years as the court shall adjudge."

Now by the 1 Vict. c. 91, after reciting so much of the above section as relates to the administering of the oaths therein mentioned, *and also the third section [*740] of the same act, it is enacted, "That if any person shall, after the commencement of this act, be convicted of any of the offences hereinbefore mentioned, such person shall not suffer death, or have sentence of death awarded against him or her for the same, but shall be liable, at the discretion of the court, to be transported beyond the seas for the term of the natural life of such person, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years."

By s. 2, in cases of imprisonment, the court may award hard labor and solitary confinement.

The statutes are not confined to oaths administered with a seditious or mutinous intent. R. v. Ball, 6 C. & P. 563; R. v. Brodribb, Id. 571. And it is sufficient to aver that the oath was administered, not to give evidence against a person belonging to an association of persons associated to do a "certain illegal act." R. v. Brodribb, *supra.*

Proof of the oath.] With regard to what is to be considered an oath within these statutes, it is enacted by the 37 Geo. 3, c. 123, s. 5, that any engagement or obligation whatsoever, in the nature of an oath, and by 52 Geo. 3, c. 104, s. 6, that any engagement or obligation whatsoever in the nature of an oath, purporting or intending to bind the person taking the same to commit any treason or murder, or any felony punishable by law with death, shall be deemed an oath within the intent and meaning of those statutes, in whatever form or manner the same shall be administered or taken, and whether the same shall be actually administered by any person or persons to any other person or persons, or taken by any person or persons, without any administration thereof by any other person or persons.

It is not necessary in the indictment to set forth the words of the oath or engagement, the purport of some material part thereof is sufficient. 37 Geo. 3, c. 123, s. 4; 52 Geo. 3, c. 104, s. 5; R. v. Moore, 6 East, 419 (*n*). Parol evidence may be given of the oath, though the party administering it appeared to read it from a paper, to produce which no notice has been given. R. v. Moore, *supra.* And where the terms of the oath are ambiguous, evidence of the declarations of the party administering it, made at the time, is admissible to show the meaning of those terms. Id.

If the book on which the oath was administered was not the Testament, it is immaterial, if the party taking the oath believes himself to be under a binding engagement. R. v. Brodribb, 6 C. & P. 671: 23 E. C. L. R.; R. v. Loveless, 1 Moo. & Rob. 349; 6 C. & P. 596. Where the prisoners were indicted under the 37 Geo. 3, Williams, J., said, that with regard to the oath contemplated by the act of Parliament, it was not required to be of a formal nature, but that it was sufficient if it was intended to operate as an oath, and was so understood by the party taking it. The precise form of the oath was not material, and the act provided against any evasions of its intentions by declaring (sect. 5), that any engagement or obligation whatever, in the nature of an oath, should be deemed an oath within the intent and meaning of the act, in whatever form or manner the same should be administered or taken.

Proof of aiding and assisting.] Who shall be deemed persons *aiding [*741] and assisting in the administration of unlawful oaths is declared by the third section of the 37 Geo. 3, c. 123, which enacts that persons aiding or assisting in, or present and consenting to the administering or taking of any oath or engagement before mentioned in the act, and persons causing any such oath or engagement to be ad-

ministered or taken, though not present at the administering or taking thereof, shall be deemed principal offenders, and tried as such, although the person or persons who actually administered such oath or engagement, if any such there be, shall not have been tried or convicted.

Proof for prisoner—disclosure of facts.] In order to escape the penalties of these statutes, it is not sufficient for the prisoner merely to prove that he took the oath or engagement by compulsion, but in order to establish that defence, he must show that he has complied with the requisitions of the statutes, by the earlier of which (sect. 2), it is enacted, that compulsion shall not justify or excuse any person taking such oath or engagement, unless he or she shall within four days after the taking thereof, if not prevented by actual force or sickness, and then within four days after the hindrance produced by such force or sickness shall cease, declare the same, together with the whole of what he or she knows touching the same, and the person or persons to whom and in whose presence, and when and where such oath or engagement was administered or taken, by information on oath before one of his majesty's justices of the peace, or one of his majesty's principal secretaries of state, or his majesty's privy council, or in case the person taking such oath or engagement shall be in actual service in his majesty's forces by sea or land, then by such information on oath as aforesaid, or by information to his commanding officer. The 52 Geo. 3, c. 104, contains a similar provision (sect. 2), fourteen days being substituted for four days.

It is also provided by both the above statutes, that any person who shall be tried and acquitted or convicted of any offence against the acts, shall not be liable to be prosecuted again for the same offence or fact as high treason, or misprision of high treason; and further, that nothing in the acts contained shall be construed to extend to prevent any person guilty of any offence against the acts, and who shall not be tried for the same, as an offence against the acts, from being tried for the same, as high treason or misprision of high treason, in such manner as if these acts had not been made.

Unlawful combinations.] As connected with this head of offence the following statutes relative to unlawful combinations are shortly referred to.

By the 39 Geo. 3, c. 79, s. 2 (E.), all societies, the members whereof are required to take unlawful oaths or engagements within the intent of the 37 Geo. 3, c. 123, or any oath not required or authorized by law, are declared unlawful combinations.

By s. 8, offenders may be summarily convicted, or may be proceeded against by indictment, and in the latter case are liable to transportation for seven years, or to be imprisoned for two years.

By the 57 Geo. 3, c. 19, s. 25 (E.), all societies, the members whereof shall be required to take any oath or any engagement which shall be unlawful within the 37 Geo. 3, c. 123, or the 52 Geo. 3, c. 104, or to take any oath not required, or author-[*742] ized by *law, &c., are to be deemed guilty of unlawful combinations within the 39 Geo. 3, c. 79.

In R. v. Dixon, 6 C. & P. 601: 25 E. C. L. R., Bosanquet, J., held that every person engaging in an association, the members of which, in consequence of being so, take any oath not required by law, is guilty of an offence within the 57 Geo. 3, c. 19, s. 25.

Administering, &c., voluntary oaths, &c.] By the 5 & 6 Wm. 4, c. 62, s. 13, "It shall not be lawful for any justice of the peace or other person to administer, or

cause or allow to be administered, or to receive, or cause or allow to be received, any oath, affidavit, or solemn affirmation, touching any matter or thing whereof such justice or other person hath not jurisdiction or cognizance by some statute in force at the time being: provided always that nothing herein contained shall be construed to extend to any oath, affidavit, or solemn affirmation, before any justice in any matter or thing touching the preservation of the peace, or the prosecution, trial, or punishment of offences, or touching any proceedings before either of the houses of Parliament, or any committee thereof respectively, nor to any oath, affidavit, or affirmation which may be required by the laws of any foreign country to give validity to instruments in writing designed to be used in such foreign countries respectively." See R. v. Nott, 4 Q. B. 768: 45 E. C. L. R.

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*OFFICES—OFFENCES RELATING TO. [*743]

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UNDER this head will be considered the evidence requisite in prosecutions against officers: 1, for malfeasance; 2, for nonfeasance; 3, for extortion; and, 4, for refusing to execute an office.

Proof of malfeasance—illegal acts in general.] It is a general rule that a public officer is indictable for misbehavior in his office. Anon. 6 Mod. 96. And where the act done is clearly illegal, it is not necessary, in order to support an indictment, to show that it was done with corrupt motives. Thus, where a license having been refused by certain magistrates, another set of magistrates, having concurrent jurisdiction, appointed a subsequent day for a meeting, and granted the license which had been refused before, it was held that this was an illegal act, and punishable by indictment, without the addition of corrupt motives.(1) R. v. Sainsbury, 4 T. R. 451. Still more is such an offence punishable when it proceeds from malicious or corrupt motives. R. v. Williams, 3 Burr. 1317; R. v. Holland, 1 T. R. 692. A gaoler is punishable for barbarously misusing the prisoners. Hawk. P. C. b. 1, c. 66, s. 2. So overseers of the poor for misusing paupers, as by lodging them in unwholesome apartments. R. v. Wetheril, Cald. 432. Or by exacting labor from such as are unfit to work. R. v. Winship, Cald. 76. But it is no part of their duty to cause paupers to be vaccinated. 3 Ad. & E. 552. Public officers are also indictable for frauds committed by them in the course of their employment. As where an overseer receives from the father of a bastard a sum of money as a compensation with the parish, and neglects to give credit for this sum in account, he is punishable, though the contract is illegal. R. v. Martin, 2 Campb. 268. See also R. v. Bembridge,

(1) While it is true that every culpable neglect of duty, enjoined on a public officer, either by common law or by statute, is an indictable offence, yet the presentment in such case, unless the act of the officer is clearly illegal, must show with sufficient certainty, that it proceeded from corrupt or culpable motives. The State v. Buxton, 2 Swan, 57.

cited 6 East, 136. Where an officer neglects a duty incumbent on him, either by common law or statute, he is for his fault indictable. Per. Cur., R. v. Wyat, 1 Salk. 380.

Upon an indictment against a public officer for neglect of duty, it is sufficient to state that he was such officer without stating his appointment; neither is it necessary to aver that the defendant had notice of all the facts alleged in the indictment, if it was his official duty to have known them. So where a defendant is charged with disobedience of certain orders communicated to him, it need not be alleged that such [*744] orders still continue in force, as they will be *assumed to continue in force until they are revoked. And an indictment for neglect of duty under a particular statute need not state that the neglect was corrupt, if the statute makes a *wilful* neglect a misdemeanor. R. v. Holland, 5 T. R. 607.

Every malfeasance or culpable nonfeasance of an officer of justice, with relation to his office, is a misdemeanor, and punishable with fine or imprisonment, or both.

As to the sale of offices, see R. v. Charretie, 13 Q. B. 447: 66 E. C. L. R.; and Hopkins v. Prescott, 4 C. B. 578: 56 E. C. L. R.

Proof of nonfeasance.] Upon a prosecution for not performing the duties of an office, the prosecutor must prove, 1, that the defendant holds the office; 2, that it was his duty, and within his power to perform the particular act; and 3, that he neglected so to do.

Where an officer is bound by virtue of his office to perform an act, the neglect to perform that act is an indictable offence. Thus a coroner, 2 Chitt. C. L. 255; 1 Russ. by Grea. 108; a constable, R. v. Wyat, 1 Salk. 380; a sheriff, R. v. Antrobus, 6 C. & P. 784; and an overseer of the poor, R. v. Tawney, 1 Bott. 333, are indictable for not performing their several duties. The majority of the judges were of opinion, that an overseer cannot be indicted for not relieving a pauper, unless there has been an order of justices for such relief, or unless in a case of immediate and urgent necessity. R. v. Meredith, Russ. & Ry. 46. But where the indictment stated that the defendant (an overseer) had under his care a poor woman belonging to his township, but neglected to provide for her necessary meat, &c., whereby she was reduced to a state of extreme weakness, and afterwards, through want, &c., died, the defendant was convicted, and sentenced to a year's imprisonment. R. v. Booth, Ibid. 47 (*n*). And in a case where an overseer was indicted for neglecting, when required, to supply medical assistance to a pauper laboring under dangerous illness, it was held that the offence was sufficiently charged and proved, though the pauper was not in the parish workhouse, nor had previously to his illness received or stood in need of parish relief. R. v. Warren, Ibid. 48 (*n*).

By the 11 Geo. 1, c. 4, the chief officers of corporations, absenting themselves on the charter day for the election of officers, shall be imprisoned for six months. Such offence, however, is not indictable within the statute, unless their presence is necessary to constitute a legal corporate assembly. R. v. Corry, 5 East, 372.

Proof of extortion.] One of the most serious offences committed by persons in office is that of extortion, which is defined to be the taking of money by an officer by color of his office, either where none at all is due, or not so much is due, or where it is not yet due.(1) Hawk. P. C. b. 1, c. 68, s. 1. So the refusal by a public officer

(1) It is an indictable offence in public officers to exact and receive anything more for the performance of their duty than the fees allowed by law. Gillmore v. Lewis, 12 Ohio, 281.

to perform the duties of his office, until his fees have been paid, is extortion. 3 Inst. 149; R. v. Hescott, 1 Salk. 330; Hutt. 53. So it is extortion for a miller or a ferryman to take more toll than is due by custom. R. v. Burdett, *infra*. So where the farmer of a market erected such a number of stalls that the market people had not space to sell their wares, it was held that the taking money from them for the use of the stalls was extortion. R. v. Burdett, 1 Ld. Raym. 149.

*The prosecutor must be prepared to prove, first, that the defendant fills the [*745] office in question. For this purpose it will be sufficient to show that he has *acted* as such officer; and secondly, the fact of the extortion. This must be done by showing what are the usual fees of the office, and proving the extortion of more. Several persons may be indicted jointly, if all are concerned; for in this offence there are no accessaries, but all are principals. R. v. Atkinson, 2 Ld. Raym. 1248; 1 Salk. 382; R. v. Loggen, 1 Str. 75.

The indictment must state the sum which the defendant received, but the exact sum need not be proved, as where he is indicted for extorting twenty shillings, it is sufficient to prove that he extorted one shilling. R. v. Burdett, 1 Ld. Raym. 149; R. v. Gillham, 6 T. R. 267; R. v. Higgins, 4 C. & P. 247: 19 E. C. L. R.(1)

The offence of extortion is punishable as a misdemeanor at common law, by fine and imprisonment, and by removal from office. Hawk. P. C. b. 1, c. 68, s. 5. Penalties are likewise added by the statute of Westm. 1, c. 26.

It is also an indictable offence to persuade another to extort money from a person, whereby money actually was extorted from him. R. v. Tracy, 3 Salk. 192.

Extortion by public officers in the East Indies.] The 33 Geo. 3, c. 52, s. 62, enacts, that the demanding or receiving any sum of money, or other valuable thing, as a gift or present, or under color thereof, whether it be for the use of the party receiving the same, or for or pretended to be for the use of the East India Company, or of any other person whatsoever, by any British subject holding or exercising any office or employment under his majesty, or the company in the East Indies, shall be deemed to be extortion and a misdemeanor at law, and punished as such. The offender is also to forfeit to the king the present so received, or its full value; but the court may order such present to be restored to the party who gave it, or may order it or any part of it, or of any fine which they shall set upon the offender, to be paid to the prosecutor or informer.

In R. v. Douglas, 13 Q. B. 74: 66 E. C. L. R.; S. C. 17 L. J. M. C. 176, Parke, B., in delivering the judgment of the Exchequer Chamber, confirming that of the Queen's Bench, said, "The object of the legislature was to prevent a person receiving any gift, or present, or sum of money, in the East Indies (he being an officer of the government, or of the East India Company), absolutely, whatever the reason of that gift might be;" and added, "it was thought by the legislature, looking at the balance of convenience and inconvenience, that great advantages were obtained by putting an end to gifts altogether, though it might be at the expense of some occasional mischief to innocent persons."

(1) The fees must be wilfully and corruptly demanded. It is not extortion in case of mistake or for extra trouble in conformity with usage. Commonwealth v. Shed, 2 Mass. 227. There must be the receipt of money or some other thing of value. Taking a promissory note is not enough. Commonwealth v. Corry, 2 Mass. 524. See People v. Whaley, 6 Cowen, 661.

It is not necessary in an indictment against a constable for extortion, in corruptly and by color of his office collecting on an execution more than was due, to show what sum he had extorted for his fees. The State v. Stotts, 5 Black. 460.

Extortions by registrars of joint stock companies.] By the 7 & 8 Vict. c. 110 (an act for the registration, incorporation, and regulation of joint-stock companies), s. 22, "If either the said registrar of joint-stock companies, or any person employed under him, either demand or receive any gratuity or reward in respect of any service performed by him, other than the fees aforesaid, then for every such offence, every such registrar or person shall be guilty of a misdemeanor."

[*746] *Proof on prosecutions for refusing to execute an office.*] A refusal *to execute an office to which a party is duly chosen, is an indictable offence, as that of constable: R. v. Lone, 2 Str. 920; R v. Genge, Cowp. 13; or overseer: R. v. Jones, 2 Str. 1145; 7 Mod. 410; 1 Russ. by Grea. 145.

The prosecutor must prove the election or appointment of the defendant, his liability to serve, notice to him of his appointment, and his refusal. It must appear that the persons appointing him had power so to do. Thus on an indictment for not serving the office of constable on the appointment of a corporation, it must be stated and proved that the corporation had power by prescription to make such an appointment, for they possess no such power of common right. R. v. Bernard, 2 Salk. 52; 1 Ld. Raym. 94. The notice of his appointment must then be proved, R. v. Harper, 5 Mod. 96, and his refusal, or neglect to perform the duties of the office, from which a refusal may be presumed.

For the defence it may be shown that the defendant is not an inhabitant resiant of the place for which he is chosen. R. v. Adlard, 4 B. & C. 772; 10 E. C. L. R.; Donne v. Martyr, 8 B. & C. 62: 15 E. C. L. R.; and see the other grounds of exception enumerated in Archb. Cr. Pr. 669, 10th ed. It is not any defence that the defendant resides in the jurisdiction of a leet within the hundred or place for which he is elected: R. v. Genge, Cowp. 13; or that no constable had ever before been appointed for the place. 2 Keb. 557.

The punishment is fine or imprisonment, or both. See R. v. Bower, 1 B. & C. 587: 8 E. C. L. R.

[*747] *PERJURY.

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THE proofs required to support an indictment for perjury at common law will be first considered, and the statutes creating the offence of perjury in various cases will be subsequently stated.

By the 22 & 23 Vict. c. 17, *supra*, p. 178, no indictment for perjury is to be preferred without previous authority as there mentioned.

Perjury at common law.] Perjury at common law is defined to be a wilful false oath by one who, being lawfully required to depose the truth in any proceeding in a court of justice, swears absolutely in a matter of some consequence to the point in question, whether he be believed or not.(1) Hawk. P. C. b. 1, c. 69, s. 1. The proceedings, however, are not confined to courts of justice. *Vide post*, p. 751.

The necessity for showing distinctly that the false oath was taken in a judicial proceeding, is not dispensed with by the 23 Geo. 2, c. 11, s. 1. R. v. Overton, 4 Q. B. 83: 45 E. C. L. R.

To support an indictment for perjury, the prosecutor must prove, 1, the authority to administer an oath; 2, the occasion of administering it; 3, the taking of the oath; 4, the substance of the oath; 5, the materiality of the matter sworn; 6, the introductory averments; 7, the falsity of the matter sworn; and 8, the corrupt intention of the defendant. 2 Stark. Ev. 621, 2d ed.

Proof of the authority to administer an oath.] Where the oath has been administered by a master in chancery, surrogate, or commissioner having a general authority for that purpose, it is not necessary to prove his appointment; it being sufficient to show that he has acted in that character. See the cases cited, *ante*, pp. 6 and 17. But *as this evidence is only presumptive, it may be rebutted, and [*748] the defendant may show that there was no appointment, or that it was illegal. Thus after proof that the oath had been made before a person who acted as a surrogate, the defendant showed that he had not been appointed according to the canon, and was acquitted. R. v. Verelst, 3 Camp. 432. Where the party administering the oath derives his authority from a special commission, directed to him for that purpose, it is necessary to prove the authority, by the production and proof of the commission which creates the special authority. 2 Stark. Ev. 622, 2d ed. Thus upon an indictment for perjury against a bankrupt, in passing his last examination, Lord Ellenborough ruled that it was necessary to give strict proof of the bankruptcy, which went to the authority of the commissioners to administer an oath, for unless the defendant really was a bankrupt the examination was unauthorized. R. v. Punshon, 3 Camp. 96; 3 B. & C. 354: 10 E. C. L. R. See also R. v. Ewington, 2 Moo. C. C. R. 223, *post*, p. 752.

Where a cause was preferred by a judge's order, and it was directed that the witnesses should be sworn before a judge, "or before a commissioner *duly authorized*," and a witness was sworn before a commissioner for taking affidavits (empowered by stat. 29 Car. 2, c. 5), it was held that he was not indictable for perjury, the commissioner not being "duly authorized" by the statute to administer an oath for a *vivâ voce* examination. R. v. Hanks, 3 C. & P. 419: 14 E. C. L. R. So a master extraordinary in chancery, not having any authority to administer oaths in matters before the Court of Admiralty, a conviction for perjury in an affidavit used in the Court of Admiralty, and sworn before a master extraordinary in chancery, was held to be bad. R. v. Stone, 1 Dears. C. C. R. 251; S. C. 23 L. J. M. C. 14. So an arbitrator under the 9 & 10 Vict. c. 95, s. 77, not having authority to administer an oath, false evidence given before him is not the subject of perjury. R. v. Hallett, 2 Den. C. C. R. 237; S. C. 20 L. J. M. C. 197.

Where perjury was charged to have been committed on that which was in effect

(1) The definition of Hawkins has the words "in a course of justice," which is more accurate than the phrase in the text, "in a court of justice." The Commonwealth v. Powell, 2 Metcalf (Ky.), 10; The State v. Kennerly, 10 Richardson's Law, 152; The State v. Lamont, 2 Wisconsin, 437.
Perjury cannot be committed in an official oath. The State v. Dayton, 3 Zabriskie, 49.

the affidavit on an interpleader rule, and the indictment set out the circumstances of a previous trial, the verdict, the judgment, the writ of *fieri facias*, the levy, the notice by the prisoner to the sheriff not to sell, and the prisoner's affidavit that the goods were his property, but omitted to state that any rule was obtained according to the provisions of the interpleader act: Coleridge, J., held that the indictment was bad, as the affidavit did not appear to be made on a *judicial* proceeding: since for anything that appeared it might have been a voluntary oath. R. v. Bishop, Carr. & M. 302: 41 E. C. L. R.

In the case of a trial taking place where the court has no jurisdiction, for evidence given thereat, a witness cannot be indicted for perjury. R. v. Cohen, 1 Stark, N. P. C. 511; Baston v. Gouch, 3 Salk. 269. But a false oath taken before commissioners, whose commission is at the time in strictness determined by the death of the king, is perjury, if taken before the commissioners had notice of the demise. Hawk. P. C. b. 1, c. 69, s. 4; 2 Russ. by Grea. 599.

Perjury was committed before magistrates upon the second application for a bastardy order, a former application having been dismissed on the merits; but it was [*749] held, that the magistrates had jurisdiction, *and the conviction was good. R. v. Cooke, 2 Den. C. C. R. 462; S. C. 21 L. J. M. C. 136.

A summons was granted by a justice under the 7 & 8 Vict. c. 101, and the 8 & 9 Vict. c. 10, on the application of the mother of a bastard child against the defendant, as the putative father, more than twelve months after the birth, in which summons it was alleged that he had within the twelve months paid money for the maintenance of the child; but instead of alleging that the mother had *given proof* that such money had been paid, in the form given by the statute, the summons alleged that the mother stated that it had been paid. The defendant appeared in answer to the summons, and took no objection either to the form of the summons or to the proceedings upon which it was founded, but denied the paternity, and swore that he had never paid any money for maintenance. Perjury was assigned on the latter statement, and was fully proved at the trial; but it was also proved that the statement by the mother that maintenance had been paid, upon which the summons was issued, was not made on oath. It was held (*dissentiente*, Martin, B.), that the proceedings against the father before the magistrate, were civil and not criminal, and that the defect in the proceedings was an irregularity which was capable of being and had been waived by the defendant. Consequently, that the jurisdiction of the magistrates was well founded, and the defendant rightly convicted of perjury. R. v. Berry, Bell, C. C. 46; S. C. 28 L. J. M. C. 70.

A. was indicted for perjury committed before the justices in petty sessions on the hearing of a summons in bastardy under the 7 & 8 Vict. c. 101, s. 2. No evidence had been given before the summoning justice that the defendant had paid any money for the maintenance of the child within twelve months next after its birth, and this had not in fact been done, but no objection was taken by the defendant before the magistrate on that account, though the summons was in the form given by the schedule to the 8 & 9 Vict. c. 10, alleging such payment of maintenance. Held, that the justices in petty sessions had jurisdiction to hear the complaint, as the defendant had waived the objection, which was one relating to matter of process only, and not of the essence of the jurisdiction; and that the conviction was, therefore, good. R. v. Simmons, Bell, C. C. 168; S. C. 28 L. J. M. C. 183.

An affidavit of debt, made under 1 & 2 Vict. c. 110, s. 8, and sworn before a registrar of the court of bankruptcy, is sworn before a competent authority, and perjury may be assigned upon it. R. v. Dunn, 16 L. J. Q. B. 382.

No oath taken before persons acting merely in a private capacity, or before those who take upon them to administer oaths of a public nature, without legal authority, or before those who are authorized to administer some oaths, but not that which happens to be taken before them, or even before those who take upon them to administer justice by virtue of an authority seeming colorable, but in truth void, can never amount to perjury in the eye of the law, for they are of no manner of force. Hawk. P. C. b. 1, c. 99, s. 4; 2 Russ. by Grea. 599 (1)

The authority by which the party is empowered to administer the oath, must, if specially described, be proved as laid. Therefore, where the indictment stated the oath to have been administered at the assizes, before justices *assigned to take the said assizes*, before *A. B., one of the said justices, the said justices having then [*750] and there power, &c., and in fact the judge, when the oath was administered, was sitting under the commission of *oyer* and *terminer* and gaol delivery, this was held to be a fatal variance. R. v. Lincoln, Russ. & Ry. 421. But an indictment for perjury at the assizes may allege the oath to have been taken before *one* of the judges in the commission, though the names of both appear. R. v. Alford, 1 Leach, 150; see R. v. Coppard, *post*, p. 762.

The recent statute 14 & 15 Vict. c. 100, s. 20, enacts, "That in every indictment for perjury, &c., it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what court or before whom the oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing was taken, made, signed, or subscribed, without setting forth the bill, answer, information, indictment, declaration, or any part of any proceeding, either in law or in equity, and without setting forth the commission or authority of the court or person before whom such offence was committed."

In an indictment for perjury, intended to be charged as having been committed in the course of the trial of an appeal before the commissioners of assessed taxes, it is necessary to set out with particularity all that is requisite to give the commissioners jurisdiction to try the appeal. R. v. ——, 1 Cox, C. C. 50. So on an indictment for perjury, alleged to have been committed on the hearing of an information under the Beer Act, 1 Wm. 4, c. 64, s. 15, before two justices at petty sessions, Park and Patteson, JJ., held that it was necessary to aver that the justices were acting in and for the division or place in which the house was situate; but that it was not necessary to allege they were acting in petty sessions, as every meeting of two justices in one place for business is itself a petty session. R. v. Rawlins, 8 C. & P. 439. An indictment for perjury committed before a magistrate, stated that the defendant went before the magistrate and was sworn, and that being so sworn, he did falsely, &c., "say, depose, swear, charge, and give the said justice to be informed" that he saw, &c.; it was held by the judges that this sufficiently showed that the oath was taken in a judicial proceeding. R. v. Gardiner, 8 C. & P. 737: 34 E. C. L. R.; S. C. 2 Moo. C. C. 95. In a previous case, where the indictment merely stated that the defendant, intending to subject W. M. to the penalties of felony, went before two magistrates, and "did depose and swear," &c. (setting out a deposition, which stated that W. B. had put his hand into the defendant's pocket, and taken out a 5*l.* note), and assigning perjury upon it; Coleridge, J., held that the indictment was bad, as it did not show that any

(1) The State v. Hayward, 1 Nott & McCord, 547; The United States v. Bailey, 9 Peters, 238; Shaffer v. Kintzer, 1 Binney, 542; see Chapman v. Gillett, 2 Conn. 40.

An oath administered by the clerk of a court, not required by law or by order of court, is extrajudicial, and if false lays no foundation for an indictment for perjury. The United States v. Babcock, 4 McLean, 113.

charge of felony had been previously made, or that the defendant then made any charge of felony, or that any judicial proceeding was pending before the magistrates. R. v. Pearson, 8 C. & P. 119.

An indictment for perjury, alleging that the defendant had filed a petition for protection from process in the county court, and charging perjury against him in the proceedings consequent upon the petition, was held sufficiently to show the jurisdiction of the county court, without alleging that the defendant had resided for six months within the jurisdiction. R. v. Walker, 27 L. J. Q. B. 137.

An information laid under the Game Act, the 1 & 2 Wm. 4, c. 32, s. 30, and in pursuance of the same statute, s. 41, and the 6 & 7 Wm. 4, c. 65, s. 9, if laid by a [*751] person not deposing on oath to the *matter of charge, must distinctly show that the charge was deposed to by some other credible witness on oath. If the information leaves this doubtful, all further proceedings upon it are without jurisdiction; and if the defendant is summoned, and appears to answer the charge, a witness giving false evidence on the hearing cannot be convicted of perjury. R. v. Scotton, 5 Q. B. 493: 48 E. C. L. R.; see also R. v. Goodfellow, Carr. & M. 569: 41 E. C. L. R. But unless a statute requires it, an information need not be on oath, and therefore, under the 24th section of the Malicious Trespass Act, 7 & 8 Geo. 4, c. 30, an information upon oath is not requisite in order to give the magistrate jurisdiction. R. v. Millard, I Dears. C. C. R. 166; S. C. 22 L. J. M. C. 108. It is not necessary in the indictment to show the *nature* of the authority of the party administering the oath. R. v. Callanan, 6 B. & C. 602: 13 E. C. L. R.; see also R. v. Berry, *supra*, p. 749.

Proof of the occasion of administering the oath.] The occasion of administering the oath must be proved as stated. Thus, if the perjury were committed on the trial of a cause of nisi prius, the record must be produced in order to show that such a trial was had: 2 Stark. Ev. 622, 2d ed.; and for this purpose the nisi prius record is sufficient.(1) R. v. Iles, Cases temp. Hardw. 118, see p. 172 and p. 809. The occasion, and the parties before whom it came on to be tried, must be correctly stated. Where it was averred that a cause came on to be tried before Lloyd, Lord Kenyon, &c., William Jones being associated, &c., and it appeared that Roger Kenyon was associated, this was ruled a fatal variance. R. v. Eden, 1 Esp. 97. See also R. v. Fellowes, 1 C. & K. 115: 47 E. C. L. R. But where an indictment alleged that the trial of an issue took place before E., sheriff of D., by virtue of a writ directed to the said sheriff; and the writ of trial put in evidence was directed to the sheriff, and the return was of a trial before him, but in fact the trial took place before a deputy, not the under-sheriff, it was held no variance. R. v. Dunn, 2 Moo. C. C. 297; 1 C. & K. 730. It is not merely before courts of justice, even at common law, that persons taking false oaths are punishable for perjury. Any false oath is punishable as perjury, which tends to mislead a court in any of its proceedings relating to a matter judicially before it, though it in no way affects the principal judgment which is to be given in the cause; as an oath made by a person offering himself as bail. And not only such oaths as are taken on judicial proceedings, but also such as any way tend to abuse the administration of justice are properly perjuries, as an oath before a justice to compel another to find sureties of the peace; before commissioners appointed by the king to inquire into the forfeiture of his tenants' estates, or commissioners appointed by the king to inquire into defective titles. Hawk. P. C. b. 1, c. 69, s. 3.

(1) Resp v. Goss et al., 2 Yeates, 479.

A false oath in any court, whether of record or not, is indictable for perjury. 5 Mod. 348. And perjury may be assigned upon the oath against simony, taken by clergymen at the time of their institution. R. v. Lewis, 1 Str. 70. A person may be indicted for perjury who gives false evidence before a grand jury when examined as a witness before them upon a bill of indictment. R. v. Hughes, 1 C. & K. 519: 47 E. C. L. R.

A man may be indicted for perjury in an oath taken by him in his own cause, as in an answer in chancery, or to interrogatories concerning *a contempt, or in [*752] an affidavit, &c., as well as by an oath taken by him as a witness in the case of another person. Hawk. P. C. b. 1, c. 69, s. 5.(1)

Perjury cannot be assigned upon a false verdict, for jurors are not sworn to depose the truth, but only to judge truly of the depositions of others. Id.

Where the prisoner was indicted for taking a false oath before a surrogate to procure a marriage license, being convicted, the judges, on a case reserved, were of opinion that perjury could not be charged upon an oath taken before a surrogate. They were also of opinion that as the indictment in this case did not charge that the defendant took the oath to procure a license, or that he did procure one, no punishment could be inflicted. R. v. Foster, Russ. & Ry. 459; and see R. v. Alexander, 1 Leach, 63; see also 1 Vent. 370, and the observations 2 Deac. Dig. C. L. 1101. But a surrogate has power to administer an oath, and a false oath taken before him for the purpose of obtaining a marriage license is a misdemeanor. R. v. Chapman, 1 Den. C. C. R. 432; S. C. 18 L. J. M. C. 152.

Perjury cannot be assigned upon an affidavit sworn in the Insolvent Debtors' Court by an insolvent respecting the state of his property and his expenditure, for the purpose of obtaining an extended time to petition under the 10th section of the 7 Geo. 4, c. 57, without proving that the court by its practice requires such an affidavit. And such proof is not given by an officer of the court producing printed rules, purporting to be rules of the court, which he has obtained from the clerk of the rules, and is in the habit of delivering out as rules of the court, but which are not otherwise shown to be rules of the court, the officer professing to have no knowledge of the practice, except from such printed rules. R. v. Koop, 6 Ad. & E. 198. Tenterden, C. J., held that an indictment for perjury would not lie under the 71st section of the 7 Geo. 4, c. 57, against an insolvent debtor for omissions of property in his schedule, such offence being made liable to punishment under the 70th section as a substantive misdemeanor. R. v. Mudie, 1 Moo. & R. 128.

The object with which the oath was taken need not be carried into effect, for the perjury is complete at the moment when the oath was taken, whatever be the subsequent proceedings. Thus where the defendant was indicted for perjury in an affidavit which could not, from certain defects in the *jurat*, be received in the court for which it was sworn; Liddledale, J., was of opinion that nevertheless perjury might be assigned upon it. R. v. Hailey, Ry. & Moo. N. P. C. 94: 21 E. C. L. R. So it was ruled by Tenterden, C. J., that a party filing a bill for an injunction, and making an affidavit of matters material to it, is indictable for perjury committed in that affidavit, though no motion is ever made for an injunction. R. v. White, Moo. & M. 271: 22 E. C. L. R.

Perjury cannot be committed in evidence given before commissioners of bank-

(1) Resp. v. Newell, 3 Yeates, 414.
In a trial before a justice of the peace, if the plaintiff offer himself as a witness, is sworn and testifies falsely, perjury may be assigned on the oath thus taken. Montgomery v. The State, 10 Ohio, 220.

ruptcy, where there was no good petitioning creditor's debt to support the fiat. R. v. Ewington, 2 Moo. C. C. 223; S. C. Carr. & M. 319: 41 E. C. L. R.

The enforced answers of a bankrupt under examination of a bankruptcy commissioners to questions relating to matters specified in sect. 117 of the Bankrupt Consolidation Act, 1849, may be given in evidence by the prosecution on any criminal proceeding against the bankrupt. R. v. Scott, 25 L. J. M. C. 128.

[*753] **Proof of the taking of the oath.*] It is sufficient in the indictment to state that the defendant *duly* took the oath.(1) R. v. McArthur, Peake, N. P. C. 155. But where it was averred that he was *sworn on the Gospels*, and it appeared that he had been sworn according to the custom of his own country, without kissing the book, it was held a fatal variance, though the averment was afterwards proved by its appearing that he was previously sworn in the ordinary manner. Id.

The mode of proving that the defendant was sworn, in an indictment for perjury in an answer in chancery, is by producing the original answer signed by him, and proving his handwriting, and that of the master in chancery to the *jurat*, together with proof of the identity of the defendant. R. v. Morris, 1 Leach, 50; 2 Burr. 1189; R. v. Benson, 2 Campb. 508. The making of an affidavit is proved in the same manner by production and proof of the handwriting. The whole affidavit must be produced. R. v. Hudson, 1 F. & F. 56.

The form of the oath as stated in the indictment was that the prisoner should speak "the truth, the whole truth, and nothing but the truth," and it was proved to have been administered in the form that the prisoner should "true answer make." Watson, B., held, that this was not a material variance. R. v. Southwood, 1 F. & F. 356.

Where the affidavit upon which the perjury was assigned was signed only with the mark of the defendant, and the *jurat* did not state that the affidavit was read over to the party, Littledale, J., said, "As the defendant is illiterate, it must be shown that she understood the affidavit. Where the affidavit is made by a person who can write, the supposition is that such person is acquainted with its contents, but in the case of a marksman it is not so. If in such a case a master by the *jurat* authenticates the fact of its having been read over, we give him credit, but if not, he ought to be called upon to prove it. I should have difficulty in allowing the parol evidence of any other person." R. v. Hailey, 1 C. & P. 258: 12 E. C. L. R.

It is incumbent upon the prosecutor to give precise and positive proof that the defendant was the person who took the oath. R. v. Brady, 1 Leach, 330; but this rule must not be taken to exclude circumstantial evidence. R. v. Price, 6 East, 323; 2 Stark. Ev. 624, 2d ed.

It must appear that the oath was taken in the county where the venue is laid; and the recital in the *jurat* of the place where the oath is administered, is sufficient evidence that it was administered at the place named. R. v. Spencer, Ry. & Moo. N. P. C. 98: 21 E. C. L. R. But though the *jurat* state the oath to be taken in one county, the prosecutor may show that it was in fact taken in another. R. v. Emden, 9 East, 437.

The making of a false affirmation by a Quaker or Moravian, must be proved in the same manner as the taking of a false oath. By the 22 Geo. 2, c. 46, s. 36, if any Quaker making the declaration or affirmation therein mentioned, shall be lawfully

(1) Resp. v. Newell, 3 Yeates, 414.
An indictment for perjury, alleging that the respondent was sworn and took her *corporal* oath to speak the truth, the whole truth, &c., was holden to be sustained by evidence of the oath taken with uplifted hand. State v. Norris, 9 N. Hampshire, 96.

convicted of having wilfully, falsely, and corruptly affirmed and declared any matter or thing, which, if the same had been deposed in the usual form, would have amounted to wilful and corrupt perjury, every person so offending shall incur and suffer the pains, penalties, &c., inflicted on persons *convicted of wilful and [*754] corrupt perjury. The 9 Geo. 4, c. 32, 3 & 4 Wm. 4, c. 49, 3 & 4 Wm. 4, c. 82, and 1 & 2 Vict. c. 77, which admit the evidence of Quakers, Moravians, and separatists, in all cases whatsoever, criminal or civil, contain similar clauses; and there are various other statutes by which false affirmations are subjected to the penalties inflicted on perjury.

The recent statute 17 & 18 Vict. c. 125, s. 20, enacts, that "If any person called as a witness or required or desiring to make an affidavit or deposition, shall refuse or be unwilling, from alleged conscientious motives, to be sworn, it shall be lawful for the court or judge, or other presiding officer or person qualified to take affidavits or depositions, upon being satisfied of the sincerity of such objections, to permit such person, instead of being sworn, to make his or her solemn affirmation," &c.

And by sect. 21, "If any person, making such solemn affirmation or declaration, shall wilfully, falsely, and corruptly affirm or declare any matter or thing which, if the same had been sworn in the usual form, would have amounted to wilful and corrupt perjury, every such person so offending shall incur the same penalties as by the laws and statutes of this kingdom are or may be enacted or provided against persons convicted of wilful and corrupt perjury."

Although the taking of a false oath required by statute is a misdemeanor, it is not perjury, unless made so by the statute. R. v. Mudie, and R v. Chapman, *ante*, p. 752; and see R. v. De Beauvoir, 7 C. & P. 20: 32 E. C. L. R ; and see also R. v. Harris, Id. 253, and R. v. Dodsworth, 8 C. & P. 218: 34 E. C. L. R., as to giving false answers at an election.

By the 5 & 6 Wm. 4, c. 62, abolishing unnecessary oaths (see *ante*, p. 742), and substituting declarations in lieu thereof (but which, by s. 9, does not extend to proceedings in courts of justice or before justices of the peace), persons making false declarations shall (s. 21) be guilty of a misdemeanor.

Proof of the substance of the oath.] In proving the substance of the oath, or the matter sworn to by the defendant, it was long a question how far it was incumbent on the prosecutor to prove the whole of the defendant's statement relative to the same subject-matter, as where he has been both examined and cross-examined; or whether it was sufficient for him merely to prove so much of the substance of the oath as was set out on the record, leaving it to the defendant to prove any other part of the evidence given by him, which qualified or explained the part set out. Thus Lord Kenyon ruled, that the whole of the defendant's evidence on the former trial should be proved, for if in one part of his evidence he corrected any mistake he had made in another part, it would not be perjury. R. v. Jones, N. P. C. 38 ; see also R. v. Dowlin, Id. 170; 2 Chitty, C. L. 312, 2d ed.; Anon. cor. Lord Gifford, cited Ry. & Moo. N. P. C. 300: 21 E. C. L. R.; *vide post*, p. 755.

It was formerly thought that an oath did not amount to perjury, unless sworn in absolute and direct terms, and that if a man swore according as he *thought*, *remembered*, or *believed* only, he could not be convicted of perjury. 3 Inst. 166. But the modern doctrine is otherwise. It is said by Lord Mansfield to be certainly true, that a man may be indicted for perjury in swearing that he *believes* a fact to be true which he knows to be false. R. v. Pedley, 1 Leach, 327. *The difficulty, if any, [*755]

is in the proof of the assignment. R. v. Schlesinger, 10 Q. B. 670 : 59 E. C. L. R.; S. C. 17 L. J. M. C. 29.(1)

So perjury may be committed by swearing to a statement which in one sense is true, but which, in the sense intended to be impressed by the party swearing, is false, as in a case mentioned by Lord Mansfield. The witness swore that he left the party whose health was in question, in such a way that were he to go on as he then was, he would not live two hours. It afterwards turned out that the man was very well, but had got a bottle of gin to his mouth, and true it was, in a sense of equivocation, that had he continued to pour the liquor down, he would in much less time than two hours have been a dead man. Lofft's Gilb. Ev. 662.

No case appears to have occurred in our law of an indictment for perjury for mere matter of *opinion*. The following observations on this subject are from the pages of an eminent writer on the criminal law of Scotland.

If the matter sworn to, be one of opinion only, as a medical opinion, it cannot in the general case be made the foundation of a prosecution for perjury. But though a medical or scientific opinion cannot in general be challenged as perjury, because the uncertainty and division of opinion in the medical profession is proverbial; yet, if it assert a fact, or draw an inference evidently false, as for example, if a medical attendant swear that a person is unfit to travel who is in perfect health, or an architect shall declare a tenement to be ruined, which is in good condition, certainly the gross falsehood of such an assertion shall in neither case be protected by the plea that it related to a matter of professional investigation. Alison, Prin. Cr. Law of Scotl. 468.

In R. v. Stolady, 1 F. & F. 518, Pollock, C. B., said that it was not a sufficiently precise allegation whereon to found an indictment for perjury that the prisoner swore that a certain event did not happen between two fixed dates; his attention not having been called to the particular day on which the transaction did take place.

A doubt may arise, whether a witness can be convicted of perjury, in answer to a question which he could not legally be called upon to answer, but which is material to the point in issue. No decision upon this subject appears to have taken place in our courts; but in Scotland it has been held, that a conviction for perjury in such case cannot be maintained. Speaking of the general rule, that where the matter is pertinent to the issue, the party taking a false oath will be guilty of perjury, Mr. Alison says, "There is one exception, however, to this rule, where the matter on which the perjury was alleged to have been committed was such, as it was not competent to examine the witness upon, however material to the issue; for law cannot lend the terrors of its punishment to protect a party in pursuing an incompetent and illegal train of investigation. On this ground it was, that the decision went, in the case of Patrick McCurly, 4th August, 1777, who had been precognosced with a view to a criminal trial, and, afterwards, as often happens, had given a different account of the matter on the trial itself. Towards the close of his deposition, he was asked whether he had ever given a different account of the matter, and he swore he had not. Upon this last falsehood he was indicted for perjury; and after a debate on the [*756] relevancy, the prosecutor abandoned the charge; nor, in truth, does *it seem possible to maintain an indictment for perjury in such a case, where the question was clearly incompetent, and the witness would have been entitled to decline answering it. Prin. Crim. Law Scot. 470.

Where on an indictment for perjury, upon the trial of an action, it appeared that

(1) The Commonwealth v. Cornish, 6 Binney, 249.

the evidence given on that trial by the defendant contained all the matter charged as perjury, but other statements, not varying the sense intervened between the matters set out, Abbott, C. J., held the omission immaterial, since the effect of what was stated was not varied. R. v. Solomon, Ry. & Moo. N. P. C. 252: 21 E. C. L. R. So where perjury was assigned upon several parts of an affidavit, it was held that those parts might be set out in the indictment as if continuous, although they were in fact separated by the introduction of other matter. R. v. Callanan, 6 B. & C 102: 13 E. C. L. R. It seems that where the indictment sets forth the *substance* and *effect* of the matters sworn, it must be proved, that in substance and effect, the defendant swore the whole of what is thus set forth as his evidence, although the count contains several distinct assignments of perjury. R. v. Leef, 2 Campb. 134; 4 B. & C. 852: 10 E. C. L. R. Where the indictment charged that the defendant in substance and effect swore, &c., and it appeared that the deposition was made by him and his wife jointly, he following up the statement of the wife, which was held to be no variance. R. v. Grendall, 2 C. & P. 563: 12 E. C. L. R. An indictment for perjury alleged to have been committed in an affidavit sworn before the commissioner of the Court of Chancery stated that a commission of bankrupt issued against the defendant, under which he was duly declared a bankrupt. It then stated, that the defendant preferred his petition to the Lord Chancellor, setting forth various matters, and amongst others, the issuing of the commission, that the petitioner was declared a bankrupt, and that his estate was seized under the commission, and that, at the second meeting, one A. B. was appointed assignee, and an assignment made to him, and that he possessed himself of the estate and effects of the petitioner. It then stated, that at the several meetings before the *commission*, the petitioner declared openly, and in the presence and hearing of the said assignee, to a certain effect. At the trial the petition was produced, and it appeared that the allegation was, that at the several meetings before the *commissioners*, the petitioner declared to that effect. It was held that this was no variance, inasmuch as it was sufficient to set out in the indictment the petition in substance and effect, and the word "commission" was one of equivocal meaning, and used to denote either a trust or authority exercised, or the *persons* by whom the trust or authority was exercised, and that it sufficiently appeared, from the context of the petition set forth in the indictment, that it was used in the latter sense. R. v. Dudman, 4 B. & C. 850: 10 E. C. L. R. Where the indictment professes to set out the substance and effect of the matter sworn to, and in the deposition a word is omitted, which is supplied in the setting forth of the deposition in the indictment, that is a fatal variance; the proper mode in such cases is, to set forth the deposition as it really is, and to supply the sense by an innuendo. R. v. Taylor, 1 Campb. 404. And where the indictment, in setting out the *substance* and *effect* of the bill in equity upon the answer to which the perjury was assigned, stated an agreement between the prosecutor and the defendant respecting *houses*, and upon the original bill being read, it appeared that the word was **house* (in the singular [*757] number), Abbott, C. J., said, "The indictment professes to describe the substance and effect of this bill; it does not, certainly, profess to set out the tenor, but this I think is a difference in substance, and consequently a fatal variance." R. v. Spencer, Ry. & Moo. N. P. C. 98: 21 E. C. L. R.

The omission of a letter, in setting out the affidavit on which perjury is assigned, will not be material, if the sense is not altered thereby, as *undertood* for *understood*. Although it be under an averment "to the tenor and effect *following*." R. v. Beech, 1 Leach, 133; Cowp. 229.

In a late case, where the witness stated that he could not undertake to say that he

had given the whole of the prisoner's testimony, but to the best of his recollection he had given all that was material to the inquiry and relating to the transaction in question, Littledale, J., thought that this evidence was *primâ facie* sufficient, and that if there was anything else material sworn by the prisoner on the former trial, he might prove it on his part. No such evidence having been given, the prisoner was convicted, and on a case reserved, the judges held that the proof was sufficient for the jury, and that the conviction was right. R. v. Rowley, Ry. & Moo. N. P. C. 299; 1 Moody, C. C. 111. Where it has once been proved, says Mr. Starkie, that particular facts, positively and deliberately sworn to by the defendant, in any part of his evidence, were falsely sworn to, it seems in principle to be incumbent on him to prove, if he can, that in other parts of his testimony he explained or qualified that which he had sworn to. 2 Stark. Ev. 625, 2d ed.

The defendant, although perjury be assigned on his answer, deposition, or affidavit in writing, may prove that an explanation was afterwards given, qualifying or limiting the first answer. 2 Stark. Ev. 627, 2d ed.; 2 Russ. by Grea. 658; R. v. Carr, Sid. 418. And if it appear, on the evidence for the prosecution, that a part of the defendant's statement, qualifying the rest, is omitted, the judge will not suffer the case to go to the jury. The defendant had paid a bill for a Mr. Shipley, and summoned a party named Watson, to whom he had paid it, before the court of requests, for an overcharge. The defendant was asked whether Watson was indebted to him in the sum of 11s.; he answered, "He is." On the question being repeated, and the witness required to recollect himself, he subjoined, "as agent for Mr. Shipley." He was indicted for perjury upon his first answer only, but it appearing upon the case for the prosecution that he had qualified that answer, Nares, J., refused to permit the case to go to the jury, observing that it was perjury assigned on part only of an oath, the most material part being purposely kept back. R. v. Hurry, 1 Lofft's Gilb. Ev. 57.

On the trial of an indictment for perjury, alleged to have been committed before a magistrate, the written deposition of the defendant taken down by the magistrate was put in to prove what he then swore, and it was proposed to call the attorney for the prosecution to prove some other matters sworn to by the defendant, which were not mentioned in the depositions; Parke, J., held that this could not be done. R. v. Wylde, 6 C. & P. 380 : 25 E. C. L. R. See *ante*, p. 64.

[*758] *Proof of the materiality of the matter sworn.*] It must either *appear on the face of the facts set forth in the indictment that the matter sworn to, and upon which the perjury is assigned, was material, or there must be an express averment to that effect. R. v. Dowling, 5 T. R. 318; R. v. Nicholl, 1 B. & Ad. 21: 20 E. C. L. R.; R. v. McKeron, 2 Russ. by Grea. 639. An express averment that a question was material, lets in evidence to prove that it was so. R. v. Bennett, 2 Den. C. C. R. 241; S. C. 20 L. J. M. C. 217. Where, upon an indictment for perjury committed in an answer in chancery, the perjury was assigned in the defendant's denial in the answer of his having agreed, upon forming an insurance company, of which he was a director, &c., to advance 10,000*l.* for three years, to answer any immediate calls, and there was no averment that this was material, nor did it appear for what purpose the bill was filed, nor what was prayed, the judgment was arrested. R. v. Bignold, 2 Russ. by Grea. 639. So perjury cannot be assigned on an answer in chancery, denying a promise absolutely void by the statute of frauds. R. v. Benesech, Peake's Add. Cases, 93.

The materiality of the matter sworn to must depend upon the state of the cause

and the nature of the question in issue (1) If the oath is altogether foreign from the purpose, not tending to aggravate or extenuate the damages, nor likely to induce the jury to give a readier credit to the substantial part of the evidence, it cannot amount to perjury. As if upon a trial in which the issue is, whether such a one is *compos* or not, a witness introduces his evidence by giving an account of a journey which he took to see the party, and swears falsely in relation to some of the circumstances of the journey. So where a witness was asked by a judge whether he brought a certain number of sheep from one town to another altogether, and answered that he did so, whereas in truth he did not bring them altogether, but part at one time and part at another, yet he was not guilty of perjury, because the substance of the question was, whether he brought them all or not, and the manner of bringing was only circumstance. (2 Rolle, 41, 369.) Upon the same ground it is said to have been adjudged, that where a witness being asked whether such a sum of money were paid for two things in controversy between the parties, answered, it was, when in truth it was only paid for one of them by agreement, such witness ought not to be punished for perjury, because, as the case was, it was no ways material whether it was for one or for both. (2 Rolle, 42.) Also it is said to have been resolved, that a witness who swore that one drew his dagger, and beat and wounded J. S., when in truth he beat him with a staff, was not guilty of perjury, because the beating only was material. (Hetley, 97.) Hawk. P. C. b. 1, c. 69, s. 8.

After stating these authorities, Mr. Serjeant Hawkins observes, that perhaps in all these cases it ought to be intended that the question was put in such a manner that the witness might reasonably apprehend that the sole design of putting it was to be informed of the substantial part of it, which might induce him, through inadvertency, to take no notice of the circumstantial part, and give a general answer to the substantial; for otherwise, if it appear plainly that the scope of the question was to sift him as to his knowledge of the substance, by examining him strictly as to the circumstances, and he gave a particular and distinct account of all the circumstances, *which afterwards appears to be false, he cannot but be guilty of perjury, in- [*759] asmuch as nothing can be more apt to incline a jury to give credit to the substantial part of a man's evidence than his appearing to have an exact and particular knowledge of all the circumstances relating to it. Upon these grounds, the opinion of the judges seems to be very reasonable (1 Rolle, 368; Palmer, 382), who held a witness to be guilty of perjury who, in an action of trespass for breaking the plaintiff's close, and spoiling it with sheep, deposed that he saw thirty or forty sheep in the close, and that he knew them to be the defendants, because they were marked with a mark which he knew to be the defendant's, whereas in truth the defendant never used such a mark; for the giving such a special reason for his remembrance could not but make his testimony the more credible than it would have been without it; and though it signified nothing to the merits of the cause whether the sheep had any mark or not, yet inasmuch as the assigning such a circumstance in a thing immaterial, had such a direct tendency to corroborate the evidence concerning what was most material, it was consequently equally prejudicial to the party, and equally crim-

(1) Where three or more persons were alleged to be jointly concerned in an assault, and it was contended to be immaterial, if all participated in it, by which of them certain acts were done, *held* to be material, and that evidence as to the acts of either, if wilfully and falsely given, constituted perjury. State v. Norris, 9 N. Hamp. 96.

Perjury may be committed by wilfully false swearing in a point which is only circumstantially material to the question in dispute. Commonwealth v. Pollard, 12 Metcalf, 225.

When a party is indicted for perjury in giving testimony on the trial of an issue in court, proof that his testimony was admitted on that trial is not sufficient to warrant the jury to infer that it was material. Commonwealth v. Pollard, 12 Metcalf, 225.

inal in its own nature, and equally tending to abuse the administration of justice, as if the matter sworn had been the very point in issue.(1) Hawk. P. C. b. 1, c. 69, s. 8; 2 Russ. by Grea. 600.

The vendor of goods having obtained a verdict in an action on a contract upon proof of the same by bought and sold notes, the purchasers filed a bill in chancery for a discovery of other parol terms, and for equitable relief from the contract. The answer to the bill denied the existence of the alleged parol terms. On an indictment assigning perjury upon the allegation which contained such denial; it was held by Coleridge, J., that the prayer of the bill being not to enforce the parol terms, but to obtain relief from the contract, the assignment of perjury was upon a matter material and relevant to the suit in chancery. R. v. Yates, Carr. & M. 132: 41 E. C. L. R.

A question having no general bearing on the matters in issue may be made material by its relation to the witness's credit, and false swearing thereon will be perjury. R. v. Overton, 2 Moo. C. C. 263; R. v. Phillpotts, 2 Den. C. C. R. 302; S. C. 21 L. J. M. C. 18. In the latter case, the evidence given in respect to which perjury had been assigned was afterwards withdrawn and was inadmissible, but it was held that this could not purge the false swearing; and Maule, J., in the course of the argument said: "Here the defendant, by means of a false oath endeavors to have a document received in evidence; it is therefore a false oath in a judicial proceeding; it is material to that judicial proceeding, and it is not necessary that it should have been relevant and material to the issue being tried."

Upon an application for an affiliation order against one H., the applicant, who had been delivered in March, was asked in cross-examination whether she had not had connection with G. in the previous September. She denied that she had. G., having been afterwards called to contradict her, swore falsely that he had had connection with her in the month named. Held on an indictment against G. for perjury, by Cockburn, C. J., Erle, C. J., Pollock, C. B., Wightman, Williams, Willes, Keating, and Mellor, JJ., Bramwell, Channell, and Wilde, BB., that the conviction of G. under these circumstances was right: for that, though the evidence was, strictly speaking, inadmissible, having been admitted, it had reference to the inquiry, and was calculated to mislead, it being false, therefore, perjury might be assigned upon it; and that 2 Hawk. P. C. bk. 1, c. 69, s. 8; 3 Inst. 164; and R. v. Philpotts, 21 L. J. M. C. 18, were authorities to this effect. Martin, B., and Crompton, J., thought otherwise, as the question to which the answer was given was not material to the issue to be tried. Reg. v. Gibbons, 10 W. R. 350.

In R. v. Murray, 1 F. & F. 80, Martin, B., after consulting Byles, J., held that a charge of perjury could not be founded on a false statement made in answer to a question *wholly irrelevant* to the matter under inquiry, though it might have the effect of testing the witness's credit.

The degree of materiality is not, as it seems, to be measured. Thus it need not appear that the evidence was sufficient for the party to recover upon, for evidence may be very material, and yet not full enough to prove directly the issue in question. R. v. Rhodes, 2 Ld. Raym. 887. So if the evidence was circumstantially material, it is sufficient. R. v. Griepe, 1 Lord Raym. 258; 12 Mod. 145.

[*760] *A few cases may be mentioned to illustrate the question of materiality. If in answer to a bill filed by A. for redemption of lands assigned to him by B., the

(1) State v. Strat, 1 Murph. 124; State v. Hattaway, 2 Nott & McCord, 118; Wilson v. Nations, 5 Yerger, 211.

defendant swears that he had no notice of the assignment, and insists upon tacking another bond debt due from B. to his mortgage, this is a material fact on which perjury may be assigned. R. v. Pepy, Peake, N. P. C. 138. In an answer to a bill filed against the defendant for the specific performance of an agreement relating to the purchase of land, the defendant had relied on the statute of frauds (the agreement not being in writing), and had also denied having entered into any such agreement, and upon this denial in his answer he was indicted for perjury; but Abbott, C. J., held that the denial of an agreement which by the statute was not binding upon the parties, was wholly immaterial, and the defendant was acquitted. R. v. Dunston, Ry. & Moo. N. P. C. 109: 21 E. C. L. R.; but see Bartlett v. Pickersgill, 4 Burr. 2255; 4 East, 577 (*n*). An indictment for perjury stated that it became a material question, whether *on the occasion of a certain alleged arrest* L. touched K., &c. The defendant's evidence as set out was, "L. put his arms round him and embraced him"—innuendo, that L. had *on the occasion to which the said evidence applied* touched the person of K. It was held by the Court of King's Bench, that the materiality of this evidence did not sufficiently appear. R. v. Nicholl, 1 B. & Ad. 21: 20 E. C. L. R. An indictment for perjury stated, that H. L. stood charged by F. W. before T. S., clerk, a justice of the peace, with having committed a trespass, by entering and being in the daytime on certain land in the pursuit of game, on the 12th August, 1843, and that T. S. proceeded to the hearing of the charge, and that upon the hearing of the charge, the defendant C. B. falsely swore that he did not see H. L. during the whole of the said 12th of August, meaning that he the said C. B. did not see the said H. L. at all on the said 12th day of August in the year aforesaid; and that *at the time he the said* C. B. *swore as aforesaid, it was material and necessary* for the said T. S. so being such justice as aforesaid, to inquire of, and be informed by, the said C. B., whether he the said C. B. did see the said H. L. at all during the said 12th day of August in the year aforesaid. It was held by Alderson B., that this averment of materiality was insufficient, because, consistently with the averment, it might have been material for T. S. in some other matter, and not in the matter stated to have been in issue before him, to have put this question, and received this answer. R. v. Bartholomew, 1 C. & K. 366: 47 E. C. L. R. An indictment for perjury on a charge of bestiality stated, that it was material "to know the state of the said A. B.'s dress at the time the said offence was so charged to be committed as aforesaid:" this was held by the judges to be a sufficient averment of materiality, to allow the prosecutor to show that the flap of his trousers was not unbuttoned (as sworn by the defendant), and that his trousers had no flap. R. v. Gardner, 2 Moo. C. C. 95. A witness having sworn at a trial that he did not write certain words in the presence of D., it was held that the presence of D. might be a fact as material as the writing of the words, and therefore that an assignment of perjury, charging that the defendant did write the words in question in D.'s presence, was good. R. v. Schlesinger, 10 Q. B. 670; S. C. 17 L. J. M. C. 29. Where a plaintiff in an action for goods sold swore falsely in cross-examination that she had never been tried at the Old Bailey, and had never been in custody at the Thames police station, Campbell, C. J., held on an *indictment for perjury, that this evidence was material. R. v. Lavey, 3 C. [*761] & K. 26.

In order to show the materiality of the deposition or evidence of the defendant it is essential, where the perjury assigned is in an answer to a bill in equity, to produce and prove the bill, or if the perjury assigned is on an affidavit, to produce and prove the previous proceedings, such as the rule *nisi* of the court in answer to which the affidavit in question has been made. If the assignment be on evidence on the trial

of a cause, in addition to the production of the record, the previous evidence and state of the cause should be proved, or at least so much of it as shows that the matter sworn to was material. 2 Stark. Ev. 626, 2d ed.

In an indictment for perjury, Patteson, J., held that an averment that "it became and was material to ascertain the truth of the matter hereinafter alleged to have been sworn to, and stated by the said J. G. upon his oath," was not a good averment of materiality. R. v. Goodfellow, Carr. & M. 569: 41 E. C. L. R.

Proof of the introductory averments.] Where, in order to show the materiality of the matter sworn to, introductory averments have been inserted in the indictment, those averments must be proved. 2 Russ. by Grea. 624. Where upon the trial of an indictment containing an assignment of perjury in the following form, "Whereas in truth and in fact the said defendant at the time of effecting the said policy, that is to say, a certain policy purporting to have been written by one Kite, by his agent Meyer, on the 13th August, 1807, &c. (and by other underwriters specified in the indictment), well knew," &c.; and on production of the policy it appeared to have been underwritten by Meyer for Kite on the 15th; Lord Ellenborough was of opinion, that as the prosecutor had chosen to allege a fact, material with reference to the knowledge of the defendant, it was necessary to prove it, and held the variance fatal. R. v. Huck, 1 Stark. N. P. C. 523: 2 E. C. L. R. But see now, as to the power of amendment, 14 & 15 Vict. c. 100, s. 1, *ante*, p. 192.

But where the introductory averment is not matter of description, it is sufficient to prove the substance of it, and a variance in other respects will be immaterial. Thus where the indictment averred the perjury to have been committed in the defendant's answer to a bill of discovery in the exchequer, alleged to have been filed on a day specified, and it appeared that the bill was filed in a preceding term, Lord Ellenborough ruled that the variance was not material; since the day was not alleged as part of the record, and that it was sufficient to prove the bill filed on any other day. R. v. Huck, 1 Stark. N. P. C. 521.(1) And where perjury was assigned on an answer to a bill alleged to have been filed in a particular term, and a copy produced was of a bill amended in a subsequent term by order of the court, it was held to be no variance, the amended bill being part of the original bill. R. v. Waller, 2 Stark. Ev. 623. And again in a similar case, where the bill was stated to have been filed by A. against B. (the defendant in the indictment) *and another*, and in fact it was filed against B., C., and D., but the perjury was assigned on a part of the answer which was material between A. and B., Lord Ellenborough held the variance immaterial. R. v. Benson, 2 Camp. 509. See also R. v. Baily, 7 C. & P. 264: 32 E. C. L. R. The defendant was tried on an indictment for perjury committed in giving evidence, as the prosecu- [*762] tor of an indictment *against A. for an assault; and it appeared that the indictment for the assault charged, that the prosecutor had received an injury, "whereby his life was greatly despaired of." In the indictment for perjury, the indictment for the assault was introduced in these words, "which indictment was presented in manner and form following, that is to say," and set forth the indictment for the assault at length, and correctly, with the omission of the word "despaired," in the above passage. It was insisted that this was a fatal variance, but the learned judge who tried the case said, that the word *tenor* has so strict and technical a meaning as to make a literal recital necessary, but that by the words "in manner and form following, that is to say," nothing more was requisite than a substantial recital, and that the

(1) In an indictment for perjury, the day on which the offence was committed must be precisely stated. United States v. Bowman, 2 Wash. C. C. Rep. 328; United States v. McNeal, 1 Gallison, 387.

variance in the present case was only matter of form, and did not vitiate the indictment. R. v. May, 2 Russ. by Grea. 626. Where the indictment stated that an *issue* came on to be tried, and it appeared that an information containing several counts, upon each of which issue was joined, came on to be tried, the variance was held immaterial. R. v. Jones, Peake, N. P. C. 37. The defendant was indicted for perjury in an answer to a bill in chancery, which had been amended after the answer put in. To prove the amendments a witness was called, who stated that the amendments were made by a clerk in the six clerks' office, whose handwriting he knew, and that the clerk wrote the word "amendment" against each alteration. Lord Tenterden was of opinion that this was sufficient proof of the amendments, but did not think it material to the case. R. v. Laycock, 4 C. & P. 326: 19 E. C. L. R.

Upon an indictment for perjury committed on a trial at the London sittings, the indictment alleged the trial to have taken place before Sir J. Littledale, one of the justices, &c. On producing the record, it did not appear before whom the trial took place, but the *postea* stated it to have been before Sir C. Abbott, C. J., &c. In point of fact it took place before Mr. Justice Littledale. Lord Tenterden overruled the objection, that this was a variance, saying, On a trial at the assizes, the *postea* states the trial to have taken place before both justices; it is considered in law as before both, though in fact it is before one only; and I am not aware that the *postea* is ever made up here differently, when a judge of the court sits for the chief justice. R. v. Coppard, Moody & Malk. 118: 22 E. C. L. R. Where an indictment alleged that the defendant committed perjury on the trial of one B., and that B. was convicted, and it appeared by the record when produced that the judgment against B. had been reversed upon error after the bill of indictment against the defendant had been found; it was held by Williams, J., that this was no variance. R. v. Meek, 9 C. & P. 513: 38 E. C. L. R. An indictment for perjury alleged the trial of an issue before E. S., Esq., sheriff of D., by virtue of a writ directed to the sheriff, the writ of trial put in evidence was directed to the sheriff, and the return was of a trial before him; but it was proved that in fact the trial took place before a deputy, not the under-sheriff. This was held to be no variance. R. v. Dunn, 2 Moo. C. C. R. 297. See also R. v. Schlesinger, 10 Q. B. 670: 59 E. C. L. R. Where an indictment for perjury assigned on an affidavit made for the purpose of setting aside a judgment, since the rule of H. T., 4 Wm. 4, alleged that the judgment was entered up, "*in or as of*" Trinity term, 5 Wm. 4, and the record of the judgment, when produced, was dated "June the 26th, 5 Wm. 4;" Patteson, J., held this to be a *variance, and [*763] refuse to amend under the 9 Geo. 4, c. 15. R. v. Cooke, 7 C. & P. 559; 32 E. C. L. R. An allegation that judgment was "entered up" in an action, is proved by the production of the judgment book from the office in which the incipitur is entered. R. v. Gordon, Carr. & M. 410: 41 E. C. L. R. On a charge of perjury alleged to have been committed before commissioners to examine witnesses in a chancery suit, the indictment stated that the four commissioners were commanded to examine the witnesses. Their commission was put in, and by it the commissioners, or any three or two of them, were commanded to examine witnesses; this was held by Coleridge, J., to be a fatal variance, and he would not allow it to be amended. R. v. Hewins, 9 C. & P. 786: 38 E. C. L. R.

An allegation that the defendant made his warrant of attorney, directed to R. W. and F. B., "then and *still* being attorneys" of the K. B., is proved by putting in the warrant. Ibid. Where, in an indictment for perjury against C. D., it was averred that a cause was depending between A. B. and C. D., Lord Denman, C. J., held, that a notice of set-off entitled in a cause A. B. against C. D., was not sufficient evi-

dence to support the allegation. R. v. Stoveld, 6 C. & P. 489: 25 E. C. L. R. As to what is not a sufficiently examined copy of a bill in chancery, see R. v. Christian, Carr. & M. 388: 41 E. C. L. R.

An indictment for perjury stated that "in the Whitechapel County Court of Middlesex, holden at, &c., in the county of Middlesex, before J. M., then and there being a judge of the court, a certain action of contract pending in the court between A. L., plaintiff, and R. H., defendant, came on to be tried;" upon which trial A. L. was then and there duly sworn, "before J. M., then and there being judge of the court, and then and there having sufficient and competent authority to administer the oath to A. L. in that behalf;" it was held that it sufficiently appeared that the court in which the action was tried was held in pursuance of 9 & 10 Vict. c. 95. Lavey v. Reg., 2 Den. C. C. R. 504; S. C. 21 L. J. M. C. 10.

An indictment for perjury committed by a bankrupt before the insolvent court, at an adjournment after his first examination, alleged that he was a trader, owing debts less than 300*l.*, and other matters. The petition upon which the prisoner had applied to the insolvent court alleged the very same matters as facts, upon which, with others, he rested his application. It was held by the Court of Criminal Appeal that this was good *primâ facie* evidence of the allegations in the indictment sufficient to throw the *onus* of proving the contrary on the prisoner. R. v. Westley, 29 L. J. M. C. 35; S. C. Bell, C. C. 193.

In the same case the indictment alleged that notice of the petition was inserted in the "Gazette;" that a day was appointed for the first examination, and the sitting on that day was adjourned. No evidence was given in support of these allegations, but it was proved that the petition of the prisoner was filed in the insolvent court. An objection was taken at the trial that without proof of these allegations the jurisdiction of the insolvent court was not shown. But it was held that, as upon filing the petition the court had jurisdiction to institute the examination, and as in the court of record *omnia præsumuntur ritè esse acta*, and as it was generally alleged in the indictment that the court had lawful power to administer the oath, the allegations of which no proof was offered might be rejected as immaterial.

[*764] *The indictment in this case alleged that the prisoner, after the passing and coming into operation of certain statutes, to wit, on the 20th of May, 1859, presented his petition, and then went on purporting to set out the titles of the statute in *hæc verba*. The years of her majesty's reign when two of the acts were passed were inaccurately stated, and there was another inaccuracy in setting out the title of one of them; the first two of these inaccuracies were amended at the trial, and the other not. It was held, first, that the judge had power to make the amendment; secondly, that as the statute was only referred to in order to show that the petition was presented after it had passed, and as that appeared sufficiently from the prior allegation of the date when the petition was filed, the reference to the statute might be rejected altogether as immaterial. In this case, Pollock, C. B., stated his opinion, generally, that where the title of an act of Parliament is set out with sufficient accuracy to enable the court to know with certainty what act is meant, any minor inaccuracy is immaterial.

Proof of the falsity of the matter sworn.] Evidence must be given to prove the falsity of the matter sworn to by the defendant; but it is not necessary to prove that all the matters assigned are false, for if one distinct assignment of perjury be proved, the defendant ought to be found guilty. R. v. Rhodes, 2 Lord Raym. 886; 2 W. Bl. 790; 2 Stark. Ev. 627, 2d ed. And where the defendant's oath is as to his belief

only, the averment that he "well knew to the contrary" must be proved. See 2 Chitty, C. L. 312; 2 Russ. by Grea. 643.

"The first observation on this part of the case is, that the defendant swears to the best of his recollection, and it requires very strong proof, in such a case, to show that the party is wilfully perjured. I do not mean to say that there may not be cases in which a party may not be proved to be guilty of perjury, although he only swears to the best of his recollection; but I should say that it was not enough to show merely that the statement so made was untrue." Per Tindal, C. J., R. v. Parker, Carr. & M. 639: 41 E. C. L. R (1)

An assignment of perjury that the prosecutor did not, at the time and place sworn to, *or at any other time or place*, commit bestiality with a donkey (as sworn to), *or with any other animal whatsoever*, is sufficiently proved by the evidence of two witnesses falsifying the deposition which had been sworn to by the defendant. R. v. Gardiner, 2 Moo. C. C. 95; S. C. 8 C. & P. 737: 34 E. C. L. R.

To convict a person of perjury before a grand jury, it is not sufficient to show that the person swore to the contrary before the examining magistrate, as *non constat* which of the contradictory statements was the true one. Per Tindal, C. J., R. v. Hughes, 1 C. & K. 519: 47 E. C. L. R.

Where the prosecutor gave no evidence upon one of several assignments of perjury, Lord Denman refused to allow the defendant to show that the matter was not false. R. v. Hemp, 5 C. & P. 468: 24 E. C. L. R.

F. was indicted for perjury committed by deposing to an affidavit in a cause wherein F. was the plaintiff and E. defendant, that E. owed F. 50*l.*; it was held, that evidence that the cause was after the making of the affidavit, referred by consent, and an award made that E. owed nothing to F., was not admissible in proof of the falsity of *the matter sworn. R. v. Fontaine Moreau, 11 Q. B. 1028: 63 [*765] E. C. L. R.; S. C. 17 L. J. Q. B. 187. "The decision of the arbitrator," said Denman, C. J., in delivering the judgment of the court, "is no more than a declaration of his opinion, and there is no instance of such a declaration of opinion being received as evidence of a fact against the party to be affected by the proof of it in any criminal case."

Where the perjury is alleged to have been committed on a trial in the county court, it is not necessary that the judge's notes should be produced, in order to prove what the prisoner then swore, but the evidence of any person who was present at the trial, and who took notes of what passed, and is able to swear to their accuracy, is sufficient. R. v. Martin, 6 Cox's C. C. 107.

Proof of the corrupt intention of the defendant.] Evidence is essential, not only to show that the witness swore falsely in fact, but also, as far as circumstances tend to such proof, to show that he did so corruptly, wilfully, and against his better knowledge. 2 Stark. Ev. 627, 2d ed. In this, as in other cases of intent, the jury may infer the motive from the circumstances. R. v. Knill, 5 B. & A. 929 (*n*): 7 E. C. L. R.(2)

There must be proof that the false oath was taken with some degree of deliberation, for if, under all the circumstances of the case, it appears that it was owing to

(1) False swearing to a fact, to the best of the opinion of the witness, which the witness, though without any reasonable cause, believes to be true, is not perjury. The Commonwealth v. Brady, 5 Gray, 78.

(2) It is wrong to instruct a jury that "the want of motive or interest to swear falsely is a circumstance from which they are at liberty to infer that the testimony of the defendant was not wilfully and corruptly false." Schaller v. The State, 14 Missouri, 502.

the weakness rather than the perverseness of the party, as where it is occasioned by surprise or inadvertence, or by a mistake with regard to a true state of the question, this would not amount to voluntary and corrupt perjury. Hawk. P. C. b. 1, c. 69, s. 2; 2 Russ. by Grea. 597; 4 Bl. Com. 127; see R. v. Stolady, *supra*, p. 755.

Witnesses—number requisite.] It is a general rule, that the testimony of a single witness is insufficient to convict on a charge of perjury. This is an arbitrary and peremptory rule, founded upon the general apprehension that it would be unsafe to convict in a case where there would be merely the oath of one man to be weighed against that of another. 2 Stark. Ev. 626, 2d ed.; 2 Russ. by Grea. 649; Hawk. P. C. b. 1, c. 69; 4 Bl. Com. 358. But this rule must not be understood as establishing that two witnesses are necessary to disprove the fact sworn to by the defendant; for, if any other material circumstance be proved by other witnesses, in confirmation of the witness who gives the direct testimony of perjury, it may turn the scale and warrant a conviction. R. v. Lee, 2 Russ. by Grea. 650. So it is said by Mr. Phillips, that it does not appear to have been laid down that two witnesses are necessary to disprove the fact sworn to by the defendant, nor does that seem to be absolutely requisite, that at least one witness is not sufficient; and, in addition to his testimony, some other independent evidence ought to be produced.(1) Phill. Ev. 141, 6th ed. "There must be something in corroboration which makes the fact sworn to not true, if that be true also." Per Alderson, B., in R. v. Boulter, *infra*.

A distinction, however, appears to be taken between proving positive allegations in the indictment and disproving the truth of the matter sworn to by the defendant, the latter, as it is said, requiring the testimony of two witnesses. Thus, Mr. Serjeant Hawkins says, that it seems to be agreed that two witnesses are required in proof of [*766] *the crime of perjury; but the *taking of the oath* and the *facts deposed* may be proved by one witness only.(2) Hawk. P. C. b. 2, c. 46, s. 10. So it is said by Mr. Starkie (citing the above passage from Hawkins), that it seems the *contradiction*

(1) State v. Hayward, 1 Nott & McCord, 547; Coulter v. Stewart, 2 Yerger, 225; Merrit's Case, 4 Rogers's Rec. 58; Case of Francis et al., Id. 12.

The case in which a living witness to the *corpus delicti* of the defendant, in a prosecution for perjury, may be dispensed with, are all such where a person, charged with a perjury by false swearing to a fact directly disproved by documentary or written testimony, springing from himself, with circumstances showing the corrupt intent: in cases where the perjury charged is contradicted by a public record, proved to have been well known to the defendant when he took the oath, the oath only proved to have been taken: in cases where the party is charged with taking an oath contrary to what he must necessarily have known to be the truth, and the false swearing can be proved by his own letters relating to the fact sworn to, or by other written testimony existing or being found in the possession of the defendant, and which has been treated by him as containing the evidence of the fact recited in it. United States v. Wood, 14 Peters, 430.

(2) On a trial for perjury, the testimony of a single witness is sufficient to prove that the defendant swore as is alleged in the indictment. Commonwealth v. Pollard, 12 Metcalf, 225.

In order to authorize a conviction of perjury, it is necessary, in addition to the testimony of one witness to the falsity of the statement alleged as the perjury, that strong corroborating circumstances, of such a character as clearly to turn the scale and overcome the oath of the party charged and the legal presumption of his innocence, should be established by independent evidence; and therefore when the charge in an indictment for perjury was that the defendant had testified that no agreement for the payment by him of more than the lawful rate of interest had ever been made between him and a person to whom he was indebted upon certain contracts, it was held that the testimony of the creditor to the existence of such an agreement, corroborated by the letters of the defendant to him, containing a direct promise to pay more than legal interest on a demand thus held, was competent and sufficient evidence of the falsity of the statement alleged as the perjury. Commonwealth v. Parker, 2 Cushing, 212.

Where a defendant, by a subsequent deposition, expressly contradicts and falsifies a former one made by him, and in such subsequent deposition expressly admits and alleges that such former one was intentionally false at the time it was made, or in such subsequent deposition testifies to such other facts and circumstances as to render the corrupt motive apparent, and negative the probability of mistake in regard to the first, he may be properly convicted upon an indictment charging the first deposition to be false, without any other proof than that of the two depositions. The People v. Burden, 9 Barb. Sup. Ct. Rep. 467.

must be given by *two direct witnesses*, and that the negative, supported by one direct witness and by circumstantial evidence, would not be sufficient. He adds, that he had been informed that it had been so held by Lord Tenterden. 2 Stark. Ev. 626 (*n*).

In R. v. Chapney, 2 Lew. C. C. 258, Coleridge, J., said, "One witness in perjury is not sufficient, unless supported by circumstantial evidence of the strongest kind; indeed, Lord Tenterden was of opinion, that two witnesses were necessary to a conviction." See R. v. Mudie, 1 Moo. & R. 128. The rule that the testimony of a single witness is not sufficient to sustain an indictment for perjury, is not a mere technical rule, but a rule founded on substantial justice; and evidence confirmatory of that one witness, in some slight particulars only, is not sufficient to warrant a conviction. Per Coleridge, J., R. v. Yates, Carr. & M. 132: 41 E. C. L. R. Where there were three assignments of perjury upon evidence relating to one and the same transaction, at one and the same time and place, it seems to have been considered that the jury ought not to convict on one of the assignments, although there were several witnesses who corroborated the witness who spoke to such an assignment, on the facts contained in the other assignments. R. v. Verrier, 12 Ad. & E. 317: 40 E. C. L. R.; 2 Russ. by Grea. 651 (*n*). And it has since been held by Tindal, C. J., that the rule which requires two witnesses, or one witness and some sufficient corroboration, applies to every assignment of perjury in an indictment. R. v. Parker, Carr. & M. 639: 41 E. C. L. R.; S. C. 2 Russ. by Grea. 654. In R. v. Boulter, 2 Den. C. C. R. 396; S. C. 21 L. J. M. C. 57, perjury was assigned on a statement made by the prisoner, upon a trial at nisi prius, that in June, 1851, he owed no more than one quarter's rent to his landlord; the prosecutor swore that the prisoner owed five quarters' rent at that date; and to corroborate the prosecutor's evidence a witness was called, who proved that in August, 1850, the prisoner had admitted to him that he then owed his landlord three or four quarters' rent. This was held not to be sufficient corroborative evidence to warrant a conviction, for the money might have been paid intermediately. In a case of perjury, on a charge of bestiality, the defendant swore that he saw the prosecutor committing the offence, and saw the flap of his trousers unbuttoned. To disprove this the prosecutor deposed that he did not commit the offence, and that his trousers had no flap, and to confirm him, his brother proved that at the time in question the prosecutor was not out of his presence more than three minutes, and his trousers had no flap. This was held by Patteson, J., to be sufficient corroborative evidence to go to the jury, who found the defendant guilty. R. v. Gardiner, 2 Moo. C. C. 95. A., to prove an alibi for B., had sworn that B. was not out of his sight between the hours of 8 A.M. and 9 A.M., on a certain day, and on this perjury was assigned; Patteson, J., held that evidence by one witness that between those hours A. was at one place on foot, and by another witness that between those hours B. was walking at another place six miles off, was sufficient proof of the assignment of perjury. R. v. Roberts, 2 C. & K. 207: 61 E. C. L. R.

Where a statement by the prisoner himself is given in evidence, contradicting the matter sworn to by him, it has been held not to be *necessary to call two [*767] witnesses to prove the falsity, one witness, with proof of the admission, being sufficient. The defendant made information, upon oath, before a justice of the peace, that three women were concerned in a riot at his mill (which was dismantled by a mob, on account of the price of corn); and afterwards, at the sessions, when the rioters were indicted, he was examined concerning those women, and having been tampered with in their favor, he then swore that they were not at the riot. There was no other evidence on the trial for perjury to prove that the women were in the

riot (which was the perjury assigned) but the defendant's information, which was read. The judge thought this evidence sufficient, and the defendant was convicted and transported. Anon. cor. Yates, J., and afterwards Lord Mansfield, and Wilmot and Aston, JJ., concurred, 5 B. & A. 939, 940 (*n*): 7 E. C. L R.; 2 Russ. by Grea. 652. So in a case where the defendant had been convicted of perjury, charged in the indictment to have been committed in an examination before the House of Lords, and the only evidence was a contradictory examination of the defendant before a committee of the House of Commons, application was made for a new trial, on the ground that in perjury two witnesses were necessary, whereas, in that case, only one witness had been adduced to prove the *corpus delicti*, viz., the witness who deposed to the contradictory evidence given by the defendant, before the committee of the House of Commons; and further, it was insisted that the mere proof of a contradictory statement by the defendant on another occasion, was not sufficient, without other circumstances showing a corrupt motive, and negativing the probability of any mistake. But the court held that the evidence was sufficient, the contradiction being by the party himself, and that the jury might infer the motive from the circumstance, and the rule was refused. R. v. Knill, 5 B. & A. 929, note (*a*). So where, upon an indictment for perjury, in an affidavit made by the defendant, a solicitor, to oppose a motion in the Court of Chancery, to refer his bill of costs for taxation, only one witness was called, and, in lieu of a second witness, it was proposed to put in the defendant's bill of costs, delivered by him to the prosecutor; upon which it was objected that this was not sufficient, the bill not having been delivered on oath, Denman, C. J., was clearly of opinion that the bill delivered by the defendant was sufficient evidence, or that even a letter written by the defendant, contradicting his statement on oath, would be sufficient to make it unnecessary to have a second witness. R. v. Mayhew, 6 C. & P. 315: 25 E. C. L. R. There appears, however, to be an objection to this evidence, which is not easily removed, namely, that there is nothing to show which of the statements made by the defendant is the false one, where no other evidence of the falsity is given. Upon this subject the following observations were made by Holroyd, J.: Although you may believe that, on the one or the other occasion, the prisoner swore what was not true, it is not a necessary consequence that he committed perjury, for there are cases in which a person might very honestly and conscientiously swear to a particular fact, from the best of his recollection and belief, and from other circumstances at a subsequent time, be convinced that he was wrong, and swear to the reverse, without meaning to swear falsely either time. Again, if a person swears one thing at one time, and another at another, you cannot convict, where it is not possible to tell which is the true and which is the false. R. v. Jackson, 1 [*768] Lewin, C. C. 270; see *also R. v. Hughes, *ante*, p. 764. So in R. v. Harris, 5 B. & A. 926: 7 E. C. L. R., the Court of K. B. were of opinion (p. 937), that perjury could not be legally assigned by showing contradictory depositions, with an averment that each of them was made knowingly and deliberately, but without averring or showing in which of the two depositions the falsehood consisted. So where the defendant was charged with perjury, committed on a trial at the sessions, Gurney, B., held, that a deposition made by the defendant before the magistrate entirely different from what he swore at the trial, was not in itself sufficient proof that the evidence he gave at the sessions was false, but that other confirmatory proof must be adduced to satisfy the jury that he swore falsely at the trial. Strong confirmatory evidence having been given of the truth of the deposition, the defendant was found guilty. R. v. Wheatland, 8 C. & P. 238: 34 E. C. L. R. See the note on this case, 2 Russ. by Grea. 652.

On an indictment for perjury, the prisoner was charged with having falsely sworn that certain invoices, bearing certain dates, were produced by her to one C. C. was called, and swore that she had not produced the invoices which she had deposed to, but that she had produced others; and he produced a memorandum he had made privately at the time of the dates of the invoices produced, which showed that they were not the same as those sworn to by the prisoner. Cockburn, C. J., held that the memorandum was a sufficient corroboration. R. v. Webster, 1 F. & F. 515.

The prisoner, who was a policeman, having laid an information against a publican for keeping his house open after lawful hours, swore on the hearing that he knew nothing of the matter, except what he had been told, and that "he did not see any person leave the defendant's house after eleven" on the night in question. It was proved by the magistrate's clerk that the prisoner, when laying the information, said that he had seen four men leave the house after eleven, and that he could swear to one as W. It was also proved, that on two other occasions the prisoner made a similar statement to two other witnesses, and that W. and others did in fact leave the house after eleven o'clock on the night in question. The prisoner moreover admitted at the hearing of the summons that he had received money from the publican to settle the matter. It was held that the evidence was sufficient to prove the perjury assigned, and that the conviction was right. R. v. Hook, Dears, & B. C. C. 606; S. 27 L. J. M. C. 222.

The following observations on this subject, by an able writer on criminal law, are well deserving of attention. Where depositions, contrary to each other, have been emitted in the same matter by the same person, it may with certainty be concluded that one or the other is false. But it is not relevant to infer perjury in so loose a manner; the prosecutor must go a step further, and specify distinctly which of the two contains the falsehood, and peril his case upon the means he possesses of proving perjury in that deposition. To admit the opposite course, and allow the prosecutor to libel on both depositions, and make out his charge by comparing them together, without distinguishing which contains the truth and which the falsehood, would be directly contrary to the precision justly required in criminal proceedings. In the older practice this distinction does not seem to have been distinctly recognized; but it is now justly considered indispensable that the perjury should be specified as existing *in one, and the other deposition referred to *in modum probationis*, to [*769] make out, along with other circumstances, where the truth really lay. Alison, Princ. Crim. Law of Scot. 475. These remarks are applicable to the cases in our law, in which the evidence of one witness, viz., the party producing the contradictory statement, and the statement itself, have been allowed as sufficient evidence to prove the falsity of the oath. Such statements may be used as strong corroborations of the prosecutor's case, and as such they are admitted in the Scotch law. A party cannot be convicted (says Mr. Alison) of perjury, upon the evidence merely of previous or subsequent declarations emitted by him, inconsistent with what he has sworn; because *in dubio* it must be presumed that what was said under the sanction of an oath was the truth, and the other an error or falsehood, but both such declarations and written evidence under his hand, inconsistent with what he has sworn, form important articles, which, with others, will be sufficient to make the scales of evidence preponderate against him. Principles of Crim. Law of Scot. 481.

Statutes relating to perjury.] The principal statutory enactment respecting perjury is the 5 Eliz. c. 9 (the 28 Eliz. c. 1, I), the operation of which is, however, more confined than that of the common law; and as it does not (see the 5 Eliz. c. 9,

s. 13) restrain in any manner the punishment of perjury at common law, it has seldom been the practice to proceed against offenders by indictment under this statute.

By s. 3, the procuring any witness to commit perjury in any matter in suit, by writ, &c., concerning any lands, goods, &c., or when sworn *in perpetuam rei memoriam*, is punishable by the forfeiture of forty pounds.

By s. 4, offenders not having goods, &c., to the value of forty pounds, are to suffer imprisonment [and stand in the pillory].

Sect. 5 enacts, that no person or persons, being so convicted or attainted, be from thenceforth received as a witness to be deposed and sworn in any court of record (within England, Wales, or the marches of the same), until such time as the judgment given against the said person or persons shall be reversed by attaint or otherwise; and that upon every such reversal, the parties grieved to recover his or their damages against all and every such person and persons as did procure the said judgment so reversed, to be first given against them, or any of them, by action or actions, to be sued upon his or their case or cases, according to the course of the common laws of the realm.

Sect. 6 enacts, that if any person or persons, either by the subornation, unlawful procurement, sinister persuasion, or means of any others, or by their own act, consent, or agreement, wilfully and corruptly commit any manner of wilful perjury, by his or their deposition in any of the courts before mentioned, or being examined *ad perpetuam rei memoriam*, that then every person or persons so offending, and being thereof duly convicted or attainted by the laws of this realm, shall for his or their said offence, lose and forfeit twenty pounds, and to have imprisonment by the space of six months, without bail or mainprize; and the oath of such person or persons so offending, from thenceforth not to be received in any court of record within this realm of England and Wales, or the marches of the same, until such time as the judgment [*770] given against the said person or *persons shall be reversed by attaint or otherwise; and that, upon every such reversal, the parties grieved to recover his or their damages against all and every such person and persons as did procure the said judgment so reversed to be given against them, or any of them, by action or actions to be sued upon his or their case or cases, according to the course of the common laws of this realm.

It appears that a person cannot be guilty of perjury within the meaning of this statute, in any case wherein he may not be guilty of subornation of perjury within the same statute, and as the subornation of perjury there mentioned, extends only to subornation "in matters depending in suit by writ, action, bill, plaint, or information, in anywise concerning lands, tenements, or hereditaments, or goods, chattels, debts, or damages, &c.," no perjury upon an indictment or criminal information can bring a man within the statute. Hawk. P. C. b. 1, c. 69, s. 19; Bac. Ab. Perjury (B). The statute only extends to perjury by witnesses, and therefore no one comes within the statute by reason of a false oath in an answer to a bill in chancery, or by swearing the peace against another, or in a presentment made by him as homager of a court baron, or for taking a false oath before commissioners appointed by the king (1) Hawk. P. C. b. 1, c. 69, s. 20. It seems that a false oath taken before the sheriff, on an inquiry of damages, is within the statute. Id. s. 22. No false oath is within the statute which does not give some person a just cause of complaint; for otherwise it cannot be said that any person was grieved, hindered, or molested. In every prosecu-

(1) Resp. v. Newell, 3 Yeates, 413.

tion on the statute, therefore, it is necessary to set forth the record of the cause wherein the perjury complained of is supposed to have been committed, and also to prove at the trial of the cause, that there is actually such a record, by producing it, or a true copy of it, which must agree with that set forth in the pleadings, without any material variance; otherwise it cannot legally appear that there ever was such a suit depending, wherein the party might be prejudiced in the manner supposed. If the action was by more than one, the false oath must appear to have been prejudicial to all the plaintiffs. Hawk. P. C. b. 1, c. 69, s. 23; Bac. Ab. Perjury (B); 2 Russ. by Grea. 620.

Various provisions for facilitating the punishment of persons guilty of perjury are contained in the 23 Geo. 2, c. 11. By sec. 3, the judges of assize, &c., may direct any witness to be prosecuted for perjury, and may assign counsel, &c. By sections 1 and 2, the indictment in perjury is much simplified, it being made sufficient to set forth the *substance* of the offence charged upon the defendant; and by what court, or before whom the oath was taken (averring such court or person to have a competent authority to administer the same), together with the proper averments to falsify the matter wherein the perjury is assigned, without setting forth the bill, answer, &c., or any part of any record or proceeding, and without setting forth the commission or authority of the court or person before whom the perjury was committed; and so also with regard to indictments for subornation of perjury.

And now the 14 & 15 Vict. c. 100, extends the provisions of the 23 Geo. 2, c. 11, and enacts, by sect. 19, "that it shall and may be lawful for the judges or judge of any of the superior courts of common law or equity, or for any of her majesty's justices, or commissioners of assize, nisi prius, oyer and terminer, or gaol delivery, or for any *justices of the peace, recorder, or deputy recorder, chairman, or other [*771] judge, holding any general or quarter sessions of the peace, or for any commissioner of bankruptcy or insolvency, or for any judge or deputy judge of any county court or any court of record, or for any justices of the peace in special or petty sessions, or for any sheriff, or his lawful deputy, before whom any writ of inquiry, or writ of trial, from any of the superior courts, shall be executed, in case it shall appear to him or them that any person has been guilty of wilful and corrupt perjury in any evidence given, or in any affidavit, deposition, examination, answer, or other proceeding, made or taken before him or them, to direct such person to be prosecuted for such perjury, in case there shall appear to him or them a reasonable cause for such prosecution, and to commit such person so directed to be prosecuted until the next session of oyer and terminer, or gaol delivery, for the county, or other district, within which such perjury was committed, unless such person shall enter into a recognizance, with one or more sufficient surety or sureties, conditioned for the appearance of such person at such next session of oyer and terminer, or gaol delivery, and that he will there surrender and take his trial, and not depart the court without leave, and to require any person he or they may think fit to enter into a recognizance, conditioned to prosecute or give evidence against such person so directed to be prosecuted as aforesaid, and to give to the party so bound to prosecute a certificate of the same being directed; which certificate shall be given without any fee or charge, and shall be deemed sufficient proof of such prosecution having been directed as aforesaid; and upon the production thereof, the costs of such prosecution shall, and are hereby required to be allowed by the court before which any person shall be prosecuted or tried in pursuance of such direction as aforesaid, unless such last-mentioned court shall specially otherwise direct; and where allowed by any such court in Ireland, such sums as shall be allowed shall be ordered by the said court to be paid to the prosecutor by the treas-

urer of the county in which such offence shall be alleged to have been committed, and the same shall be presented for, raised, and levied in the same manner as the expenses of prosecutions for felonies are now presented for, raised, and levied in Ireland. Provided always, that no such direction or certificate shall be given in evidence upon any trial to be had against any person upon a prosecution so directed as aforesaid."

Sect. 20 enacts, "For every indictment for perjury, or for unlawfully, wilfully, falsely, fraudulently, deceitfully, maliciously, or corruptly taking, making, signing, or subscribing any oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing, it shall be sufficient to set forth the substance of the offence charged upon the defendant, and by what court, or before whom, the oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing, was taken, made, signed, or subscribed, without setting forth the bill, answer, information, indictment, declaration, or any part of any proceeding, either in law or in equity, and without setting forth the commission or authority of the court or person before whom such offence was committed."

Sect. 21 enacts: "In every indictment for subornation of perjury, or for corrupt bargaining or contracting with any person to commit wilful and corrupt perjury, or [*772] for inciting, causing, or procuring any *person unlawfully, wilfully, falsely, fraudulently, deceitfully, maliciously, or corruptly, to take, make, sign, or subscribe any oath, affirmation, declaration, affidavit, deposition, bill, answer, notice, certificate, or other writing, it shall be sufficient, wherever such perjury or other offence aforesaid shall have been actually committed, to allege the offence of the person who actually committed such perjury or other offence in the manner hereinbefore mentioned, and then to allege that the defendant unlawfully, wilfully, and corruptly did cause and procure the said person the said offence, in manner and form aforesaid, to do and commit, and wherever such perjury or other offence aforesaid, shall not have been actually committed, it shall be sufficient to set forth the substance of the offence charged upon the defendant without setting forth or averring any of the matters or things hereinbefore rendered unnecessary to be set forth or averred in the case of wilful and corrupt perjury."

Sect. 22 enacts, that "A certificate containing the substance and effect only (omitting the formal part) of the indictment and trial for any felony or misdemeanor, purporting to be signed by the clerk of the court or other officer having the custody of the records of the court where such indictment was tried, or by the deputy of such clerk or other officer (for which certificate a fee of six shillings and eightpence and no more, shall be demanded and taken), shall, upon the trial of any indictment for perjury or subornation of perjury, be sufficient evidence of the trial of such indictment for felony or misdemeanor, without proof of the signature or official character of the person appearing to have signed the same."

By the 22 & 23 Vict. c. 17, *supra*, p. 178, no indictment for perjury or subornation of perjury is to be preferred without previous authorization.

Punishment.] Perjury is punishable at common law with fine and imprisonment, at the discretion of the court.

By the 2 Geo. 2, c. 25, s. 2 (in Ireland by the 3 Geo. 2, c. 4, made perpetual by the 17 & 18 Geo. 3, c. 36), "the more effectually to deter persons from committing wilful and corrupt perjury or subornation of perjury," it is enacted, that "besides the punishment already to be inflicted by law for so great crimes, it shall and may be lawful for the court or judge before whom any person shall be convicted of wilful and

corrupt perjury, or subornation of perjury, according to the laws now in being, to order such person to be sent to some house of correction within the same county, for a time not exceeding seven years, there to be kept to hard labor during all the said time, or otherwise to be transported to some of his majesty's plantations beyond the seas, for a term not exceeding seven years, as the court shall think most proper; and thereupon judgment shall be given, that the person convicted shall be committed or transported accordingly, over and beside such punishment as shall be adjudged to be inflicted on such person, agreeable to the laws now in being; and if transportation be directed, the same shall be executed in such manner as is or shall be provided by law for the transportation of felons; and if any person so committed or transported shall voluntarily escape or break prison, or return from transportation, before the expiration of the time for which he shall be ordered to be transported as aforesaid, such person being thereof lawfully convicted, shall suffer death as a felon, without benefit of clergy, and shall be *tried for such felony in the county where he so es- [*773] caped, or where he shall be apprehended."

By the 3 Geo. 4, c. 114 (the 7 Geo. 4, c. 9, I.), persons guilty of perjury or subornation of perjury, may be sentenced to hard labor.

By the 7 Wm. 4 & 1 Vict. c. 23 (U. K.), the punishment of the pillory is abolished.

Postponing trials for perjury.] It is the practice at the Central Criminal Court not to try an indictment for perjury arising out of a civil suit, while that suit is in any way undetermined, except in cases where the court in which it is pending postpone the decision of it, in order that the criminal charge may be first disposed of. R. v. Ashburn, 8 C. & P. 50: 34 E. C. L. R.

SUBORNATION OF PERJURY.

Subornation of perjury, at common law, is the procuring a man to take a false oath amounting to perjury, the man actually taking such oath; but if he did not actually take it, the person by whom he was incited is not guilty of subornation of perjury; yet he may be punished by fine and corporal punishment.(1) Hawk. P. C. b. 1, s. 69, c. 10.

Upon an indictment for subornation of perjury, the prosecutor must prove, 1, the inciting by the defendant, and that he knew that the evidence to be given was false; and 2, the taking of the false oath by the witness, &c. See now, 14 & 15 Vict. c. 100, s. 21, *ante*, p. 771.

Proof of the incitement.] The incitement may be proved by calling the party who was suborned. The knowledge of the defendant that the evidence about to be given would be false, will probably appear from the evidence of the indictment, or it may be collected from other circumstances.(2)

(1) Case of Francis et al., 1 Rogers's Rec. 121.

Subornation of perjury may be proved by the testimony of one witness. Commonwealth v. Douglass, 5 Metcalf, 241.

(2) Though a party who is charged with subornation of perjury, knew that the testimony of a witness whom he called would be false, yet if he did not know that the witness would wilfully testify to a fact knowing it to be false, he cannot be convicted of the crime charged. To constitute subornation of perjury, the party charged must procure the commission of the perjury by inciting, instigating or persuading the witness to commit the crime. Commonwealth v. Douglass, 5 Metcalf, 241.

On the trial of A. for suborning B. to commit perjury on a former trial of A. for another offence, a witness testified that B. on that former trial, swore that he came from L. as a witness on that trial in consequence of a letter written to him by A. Held, that, although this was not evidence that A.

Proof of the taking of the false oath.] In general the proof of the perjury will be the same as upon an indictment for perjury, against the witness who perjured himself; and even if the latter has been convicted, it will not, as it seems, be sufficient against the party who had suborned him, to prove merely the record of the conviction; but the whole evidence must be gone into as upon the former trial. The defendant was indicted for procuring one John Macdaniel to take a false oath. To prove the taking of the oath by Macdaniel, the record of his conviction for perjury was produced. But it was insisted for the defendant, that the record was not of itself sufficient evidence of the fact; that the jury had a right to be satisfied that such conviction was correct; that the defendant had a right to controvert the guilt of Macdaniel, and that the evidence given on the trial of the latter ought to be submitted to the consideration of the present jury. The recorder obliged the counsel for the crown to go through the whole case in the same manner as if the jury had been charged to try Macdaniel. R. v. Reilly, 1 Leach, 455. Upon this case Mr. Starkie has made the following observations: This authority seems at first sight to be inconsistent with that class of cases in which it has been held that, as against an ac- [*774] cessary before the fact to a felony, the record of the *conviction of the principal is evidence of the fact. If the prisoner, instead of being indicted as a principal in procuring, &c., had been indicted as accessary before the fact, in procuring, &c., the record would clearly have been good *primâ facie* evidence of the guilt of the principal. It is, however, to be recollected, that this doctrine rests rather upon technical and artificial grounds, than on any clear and satisfactory principle of evidence. 2 Stark. Ev. 627, 2d ed. It may also be observed, that the indictment for subornation of perjury does not set forth the *conviction* of the party who took the false oath, but only the preliminary circumstances and the taking of the oath; forming an allegation of the *guilt* of the party, and not of his *conviction;* and in R. v. Turner, 1 Moo. C. C. 347, *ante*, p. 50, the judges expressed a doubt whether, if an indictment against a receiver stated, not the *conviction* but the *guilt* of the principal felon, the record of the conviction of the principal would be sufficient evidence of the guilt.

[*775] *PIRACY.

Offence at common law, ... 775
Stat. 11 & 12 Wm. 3, c. 7, ... 775
8 Geo. 1, c. 24, ... 776
18 Geo. 2, c. 30, ... 776
32 Geo. 2, c. 25. 776
5 Geo. 4, c. 113—dealing in slaves, ... 777
Proof of the piracy, ... 778
with regard to the persons guilty, ... 778
with regard to accessaries, ... 779
Venue and trial, ... 779
Punishment under the 7 Wm. 4 and 1 Vict. c. 88, ... 779

Offence at common law.] THE offence of piracy at common law consists in committing those acts of robbery and depredation upon the high seas which, if committed on land, would have amounted to felony there, though it was not felony at com-

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wrote such letter to B., yet it was evidence that B. so testified in the presence of A., and as A thereby had an opportunity to prove, but did not prove, on the trial for suborning B., in what manner or by whose agency B. came from L., such testimony of B. might be considered by the jury in connection with the other evidence in the case. Ibid.

mon law. 2 East, P. C. 796; 4 Bl. Com. 72; Hawk. P. C. c. 37, s. 4.(1) Before the 28 Hen. 8, c. 15, the offence was only punishable by the civil law, and that statute does not render it a felony. By other statutes, however, which will be presently noticed, the offence is made felony, and the nature of the offence which shall constitute piracy is specifically described.

"The offence of piracy at common law is nothing more than robbery upon the high seas; but by statutes passed at various times, and still in force, many artificial offences have been created, which are to be deemed to amount to piracy." Report of Comm. of Crim. Law.

Stat. 11 *&* 12 *Wm.* 3, *c.* 7.] By the 11 & 12 Wm. 3, c. 7 (E.), s. 8, "If any of his majesty's natural born subjects or denizens of this kingdom shall commit any piracy or robbery, or any act of hostility against others, his majesty's subjects, upon the sea, under color of any commission from any foreign prince or state, or pretence of authority from any person whatsoever, such offender or offenders shall be deemed, adjudged, and taken to be pirates, felons, and robbers," &c.

By s. 9, "If any commander, or master of any ship, or any seaman or mariner, shall in any place where the admiral has jurisdiction, betray his trust, and turn pirate, enemy, or rebel, and piratically and feloniously run away with his or their ship or ships, or any barge, boat, ordnance, ammunition, goods, or merchandise, or yield them up voluntarily to any pirate, or shall bring any seducing message from any pirate, enemy, or rebel, or consult, combine, or confederate with *or at- [*776] tempt or endeavor to corrupt any commander, master, officer, or mariner, to yield up or run away with any ship, goods or merchandise, or turn pirates, or go over to pirates; or if any person shall lay violent hands on his commander, whereby to hinder him from fighting in defence of his ship and goods committed to his trust, or shall confine his master, or make or endeavor to make a revolt in his ship, he shall be adjudged, deemed, and taken to be a pirate, felon, and robber [and suffer death," &c.]

Upon the above section (9) of the 11 & 12 Wm. 3, c. 7, it has been decided by the twelve judges, that the making or endeavoring to make a revolt on board a ship, with a view to procure a redress of what the prisoners may think grievances, and without any intent to run away with the ship, or to commit any act of piracy, is an offence within the statute. R. v. Hasting, 1 Moo. C. C. 82.

Stat. 8 *Geo.* 1, *c.* 24.] By the 8 Geo. 1, c. 24 (E.), s. 1, "In case any person or persons belonging to any ship or vessel whatsoever, upon meeting any merchant ship or vessel on the high seas, or in any port, haven, or creek whatsoever, shall forcibly board or enter into such ship or vessel, and though they do not seize or carry off such ship or vessel, shall throw overboard or destroy any part of the goods or merchandise belonging to such ship or vessel, the person or persons guilty thereof shall in all respects be deemed and punished as pirates as aforesaid."

And by the same section, "If any commander or master of any ship or vessel, or any other person or persons, shall anywise trade with any pirate, by truck, barter, exchange, or in any other manner, or shall furnish any pirate, felon, or robber upon the seas, with any ammunition, provision, or stores of any kind; or shall fit out any ship or vessel, knowingly and with a design to trade with any pirate, felon, or robber upon the seas; or if any person or persons shall anywise consult, combine, confede-

(1) United States v. Chapels et al., 3 Wheeler's C. C. 205; 1 Kent's Comm., lecture ix, Mr. Duponceau's translation of Bynhershoeck on War, c. 17, p. 128, n; Bass's Case, 4 Rogers's Rec. 161; 2 Wheeler's C. C. Preface, p. xxvii.

rate, or correspond with any pirate, felon, or robber on the seas, knowing him to be guilty of such piracy, felony, or robbery, every such offender shall be deemed and adjudged guilty of piracy, felony, and robbery."

Stat. 18 *Geo.* 2, *c.* 30.] By the 18 Geo. 2, c. 30 (E.), all persons being natural-born subjects or denizens of his majesty, who, during any war, shall commit any hostilities upon the sea, or in any haven, river, creek, or place where the admiral or admirals have power, authority, or jurisdiction, against his majesty's subjects, by virtue or under color of any commission from any of his majesty's enemies, or shall be any other ways adherent, or giving aid or comfort to his majesty's enemies upon the sea, or in any haven, river, creek, or place where the admiral or admirals have power, &c., may be tried as pirates, felons, and robbers, in the Court of Admiralty, in the same manner as pirates, &c., are by the said act (11 & 12 Wm. 3) directed to be tried, [and shall suffer death.]

Under this statute it has been held, that persons adhering to the king's enemies, by cruising in their ships, may be tried as pirates under the usual commission granted by virtue of the statute 28 Hen. 8. R. v. Evans, 2 East, P. C. 798.

Stat. 32 *Geo.* 2, *c.* 25.] By the 32 Geo. 2, c. 25, s. 12, in case any commander [*777] of a private ship or vessel of war, duly commissioned by *the 29 Geo. 2, c. 34, or by that act, shall agree with any commander or other person belonging to any neutral or other ship or vessel (except those of his majesty's declared enemies) for the ransom of any such neutral or other ship or vessel, or cargo, after the same has been taken as a prize, and shall, in pursuance of such agreement, quit, set at liberty, or discharge any such prize, instead of bringing it into some port of his majesty's dominions, such offender shall be deemed and adjudged guilty of piracy, felony, and robbery, and shall suffer death. See 22 Geo. 3, c. 25, and 2 East, P. C. 801.

Stat. 5 *Geo.* 4, *c.* 113—*dealing in slaves.*] By the 5 Geo. 4, c. 113 (U. K.), s. 9, the carrying away, conveying, or removing of any person upon the high seas for the purpose of his being imported or brought into any place as a slave, or being sold or dealt with as such, or the embarking or receiving on board any person for such purpose, is made piracy, felony, and robbery, punishable with death. By sect. 10, the dealing in slaves, and other offences connected therewith, are made felony.

Now by the 7 Wm. 4 & 1 Vict. c. 91 (U. K.), the punishment of death, imposed by the ninth section of the above statute, is abolished, and transportation for life, &c., substituted.

The provisions of the statute 5 Geo. 4, c. 113, are not confined to acts done by British subjects in furtherance of the slave trade in England or the British colonies, but apply to acts done by British subjects in furtherance of that trade in places which do not form part of the British dominions. Per Maule and Wightman, JJ., R. v. Zulueta, 1 C. & K. 215. In order to convict a party who is charged with having employed a vessel for the purpose of slave trading, it is not necessary to show that the vessel which carried out the goods was intended to be used for bringing back slaves in return; but it will be sufficient if there was a slave adventure, and the vessel was in any way engaged in the advancement of that adventure. Ibid.

On the 26th February, 1845, the Felicidade, a Brazilian schooner, fitted up as a slaver, surrendered to the armed boats of her Majesty's ship Wasp. She had no slaves on board. The captain and all his crew, except Majaval and three others, were taken out of her and put on board the Wasp. On the 27th February, the three

others were taken out and put on board the Wasp also. Cerqueira, the captain, was sent back to the Felicidade, which was then manned with sixteen British seamen, and placed under the command of lieutenant Stupart. The lieutenant was directed to steer in pursuit of a vessel seen from the Wasp, which eventually turned out to be the Echo, a Brazilian brigantine, having slaves on board, and commanded by Serva, one of the prisoners. After a chase of two days and nights, the Echo surrendered, and was then taken possession of by Mr. Palmer, a midshipman, who went on board her, and sent Serva and eleven of the crew of the Echo to the Felicidade. The next morning lieutenant Stupart took command of the Echo, and placed Mr. Palmer and nine British seamen on board the Felicidade in charge of her and the prisoners. The prisoners shortly after rose on Mr. Palmer and his crew, killed them all, and ran away with the vessel. She was recaptured by a British vessel, and the prisoners were brought to this country, and tried at Exeter for murder. The jury found them guilty. The foundation of the conviction pursuant to the summing up of the *learned baron (Platt), who tried the case, was that the Felicidade [*778] was in the lawful custody of her majesty's officers; that all on board that vessel were within her majesty's admiralty jurisdiction; and that the jury should find the prisoners guilty of murder, if satisfied by the evidence that they plotted together to slay all the English on board, and run away with the vessel; that, in carrying their design into execution, Majaval slew Mr. Palmer, by stabbing him and throwing him overboard, and that the other prisoners were present, aiding and assisting Majaval in the commission of the murder. On a case reserved for the opinion of the judges, objections to these points were argued by the counsel for the prisoners, and the conviction was held to be wrong. Reg. v. Serva and others, 1 Den. C. C. R. 104.

Proof of the piracy.] The prosecutor must give evidence of facts, which, had the transaction occurred within the body of a county, would have rendered the offender guilty of larceny or robbery at common law. He must therefore show a taking *animo furandi* and *lucri causâ*. It is said that if a ship is attacked by a pirate, and the master, for her redemption, gives his oath to pay a certain sum, though there is no taking, yet it is piracy by the law marine, but by the common law there must be an actual taking, though but to the value of a penny, as in robbery. 1 Beawes, Lex Merc. 25, citing 44 Ed. 3, 14, 4 Hen. 4. If a ship is riding at anchor, with part of the mariners in her boat, and the rest on shore, so that none remain in the ship, if she be attacked and robbed, it is piracy. 1 Beawes, Lex Merc. 253, citing 14 Edw. 3, 115.

Proof with regard to the persons guilty of piracy.] The subject of a foreign power in amity with this country may be punished for piracy committed upon English property. 1 Beawes, Lex Merc. 251. A person having a special trust of goods will not be guilty of piracy by converting them to his own use; as where the master of a vessel with goods on board, ran the goods on shore in England, and burnt the ship with intent to defraud the owners and insurers, on an indictment for piracy and stealing the goods, it was held to be only a breach of trust, and no felony, and that it could not be piracy to convert the goods in a fraudulent manner, until the special trust was determined. R. v. Mason, 2 East, P. C. 796; Mod. 74. But it is otherwise with regard to the mariners. Thus where several seamen on board a ship seized the captain, he not agreeing with them, and after putting him ashore, carried away the ship, and subsequently committed several piracies, it was held that this force upon the captain, and carrying away the ship, was piracy. R. v. Maye, 2 East, P.

C. 796. The prisoners were convicted upon a count charging them with feloniously and piratically stealing sixty-five fathoms of cable, &c., upon the high seas, within the jurisdiction of the admiralty. It appeared that they were Deal pilots, who having been applied to by the master to take the vessel into Ramsgate, had, in collusion with him, cut away the cable and part of the anchor, which had before been broken, for the purpose of causing an average loss to the underwriters. It was objected that the offence of the prisoners was not larceny, having been committed by them jointly with the master of the vessel, not for the purpose of defrauding the owners, but for [*779] the purpose of defrauding the underwriters for the benefit of the owners. *A majority of the judges, however, held the conviction right. R. v. Curling, Russ. & Ry. 123.

Proof with regard to accessories.] Accessories to piracy were triable only by the civil law, and if their offence was committed on land, they were not punishable at all before the 11 & 12 Wm. 3, c. 7, s. 10. And now, by the 8 Geo. 1, c. 24, s. 3, all persons whatsoever, who, by the 11 & 12 Wm. 3, c. 7, are declared to be accessory or accessories to any piracy or robbery therein mentioned, are declared to be principal pirates, felons, and robbers, and shall be inquired of, heard, determined, and adjudged in the same manner as persons guilty of piracy and robbery may, according to that statute, and shall suffer death in like manner as pirates, &c.

The knowingly abetting a pirate, within the body of a county, is not triable at common law. Admiralty Case, 13 Rep. 53.

Venue and trial.] The decisions with respect to the venue for offences committed on the high seas have been stated, *ante*, p. 237.

By the 46 Geo. 3, c. 54, all treasons, piracies, felonies, robberies, murders, conspiracies, and other offences, of what nature or kind soever, committed upon the sea, or in any haven, river, creek, or place where the admiral or admirals have power, authority, or jurisdiction, may be inquired of, tried, &c., according to the common course of the laws of this realm; and for offences committed upon the land within this realm, and not otherwise, in any of his majesty's islands, plantations, colonies, dominions, forts, or factories, under and by virtue of the king's commission or commissions, under the great seal of Great Britain, to be directed to any such four or more discreet persons as the lord chancellor, &c., shall from time to time think fit to appoint. The commissioners are to have the same powers as commissioners under the 28 Hen. 8.

Punishment under the 7 Wm. 4 and 1 Vict. c. 88.] By the 7 Wm. 4 and 1 Vict. c. 88 (U. K.), so much of the 28 H. 8, c. 15, the 11 & 12 Wm. 3, c. 7, the 4 Geo. 1, c. 11, s. 7, the 8 Geo. 1, c. 24, and the 18 Geo. 2, c. 30, as relate "to the punishment of the crime of piracy, or of any offence by any of the said acts declared to be piracy, or of accessories thereto respectively," are repealed.

By s. 2, "Whosoever, with intent to commit, or at any time of or immediately before, or immediately after committing the crime of piracy in respect of any ship or vessel, shall assault, with intent to murder, any person being on board of or belonging to such ship or vessel, or shall stab, cut, or wound any such person, or unlawfully do any act by which the life of such person may be endangered, shall be guilty of felony, and being convicted thereof, shall suffer death as a felon."

By s. 3, "Whosoever shall be convicted of any offence which by any of the acts hereinbefore referred to, amounts to the crime of piracy, and is thereby made punishable with death, shall be liable, at the discretion of the court, to be transported

beyond the seas for the term of the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years."

By s. 4, "In the case of every felony punishable under this act, every principal in the second degree, and every accessory before the *fact, shall be punishable [*780] with death or otherwise, in the same manner as the principal in the first degree is by this act punishable, and every accessory after the fact to any felony punishable under this act shall, on conviction, be liable to be imprisoned for any term not exceeding two years."

By s. 5, in case of imprisonment, the court may award hard labor, and solitary confinement not exceeding one month at any one time, and three months in any one year.

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*POISON. [*781]

Administering poison, with intent to murder, ... 781
Attempting to administer poison, with intent to murder, ... 781
drugs, with intent to commit an indictable offence, ... 781
poison so as to endanger life or inflict grievous bodily harm, . . . 781
poison, with intent to aggrieve, injure, or annoy, ... 781
Persons charged with felony may be convicted of misdemeanor, ... 782
Poisoning fish, ... 782
Administering drugs to procure abortion, ... 782
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of the intent, ... 782

Administering poison, with intent to murder.] See 24 & 25 Vict. c. 100, s. 11, *supra*, p. 720.

Attempting to administer poison, with intent to murder.] See 24 & 25 Vict. c. 100, s. 14, *supra*, p. 720.

Administering drugs, with intent to commit an indictable offence.] By the 24 & 25 Vict. c. 100, s. 22, "Whosoever shall unlawfully apply or administer to or cause to be taken by, or attempt to apply or administer to, or attempt to cause to be administered to or taken by, any person, any chloroform, laudanum, or other stupefying or overpowering drug, matter, or thing, with intent in any of such cases thereby to enable himself or any other person to commit, or with intent in any of such cases thereby to assist any other person in committing, any indictable offence, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any other term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor."

Administering poison so as to endanger life or inflict grievous bodily harm.] By s. 23, "Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, so as thereby to endanger the life of such person, or so as thereby to inflict upon such person any grievous bodily harm, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding ten years, and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor."

Administering poison, with intent to injure, aggrieve, or annoy.] By s. 24, "Who- [*782] soever shall unlawfully and maliciously administer *to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, with intent to injure, aggrieve, or annoy such person, shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labor."

Persons charged with felony of administering poison may be convicted of misdemeanor.] By s. 25, "If, upon the trial of any person for any felony in the last but one preceding section mentioned, the jury shall not be satisfied that such person is guilty thereof, but shall be satisfied that he is guilty of any misdemeanor in the last preceding section mentioned, then and in every such case the jury may acquit the accused of such felony, and find him guilty of such misdemeanor, and thereupon he shall be liable to be punished in the same manner as if convicted upon an indictment for such misdemeanor."

Poisoning fish.] By the 24 & 25 Vict. c. 97, s. 32, unlawfully and maliciously putting any lime or other noxious material in any pond or water which shall be private property, or in which there shall be any private right of fishery, with intent thereby to destroy any of the fish that may then be or that may thereafter be put therein, is made a misdemeanor, to be punished by penal servitude for any term not exceeding seven years, and not less than three years,—or by imprisonment for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and if the prisoner be a male under the age of sixteen years, with or without whipping.

Administering drugs to procure abortion.] See the 24 & 25 Vict. c. 100, ss. 58, 59, *supra*, p. 250.

Proof of administering.] See tit. Abortion, *supra*, p. 250.

Proof of the intent.] Administering cantharides to a woman, with intent to excite her sexual passion, in order that the prisoner may have connection with her, was held to be an administering with intent to injure, aggrieve, or annoy within the meaning of the repealed statute of 23 & 24 Vict. c. 8, s. 2. Reg. v. Wilkins, 10 W. R. 62.

[*783] *POST-OFFICE—OFFENCES RELATING TO THE.

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Statutes.] THE law with regard to embezzlement of letters by persons employed in the post-office was formerly contained in the 5 Geo. 3, c. 25, s. 17, 7 Geo. 3, c. 50, s. 1, & 42 Geo. 3, c. 81, s. 1. The provisions of those acts were afterwards consolidated in the 52 Geo. 3, c. 143.

By the 7 Wm. 4 & 1 Vict c. 32 (U. K.), the last-mentioned statute and all other enactments relative to offences committed against the post-office (excepting so much of the 5 Geo. 3, c. 25, and the 7 Geo. 3, c. 50, as respectively relate to any felony or other offence committed within the British dominions in America and the West Indies), were repealed, and the law was consolidated and further provisions made, by the 7 Wm. 4 & 1 Vict. c. 36 (U. K.), which came into operation on the same day as the 7 Wm. 4 & 1 Vict. c. 32.

Offences by officers employed by the post-office—opening or detaining letters.] By the 7 Wm. 4 & 1 Vict. c. 36 (U. K.), s. 25, "Every person employed by or under the post-office who shall contrary to his duty open or procure or suffer to be opened a post letter, or shall wilfully detain or delay, or procure or suffer to be detained or delayed, a post letter, shall in England and Ireland be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof, shall suffer such punishment by fine or imprisonment, or by both, as to the court shall seem meet; *provided always, that nothing herein contained shall extend to the opening [*784] or detaining or delaying of a post letter returned for want of a true direction, or of a post letter returned by reason that the person to whom the same shall be directed is dead or cannot be found, or shall have refused the same; or shall have refused or neglected to pay the postage thereof; nor to the opening or detaining or delaying of a post letter in obedience to an express warrant in writing under the hand (in Great Britain) of one of the principal secretaries of state, and in Ireland under the hand and seal of the lord lieutenant of Ireland."

Offences by officers employed in the post-office—stealing, embezzling, secreting, or destroying letters.] By s. 26, "Every person employed under the post-office who shall steal, or shall for any purpose whatever, embezzle, secrete, or destroy a post letter, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and shall, at the discretion of the court, either be transported beyond the seas for the term of seven years, or be imprisoned for any term not exceeding three years; and if any such post letter so stolen or embezzled, secreted, or destroyed, shall contain therein any chattel or money whatsoever, or any valuable security, every such offender shall be transported beyond the seas for life."

Offences by officers employed in the post-office—stealing or embezzling printed papers.] By s. 32, "For the protection of printed votes and proceedings in Parliament and printed newspapers," it is enacted, that "Every person employed in the post-office who shall steal, or shall for any purpose embezzle, secrete, or destroy, or shall wilfully detain or delay in course of conveyance or delivery thereof by the post, any printed votes or proceedings in Parliament, or any printed newspaper, or any other printed paper whatever sent by the post without covers, or in covers open at the sides, shall in England and Ireland be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof, shall suffer such punishment by fine or imprisonment, or by both, as to the court shall seem meet."

Offences by other parties—stealing out of letters.] By s. 27, "Every person who shall steal from or out of a post letter any chattel, or money, or valuable security, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and shall be transported beyond the seas for life."

Offences by other parties—stealing letter-bags or letters from mail or post-office.] By s. 28, "Every person who shall steal a post letter-bag, or a post letter from a post letter-bag, or shall steal a post letter from a post-office, or from an officer of the post-office, or from a mail, or shall stop a mail with intent to rob or search the same, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and shall be transported beyond the seas for life."

Offences by other parties—stealing from a post-office packet.] By s. 29, "Every [*785] person who shall steal or unlawfully take away a *post letter-bag sent by a post-office packet, or who shall steal or unlawfully take a letter out of any such bag, or shall unlawfully open any such bag, shall, in England and Ireland, be guilty of felony, and in Scotland of a high crime and offence, and shall be transported beyond the seas for any term not exceeding fourteen years."

Offences by other parties—fraudulently retaining letters, &c.] By s. 31, reciting that "post letters are sometimes by mistake delivered to the wrong person, and post letters and post letter-bags are lost in the course of conveyance or delivery thereof, and are detained by the finders in expectation of gain or reward;" it is enacted, "that every person who shall fraudulently retain, or shall wilfully secrete, or keep, or detain, or being required to deliver up by an officer of the post-office, shall neglect or refuse to deliver up a post letter which ought to have been delivered to any other person, or a post letter-bag or post letter which shall have been sent, whether the same shall have been found by the person secreting, keeping, or detaining, or neglecting or refusing to deliver up the same, or by any other person, shall, in England and Ireland, be guilty of a misdemeanor, and in Scotland of a crime and offence, and being convicted thereof shall be liable to be punished by fine and imprisonment."

Accessories and procurers.] By s. 35, it is enacted, "that in the case of every felony punishable under the post-office acts, every principal in the second degree, and every accessory before the fact, shall be punishable in the same manner as the principal in the first degree is by the post-office acts punishable; and every accessory after the fact to any felony punishable under the post-office acts (except only a receiver of any property or thing stolen, taken, embezzled, or secreted), shall, on conviction, be liable to be imprisoned for any term not exceeding two years; and every person who shall aid, abet, counsel, or procure the commission of any misdemeanor punishable under the post-office acts, shall be liable to be indicted and punished as a principal offender." See also s. 37, *infra*.

And by s. 36, "Every person who shall solicit or endeavor to procure any other person to commit a felony or misdemeanor punishable by the post-office acts, shall in England and Ireland be guilty of a misdemeanor, and in Scotland of a crime and offence, and being thereof convicted shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years."

Receivers.] By s. 30, "With regard to receivers of property sent by the post and stolen therefrom," it is enacted, "that every person who shall receive any post letter

or post letter-bag, or any chattel or money or valuable security, the stealing or taking or embezzling or secreting whereof shall amount to a felony under the post-office acts, knowing the same to have been feloniously stolen, taken, embezzled, or secreted, and to have been sent or to have been intended to be sent by the post, shall in England and Ireland be guilty of felony, and in Scotland of a high crime and offence, and may be indicted and convicted either as an accessory after the fact or for a substantive felony, and in the latter case, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to *justice; [*786] and every receiver, howsoever convicted, shall be liable to be transported beyond the seas for life."

Venue.] By s. 37, "The offence of every offender against the post-office acts may be dealt with, and indicted and tried and punished, and laid and charged to have been committed in England and Ireland, either in the county or place where the offence shall be committed, or in any county or place in which he shall be apprehended, or be in custody, as if his offence had been actually committed in that county or place, and if committed in Scotland either in the High Court of Justiciary at Edinburgh or in the Circuit Court of Justiciary to be holden by the lords commissioners of justiciary within the district where such offence shall be committed, or in any county or place within which such offender shall be apprehended or be in custody, as if his offence had been actually committed there; and where an offence shall be committed in or upon or in respect of a mail, or upon a person engaged in the conveyance or delivery of a post letter-bag or post letter, or in respect of a post letter-bag, or post letter, or a chattel, or money, or valuable security sent by the post, such offence may be dealt with and inquired of, and tried and punished, and laid and charged to have been committed, as well in any county or place in which the offender shall be apprehended or be in custody, as also in any county or place through any part whereof the mail, or the person, or the post letter-bag, or the post letter, or the chattel, or the money, or the valuable security sent by the post in respect of which the offence shall have been committed, shall have passed in due course of conveyance or delivery by post, in the same manner as if it had been actually committed in such county or place; and in all cases where the side or the centre or other part of a highway, or the side, the bank, the centre, or other part of a river, or canal, or navigation, shall constitute the boundary of two counties, such offence may be dealt with and inquired of, and tried and punished, and laid and charged to have been committed in either of the said counties through which or adjoining to which or by the boundary of any part of which the mail or person shall have passed in due course of conveyance or delivery by the post, in the same manner as if it had actually been committed in such county or place; and every accessory before or after the fact to any such offence, if the same be a felony or a high crime, and every person aiding or abetting or counselling or procuring the commission of any such offence, if the same be a misdemeanor, may be dealt with, indicted, tried, and punished as if he were a principal, and his offence laid and charged to have been committed in any county or place in which the principal offender may be tried."

By s. 39, "Where an offence punishable under the post-office acts shall be committed within the jurisdiction of the admiralty, the same shall be dealt with and inquired of and tried and determined in the same manner as any other offence committed within that jurisdiction."

Form of indictment.] By s. 40, "In every case where an offence shall be com-

mitted in respect of a post letter-bag or a post letter, or a chattel, money, or a valuable security sent by the post, it shall be lawful to lay in the indictment or criminal letters to be preferred against the offender, the property of the post letter-bag or [*787] *of the post letter, or chattel or money, or the valuable security sent by the post, in the postmaster-general; and it shall not be necessary in the indictment or criminal letters to allege or to prove upon the trial or otherwise that the post letter-bag or any such post letter or valuable security was of any value; and in any indictment or any criminal letters to be preferred against any person employed under the post-office for any offence committed against the post-office acts, it shall be lawful to state and allege that such offender was employed under the post-office of the United Kingdom at the time of the committing of such offence, without stating further the nature or particulars of his employment."

Punishment.] By s. 41, "Every person convicted of any offence for which the punishment of transportation for life is herein awarded shall be liable to be transported beyond the seas for life or for any term not less than seven years, to be imprisoned for any term not exceeding four years; and every person convicted of any offence punishable according to the post-office acts by transportation for fourteen years shall be liable to be transported for any term not exceeding fourteen years nor less than seven years, or to be imprisoned for any term not exceeding theree years."

By s. 42, "Where a person shall be convicted of an offence punishable under the post-office acts for which imprisonment may be awarded, the court may sentence the offender to be imprisoned, with or without hard labor, in the common gaol or house of correction, and may also direct that he shall be kept in solitary confinement for the whole or any portion of such imprisonment, as to the court shall seem meet."

Interpretation clause.] By s. 47, "For the interpretation of the post-office laws," it is enacted, that the following terms and expressions shall have the several interpretations hereinafter respectively set forth, unless such interpretations are repugnant to the subject, or inconsistent with the context of the provisions in which they may be found; (that is to say), the term "British letter" shall mean a letter transmitted within the United Kingdom; and the term "British newspapers" shall mean newspapers printed and published in the United Kingdom liable to the stamp duty and duly stamped; and the term "British postage" shall mean the duty chargeable on letters transmitted by post from place to place within the United Kingdom, or if transmitted to or from the United Kingdom, chargeable for the distance which they shall be transmitted within the United Kingdom, and including also the packet postage, if any; and the term "colonial letter" shall mean a letter transmitted between any of her majesty's colonies and the United Kingdom; and the term "colonial newspapers" shall mean newspapers printed and published in any of her majesty's dominions out of the United Kingdom; and the term "convention posts" shall mean posts established by the postmaster-general under agreements with the inhabitants of any places; and the term "double letter" shall mean a letter having one inclosure; and the term "double post" shall mean twice the amount of single postage; and the term "East Indies" shall mean every port and place within the territorial acquisitions now vested in the East India Company in trust for her majesty, and every other port or place within the limits of the charter of the said company (China [*788] excepted), and shall also *include the Cape of Good Hope; and the term "express" shall mean every kind of conveyance employed to carry letters on behalf

of the post-office other than the usual mail; and the term "foreign country" shall mean any country, state, or kingdom, not included in the dominions of her majesty; and the term "foreign letter" shall mean a letter transmitted to or from a foreign country; and the term "foreign newspapers" shall mean newspapers printed and published in a foreign country in the language of that country; and the term "foreign postage" shall mean the duty charged for the conveyance of letters within such foreign country; and the term "franking officer" shall mean the person appointed to frank the official correspondence of offices to which the privilege of franking is granted; and the term "her majesty" shall mean "her majesty, her heirs, and successors;" and the term "her majesty's colonies" shall include every port and place within the territorial acquisitions now vested in the East India Company in trust for her majesty, the Cape of Good Hope, the Islands of Saint Helena, Guernsey, Jersey, and the Isle of Man (unless any such places be expressly excepted), as well as her majesty's other colonies and possessions beyond seas; and the term "inland postage" shall mean the duty charged for the transmission of post letters within the limits of the United Kingdom, or within the limits of any colony; and the term "letter" shall include packet, and the term "packet" shall include letter; and the expression "lord lieutenant of Ireland" shall mean the chief governor or governors of Ireland for the time being; and the expression "lords of the treasury" shall mean the lord high treasurer of the United Kingdom of Great Britain and Ireland, or the lords commissioners of her majesty's treasury of the United Kingdom of Great Britain and Ireland, or any three or more of them; and the term "mail" shall include every conveyance by which post letters are carried, whether it be a coach, or cart, or horse, or any other conveyance, and also a person employed in conveying or delivering post letters, and also every vessel which is included in the term packet boat; and the term "mail bag" shall mean a mail of letters, or a box, or a parcel, or any other envelop in which post letters are conveyed, whether it does or does not contain post letters; and the term "master of a vessel" shall include any person in charge of a vessel, whether commander, mate, or other person, and whether the vessel be a ship of war or other vessel; and the expression "officer of the post-office" shall include the postmaster-general, and every deputy postmaster, agent, officer, clerk, letter-carrier, guard, post-boy, rider, or any other person employed in any business of the post-office, whether employed by the postmaster-general, or by any person under him, or on behalf of the post-office; and the term "packet postage" shall mean the postage chargeable for the transmission of letters by packet boats between Great Britain and Ireland, or between the United Kingdom and any of her majesty's colonies, or between the United Kingdom and foreign countries; and the term "packet letter" shall mean a letter transmitted by a packet boat; and the term "penalty" shall include every pecuniary penalty of forfeiture; and the expression "persons employed by or under the post-office" shall include every person employed in any business of the post-office according to the interpretation given to the officer of the post-office; and the terms "packet boats" and "post-office packets" shall include vessels employed by or under the post-office or the admiralty for the transmission of post letters, and also ships or vessels (though not *regularly employed as [*789] packet boats) for the conveyance of post letters under contract, and also a ship of war or other vessel in the service of her majesty, in respect of letters conveyed by it; and the term "postage" shall mean the duty chargeable for the transmission of post-letters; and the term "post town" shall mean a town where a post-office isestablished (not being a penny, or twopenny, or convention post-office); and the term "post letter-bag" shall include a mail-bag or box, or packet or parcel, or other envelop or cover-

ing in which post letters are conveyed, whether it does or does not contain post letters; and the term "post letter" shall mean any letter or packet transmitted by the post under the authority of the postmaster-general, and a letter shall be deemed a post letter from the time of its being delivered to a post-office to the time of its being delivered to the person to whom it is addressed; and the delivery to a letter-carrier or other person authorized to receive letters for the post shall be a delivery to the post-office; and a delivery at the house or office of the person to whom the letter is addressed, or to him, or to his servant or agent, or other person considered to be authorized to receive the letter according to the usual manner of delivering that person's letter, shall be a delivery to the person addressed; and the term "post-office" shall mean any house, building, room, or place, where post letters are received or delivered, or in which they are sorted, made up, or despatched; and the term postmaster-general shall mean any person or body of persons executing the office of postmaster-general for the time being, having been duly appointed to the office by her majesty; and the terms "post-office acts" and "post-office laws," shall mean all acts relating to the management of the post, or to the establishment of the post-office, or to postage duties from time to time in force; and the term "ships" shall include vessels other than packet boats; and the term "single postage" shall mean the postage chargeable for a single letter; and the term "single letter" shall mean a letter consisting of one sheet or piece of paper, and under the weight of an ounce; and the term "sea postage" shall mean the duty chargeable for the conveyance of letters by sea by vessels not packet boats; and the term "ship letter" shall mean a letter transmitted inwards or outwards over seas by a vessel not being a packet boat; and the term "treble letter" shall mean a letter consisting of more than two sheets or pieces of paper, whatever the number, under the weight of an ounce; and the term "treble postage" shall mean three times the amount of single postage; and the term "treble duty of postage" shall mean three times the amount of the postage to which the letter to be charged would otherwise have been liable according to the rates of postage chargeable on letters; and the term "United Kingdom" shall mean the United Kingdom of Great Britain and Ireland; and the term "valuable security" shall include the whole or any part of any tally, order, or other security whatsoever, entitling or evidencing the title of any person or body corporate to any share or interest in any public stock or fund, whether of this kingdom or of Great Britain or of Ireland, or of any foreign state, or in any fund of any body corporate, company, or society, or to any deposit in any savings bank, or the whole or any part of any debenture, deed, bond, bill, note, warrant, or order, or other security whatsoever for money, or for payment of money, whether of this kingdom or of any foreign state, or of any warrant or order for the delivery or transfer of any goods or valuable thing; and [*790] *the term "vessel" shall include any ship or other vessel not a post-office packet; and whenever the term "between" is used in reference to the transmission of letters, newspapers, parliamentary proceedings, or other things between one place and another, it shall apply equally to the transmission from either place to the other; and every officer mentioned shall mean the person for the time being executing the functions of that officer; and whenever in this act or the schedules thereto, with reference to any person, or matter, or thing, or to any persons, matters, or things, the singular or plural number or the masculine gender only is expressed, such expression shall be understood to include several persons, or matters, or things, as well as one person, or matter, or thing, and one person, matter, or thing, as well as several persons, or matters, or things, females as well as males, bodies politic or corporate as well as individuals, unless it be otherwise specially provided, or the subject or context be repugnant to such construction.

By s. 48, "This act shall extend to and be in force in the Islands of Man, Jersey, Guernsey, Sark, and Alderney, and in all her majesty's colonies and dominions where any post or post communication is established by or under the postmaster-general of the United Kingdom of Great Britain and Ireland."

What is a post letter.] Under the 26th section, it has been held, that where an inspector secretly put a letter, prepared for the purpose, containing a sovereign, amongst some letters, which a letter-carrier suspected of dishonesty was about to sort, and the letter-carrier stole the letter and sovereign, that he was not rightly convicted of stealing *a post letter*, such letter not having been put in the post in the ordinary way, but was rightly convicted of the larceny of the sovereign, laid as the property of the postmaster-general. R. v. Rathbone, 2 Moo. C. C. 242. To make a man liable under this section, the letter must have come into his hands in the ordinary course of the post-office. R. v. Shepherd, 25 L. J. M. C. 52. See also R. v. Gardener, 1 C. & K. 628: 47 E. C. L. R. The president of a department in the post-office put a half sovereign into a letter, on which he wrote a fictitious address, and dropped the letter with the money in it into the letter-box of a post-office receiving-house where the prisoner was employed in the service of the post-office. It was held that this was a stealing of a post letter containing money, within the statute, and that this was not the less a "post letter" within that enactment, because it had a fictitious address. R. v. Young, 1 Den. C. C. R. 194. Where a person took a money letter to the post-office, which was at an inn, and did not put it into the letter-box, but laid the letter and the money to prepay it upon a table in the passage of the inn, in which passage the letter-box was, telling the prisoner, a female servant, who was not authorized to receive letters, who said she would "give it to them," but who, instead of doing so, stole the letter and its contents; Patteson, J., held that this was not a "post letter" within the meaning of the statute. R. v. Harley, 1 C. & K. 89. See the interpretation clause, *supra*, p. 787.

Proof of being employed by or under the post-office.] The employment of the offender "by or under the post-office" must be proved. It is not necessary in these cases to produce the actual appointment of the prisoner, it is sufficient to show that he acted in the capacity *imputed to him. R. v. Borrett, 6 C. & P. 124: 25 [*791] E. C. L. R.; R. v. Ree, Id. 606. The prisoner was indicted on the 7 Geo. 3, c. 50 (which stated the special capacities of the parties employed in the post-office), in the first and third counts, as "a person employed in sorting and charging letters in the post-office," in the second and fourth counts as "a person employed in the business relating to the general post-office;" it appeared that he was only a sorter, and not a charger, and he was convicted on the second and fourth counts only. It was objected that as he was acquitted on the counts charging him as a sorter and charger, and it was not proved that he was employed in any other capacity than that of a sorter, he ought not to have been convicted on the second and fourth counts. The judges thought the objection valid, but were inclined to be of opinion that the prisoner might have been properly convicted upon the first and third counts by a special finding that he was a sorter only. R. v. Shaw, 2 East, P. C. 580; 2 W. Bl. 789; 1 Leach. 79. In a subsequent case where the prisoner was described as a post-boy and rider, and was proved to be only a post-boy, being convicted, the judges held the conviction right, saying that a post-boy riding on horseback was a rider as well as a post-boy. R. v. Ellins, Russ. & Ry. 188. A person employed at a receiving-house of the general post-office to clean boots, &c., and who occasionally assisted in tying up the letter-

bags, was held not to be a person employed by the post-office within the 52d Geo. 3, c. 143, s. 2. R. v. Pearson, 4 C. & P. 572: 19 E. C. L. R. S. delivered two 5*l.* notes to Mrs. D., the wife of the postmaster of C., at which post-office money orders were not granted, and asked her to send them by G., the letter-carrier from C. to W., in order that he might get two 5*l.* money orders for them at the W. post-office. Mrs. D. gave these instructions to G., and put the notes by his desire into his bag. G. afterwards took the notes out of the bag, and pretended, when he got to the W. post-office, that he had lost them. It was found by the jury that G. had no intention to steal the notes when they were given to him by Mrs. D. It was held that the notes were not in G.'s possession in the course of his duty as a post-office servant. R. v. Glass, 1 Den. C. C. R. 215. The prisoner was employed to carry letters from C. A. to F., such employment being complete upon the delivery of the letters at F. Upon one occasion, at the request of the postmaster at F., the prisoner assisted in sorting the letters at that place, and whilst so engaged, stole one of the letters containing money. It was held by the Court of Criminal Appeal that the prisoner was a person "employed under the post-office," within the 7 Wm. 4 & 1 Vict. c. 36, s. 26. R. v. Reason, 1 Dears. C. C. 226. Coleridge, J., distinguished R. v. Glass, which had been relied on by the prisoner's counsel, observing that in that case, "it was not the business of the postmaster to get money orders." So the postmistress of G. received from A. a letter unsealed, but addressed to B., and with it 1*l.* for a post-office order, 3*d.* for the poundage on the order, 1*d.* for the postage, and 1*d.* for the person who got the order. S. gave the letter unsealed and the money to the prisoner, who was the letter-carrier from G. to L., telling him to get the order at L., and inclose it in the letter, and post the letter at L. The prisoner destroyed the letter, never procured the order, and kept the money. Cresswell, J., held that he was indictable under s. [*792] 26 of the 7 Wm. 4 & 1 Vict. c. 36, he being at the *time in the employment of the post-office. R. v. Bickerstaff, 2 C. & K. 761: 61 E. C. L. R.

Where the prisoner was employed by a postmistress to carry letters from D. to B., at a weekly salary paid him by the post-mistress, which was repaid to her by the post-office, it was held that he was a person employed by the post-office within the 52 Geo. 3, c. 143, s. 2. R. v. Salisbury, 5 C. & P. 155: 24 E. C. L. R. In the above case, Patteson, J., was inclined to think that the words, "whilst employed," in the second section, merely meant that the party should be then in the employ of the post-office, and not that the letter stolen should be in the party's hands in the course of his duty. Ibid.

Where a prisoner was a letter-carrier, employed by the post-office to deliver letters about Gloucester, and had been in the habit of calling at the lodge of the Gloucester Infirmary, and receiving letters there, and a penny upon each to prepay the postage, and his practice was to deliver these letters at the Gloucester post-office; but he sometimes omitted to call at the lodge, and then the letters were taken by some person and put into the post-office; and during the time the prisoner had been ill, another person who performed these duties had also called at the lodge, and received the letters and the pennies, and delivered them at the post-office in the same way as the prisoner. Evidence was also given to show that the prisoner had embezzled pence received at the lodge to prepay letters. It was admitted, that proof that the prisoner acted as a letter-carrier was sufficient to show that he held that situation, but it was urged that where the charge was of embezzling money received by virtue of his employment, it must be shown that it was the duty of the prisoner to receive the money; and in this case it was his mere voluntary act, and he was neither bound to go to the lodge nor to receive the letters; but it was held by Coleridge, J., that there was evi-

dence to go to the jury that the pence were received by virtue of the prisoner's employment. R. v. Townsend, Carr. & M. 178: 41 E. C. L. R.

Proof of stealing, embezzling, secreting, or destroying.] Prove a larceny of a letter, or of a letter containing money, &c., as the case may be. The ownership of the property need not be proved, but may be laid in the postmaster-general; neither need it be shown to be of any value.

Where the charge is for embezzling, &c., the prosecutor must prove that the prisoner either embezzled, secreted, or destroyed the letter described. Where the prisoner secreted half a bank note on one day and the other half on another day, it was held to be a secreting of the note within the 7 Geo. 3, c. 50. The doubt was, whether *secreting* in the statute did not mean the *original* secreting, as taking does; but the judges distinguished between taking and secreting, for after the prisoner had got possession of the second letter he secreted both. R. v. Moore, 2 East, P. C. 582. The stat. 52 Geo. 3, mentioned "any part of any bill," &c. The secreting will be proved in general by circumstantial evidence.

A person employed in the post-office committed a mistake in the sorting of two letters containing money, and he threw the letters, unopened, and the money, down a water-closet, in order to avoid a penalty attached to such mistakes. It was held, that this was a larceny of the letters and money, and also a secreting of the letters *within 7 Wm. 4 and 1 Vict. c. 36, s. 26. R. v. Wynn, 1 Den. C. C. R. [*793] 365; S. C. 18 L. J. M. C. 51.

Where such is the charge, it must appear that the letter contained some chattel, money, or valuable security. Where the letter embezzled was described as containing several notes, it was held sufficient to prove that it contained any one of them, the allegation not being descriptive of the letter, but of the offence. R v. Ellins, Russ. & R. 188. It is not necessary to prove the execution of the instruments which the letter is proved to contain. Ibid. Country bank notes paid in London, and not reissued, were held within the 7 Geo. 3, c. 50. They were said to be valuable to the possessors of them, and available against the makers of them, and fell within both the words and meaning of the act. R. v. Ransom, Russ. & Ry. 232; 2 Leach, 1090; acc. R. v. West, Dears. & B. C. C. 109. Upon an indictment under the 7 Geo. 3, c. 50, it was held, that a bill of exchange might be described as a warrant for the payment of money, as in cases of forgery. R. v. Willoughby, 2 East, P. C. 581. A post-office order for the payment of money in the ordinary form, is a warrant and order for the payment of money, and may be so described in an indictment for larceny. R. v. Gilchrist, 2 M. C. C. 233. Neither the former statutes nor the 52 Geo. 3, c. 143, contained the word "coin" or "money." The prisoner was indicted under the former statute for stealing 5*s.* 3*d.* in gold coin (being a sorter in the post-office), and it was objected that as the letters contained *money*, and not securities for money, the case was not within the acts, and the court (at the Old Bailey) being of this opinion, the prisoner was acquitted. R. v. Skutt, 2 East, P. C. 592. The security specified in the statute must be valid and available, and therefore a draft purporting to be drawn in London, but drawn in Maidstone, and having no stamp upon it, pursuant to the 31 Geo. 3, c. 25, was held not to be a draft within the 7 Geo. 3, c. 50. R. v. Pooley, Russ. & Ry. 12; 2 Leach, 887; 3 Bos. & Pul. 311.

A servant being sent with a letter, and a penny to pay the postage, and finding the office shut, put the penny inside the letter and fastened it by means of a pin, and then put the letter into the box. A messenger in the general post-office stole this letter with the penny in it. It was held by Lord Denman, C. J., that the prisoner

might be convicted of stealing a post letter containing money, although the money was not put into the letter for the purpose of being conveyed by means of it to the person to whom it was addressed. R. v. Mence, Carr. & M. 234: 41 E. C. L. R.

It seems that the contents of the letter secreted, &c., will not be evidence as against the prisoner to prove that the letter contained the valuable security mentioned in it. R. v. Plumer, Russ. & Ry. 264. The letter in question had marked upon it, "paid 2*s.*," which was the rate of double postage. This was written by the clerk of the writer of the letter, who had paid the postage, but was not called. There being no other proof of the double postage, the judges held the conviction wrong. Ibid.

The prisoner having been indicted under the 5 Geo. 3, c. 25, s. 17, and 7 Geo. 3, c. 50, s. 3, the jury found specially that he was a person employed by the post-office in stamping and facing letters, and that he secreted a letter which came into his hands by virtue of his office, containing a 10*l.* note, but that he did not open the same, nor know that the bank note was contained therein, but that he secreted it [*794] with *intent to defraud the king of the postage, which had been paid. The prisoner, it is said, remained in prison several years, but no judgment appears to have been given. R. v. Sloper, 2 East, P. C. 583; 1 Leach, 81.

Where the prisoner, with intent to steal the mail-bags, pretended to be the guard, and procured them to be let down to him from the window by a string, and carried them away, being indicted on the 7 Geo. 3, c. 50, and found guilty, all the judges held the conviction right, on a count for stealing the letters out of the post-office; for his artifice in obtaining the delivery of them in the bag out of the house, was the same as if he had actually taken them out himself. R. v. Pearce, 2 East, P. C. 603; see R. v. Kay, *infra*, acc. Upon the same statute it was held, that a letter-carrier, taking letters out of the office, intending to deliver them to the owners, but to embezzle the postage, could not be indicted for stealing such letters. R. v. Howard, 2 East, P. C. 604.

The above statute made it an offence to steal from the *possession* (not from the *person*) of persons employed to convey letters, &c. Therefore, where a mail-rider, after fixing the portmanteau containing the letters on his horse, fastened his horse at the post-office, and went to a house about thirty yards distant for his great coat, and in the meantime the prisoner came and stole the letters, it was held by Wood, B., that the case was within the statute, for that the letters had been in the possession of the mail-rider, and that possession had never been abandoned. R. v. Robinson, 2 Stark. N. P. C. 485: 3 E. C. L. R.

What is a post-office.] With regard to what was to be considered a "post-office" within the above statute, it was held, that a "receiving-house" was not such, but such house was "a place for the receipt of letters" within the act; and, if a shop, the whole shop was to be considered as "a place for the receipt of letters," and therefore the putting of a letter on the shop counter, or giving it to a person belonging to the shop, was a putting into the post. R. v. Pearson, 4 C. & P. 572: 19 E. C. L. R. To complete the offence under the fourth section of the 52 Geo. 3, c. 143, of stealing a letter from the place of receipt, it was held, that the letter should be carried wholly out of the shop, and therefore if a person opened a letter in the shop, and there stole the contents, without taking the letter out of the shop, the case was not within the statute. R. v. Pearson, *supra;* see R. v. Harley, *ante*, p. 791, and the interpretation clause, p. 789.

In whose possession letters are on their way through the post.] The person who has possession of the letter during its course through the post-office, has the bare custody of a servant only, and has not the possession of a bailee. R. v. Pearce, 2 East, P. C. 609; R. v. Kay, Dear. & B. C. C. 231; S. C. 26 L. J. M. C. 119. In the latter case the owner of a watch placed it with the seller to be regulated, and the prisoner, pretending that he was the owner, desired the watchmaker to send the watch by post, directed in a certain manner, and then, by a further fraud, obtained the parcel containing the watch from the post-office. He was held to be rightly convicted of larceny. See R. v. Cryer, *infra*, p. 826, acc.

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*PRISON BREACH. [*795]

Proof of the nature of the offence for which the prisoner was imprisoned, . . . 795
of the imprisonment and the nature of the prison, ... 796
of the breaking of the prison, ... 796
Punishment, ... 797
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WHERE a person is in custody aon charge of treason or felony and effects his escape by force, the offence is a felony at common law; where he is in custody on a minor charge it is a misdemeanor. 1 Russ. by Grea. 427; see statute 1 Ed. 2, st. 5, *infra*.

Upon a prosecution for prison breach, the prosecutor must prove, 1, the nature of the offence for which the prisoner was imprisoned; 2, the imprisonment and the nature of the prison; and 3, the breaking of the prison.

Proof of the nature of the offence for which the prisoner was imprisoned.] The statute *de frangentibus prisonam*, 1 Ed. 2, st. 2, enacts, "That none thenceforth that breaks prison shall have judgment of life or member for breaking of prison only, except the cause for which he was taken or imprisoned did require such a judgment, if he had been convicted thereupon according to the law and custom of the realm." If the offence therefore for which the party is arrested does not require judgment of life or member, it is not a felony. 1 Russ. by Grea. 428. And though the offence for which the party is committed is supposed in the *mittimus* to be of such a nature as requires a capital judgment, yet if in the event it be found of an inferior nature, it seems difficult to maintain that the breaking can be a felony. Ibid. It seems that the stating the offence in the *mittimus* to be one of lower degree than felony, will not prevent the breaking from being a felony, if in truth the original offence was such. Hawk. P. C. b. 2, c. 18, s. 15; 1 Russ. by Grea. 428. A prisoner on a charge of high treason, breaking prison, is only guilty of a felony. Hawk. P. C. b. 2, c. 18, s. 15. It is immaterial whether the party breaking prison had been tried or not. Id. s. 16.

Where the prisoner has been convicted the certificate of the clerk of assize, &c., with proof of identity, will be proof of the nature and fact of the conviction and of the species and period of confinement to which the party was sentenced. 4 Geo. 4, c. 64, s. 44.

Whenever a party is in lawful custody on a charge of felony, whether he has been

taken upon a *capias*, or committed on a *mittimus*, he is within the statute, however innocent he may be, or however groundless may be the prosecution against him; for he is bound to submit to his imprisonment, until he is discharged by due course of [*796] law. 2 Inst. 590; 1 Hale, 610; 2 Hawk. c. 18, s. 5. A party may *therefore be convicted of the felony for breaking prison before he is convicted of the felony for which he was imprisoned; the proceeding in this instance differing from cases of escape and rescue. 2 Inst. 592; 1 Hale, 611; 2 Hawk. c. 18, s. 18. But although it is immaterial whether or not the prisoner has been convicted of the offence, which he has been charged with, yet if he has been tried and acquitted, and afterwards breaks prison, he will not be subject to the punishment of prison breach. And even if the indictment for the breaking of the prison be before the acquittal, and he is afterwards acquitted of the principal felony, he may plead that acquittal in bar of the indictment for felony for breach of prison. 1 Hale, P. C. 611, 612.

Proof of the imprisonment and the nature of the prison.] The imprisonment, in order to render the party guilty of prison breaking, must be a lawful imprisonment; actual imprisoment will not be sufficient; it must be *primâ facie* justifiable.(1) Therefore where a felony has been committed, and the prisoner is apprehended for it, without cause of suspicion, and the *mittimus* is informal, and he breaks prison, this will not be felony, though it would be otherwise if there were such cause of suspicion as would form a justification for his arrest. Hawk. P. C. b. 2, c. 18, s. 7, 15; 1 Hale, P. C. 610. So if no felony has in fact been committed, and the party is not indicted, no *mittimus* will make him guilty within the statute, his imprisonment being unjustifiable. Id. But if he be taken upon a *capias* awarded on an indictment against him, it is immaterial whether he is guilty or innocent, and whether any crime has or has not in fact been committed, for the accusation being on record, makes his imprisonment lawful, though the prosecution be groundless. Hawk. P. C. b. 2, c. 18, s. 5, 6.

The statute extends to a prison in law, as well as to a prison in deed. 2 Inst. 589. An imprisonment in the stocks, or in the house of him who makes the arrest, or in the house of another, is sufficient. 1 Hale, P. C. 609. So if a party arrested, violently rescues himself from the hands of the party arresting him. Ibid. The imprisonment intended is nothing more than a restraint of liberty. Hawk. P. C. b. 2, c. 18, s. 4.

It is sufficient if the gaoler has a notification of the offence for which the prisoner is committed, and the prisoner of the offence for which he was arrested, and commonly, says Lord Hale, he knows his own guilt, if he is guilty, without much notification. 1 Hale, P. C. 610.

Proof of the breaking of the prison.] An actual breaking of the prison with force, and not merely a constructive breaking, must be proved. If a gaoler sets open the prison doors, and the prisoner escapes, this is no felony in the latter. 1 Hale, P. C. 611. And if the prison be fired, and the prisoner escapes to save his life, this excuses the felony, unless the prisoner himself set fire to the prison. Ibid. In these cases the breaking amounts to a misdemeanor only. The breaking must be by the prisoner himself, or by his procurement, for if other persons without his privity or consent break the prison, and he escape through the breach so made, he

(1) State v. Leach, 7 Conn. 752. Where the sole object of a prisoner illegally confined, is to liberate himself, he is not liable, though other real criminals, by means of his prison breach, escape. Ibid.

cannot be indicted for the breaking but only for the escape. 2 Hawk. c. 18, s. 10. No breach of prison will amount to felony, unless the prisoner *actually es- [*797] cape. 2 Hawk. c. 18, s. 12; 2 Inst. 590; 1 Hale, 611. A prisoner convicted of felony made his escape over the walls of a prison, in accomplishing which he threw down some bricks from the top of the wall, which had been placed there loose, without mortar, in the form of pigeon-holes, for the purpose of preventing escapes. Being convicted of prison breaking, a doubt arose whether there was such force as to constitute that offence, but the judges were unanimously of opinion that the conviction was right. R. v. Haswell, Russ. & Ry. 458.

Punishment.] Although to break prison and escape, when lawfully committed for any treason or felony, still remains felony as at common law, the breaking prison when lawfully confined upon any other inferior charge, is punishable only as a high misdemeanor by fine and imprisonment. 4 Bl. Com. 130; 2 Hawk. c. 18, s. 21.

By the 7 & 8 Geo. 4, c. 28, s. 8, "Every person convicted of any felony not punishable with death, shall be punished in the manner prescribed by the statute or statutes especially relating to such felony; and that every person convicted of any felony, for which no punishment hath been, or hereafter may be specially provided, shall be deemed to be punishable under this act, and shall be liable, at the discretion of the court, to be transported beyond the seas for the term of seven years, or to be imprisoned for any term not exceeding two years; and if a male, to be once, twice, or thrice publicly or privately whipped (if the court shall so think fit), in addition to such imprisonment."

By s. 8, in cases of imprisonment, the court may award hard labor and solitary confinement; but the latter is not to exceed one month at a time, and three months in any one year.

By the Irish statutes, the 1 & 2 Wm. 4, c. 44, s. 4, every person who shall by force or violence break open any gaol, prison, or bridewell, with an intention to rescue and enlarge himself, or any other prisoner therein confined on account of any offence, though the same be not capital, shall be transported for life, or for seven or fourteen years; or be imprisoned, with or without hard labor, for any term not exceeding three years; and if a male, be once, twice, or thrice publicly or privately whipped, if the court shall think fit, in addition to such imprisonment; and shall and may be tried before the trial of the person or persons so enlarged.

Conveying tools, &c., to prisoners to assist in escape.] By the 4 Geo. 4, c. 64 (E.) s. 43, "If any person shall convey or cause to be conveyed into any prison to which that act shall extend, any mask, visor, or other disguise, or any instrument or arms proper to facilitate the escape of any prisoners, and the same shall deliver or cause to be delivered to any prisoner in such prison, or to any other person there, for the use of any such prisoner, without the consent or privity of the keeper of such prison, every such person shall be deemed to have delivered such visor or disguise, instrument or arms, with intent to aid and assist such prisoner to escape, or attempt to escape; and if any person shall, by any means whatever, aid and assist any prisoner to escape, or in attempting to escape from any prison, every person so offending, whether an escape be actually made or not, shall be guilty of felony, and being convicted thereof, shall be transported beyond the seas for any term not exceeding fourteen years."

*An indictment under this section need not set out the means which had [*798] been used by the defendant to assist the prisoner to escape. R. v. Holloway, 2 Den.

C. C. R. 287. In that case the indictment charged that A., being a prisoner in a gaol, was meditating and endeavoring to effect his escape, and had procured a key to be made with intent to effect his escape, and had made overtures to the defendant, then and there being a turnkey in the said gaol, to induce the defendant to aid and assist him to escape; that the defendant then and there, and whilst A. was such prisoner in the gaol, received the said key with intent to enable A. to escape from the gaol and go at large whithersoever he would; and so the defendant then and there feloniously did aid and assist A., then and there being such prisoner, in so attempting to escape from the gaol. It was held that the offence was stated with sufficient particularity, and that the aiding and assisting sufficiently appeared to be an illegal act. It was held, also, that the prosecution need not under this statute, be instituted within one year after the offence committed, as was required by 16 Geo. 2, c. 31, s. 4.

As to aiding escapes from prison, see also the 16 Geo. 2, c. 31.

Special enactments.] The offence of prison breach is made the subject of special provisions in various statutes. Thus, by the 8 Vict. sess. 2, c. 29, s. 24, prison breaking from the Pentonville prison, and by the 6 & 7 Vict. c. 26, s. 22, prison breaking from the penitentiary at Milbank, are made punishable by additional imprisonment for three years, and, in a case of a second offence, by transportation for seven years, or imprisonment not exceeding two years, with or without hard labor, and with or without solitary confinement, and, if a male, with once, twice, or thrice whipping, public or private, at the discretion of the court. A similar punishment is enacted by the 1 & 2 Vict. c. 82, s. 12, for prison breach from Parkhurst prison.

[*799] *PUBLIC COMPANIES—OFFENCES BY OFFICERS OF.

Embezzlement of property.] By the 24 & 25 Vict. c. 96, s. 81, "Whosoever being a director, member, or public officer of any body corporate or public company, shall fraudulently take or apply for his own use or benefit, or for any use or purposes other than the use or purposes of such body corporate or public company, any of the property of such body corporate or public company, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award, as hereinbefore last mentioned," namely, penal servitude not exceeding seven years and not less than three years, or imprisonment not exceeding two years, with or without hard labor, and with or without solitary confinement. See s. 75, *supra*, p. 254.

Keeping fraudulent accounts.] By s. 82, "Whosoever being a director, public officer, or manager of any body corporate or public company, shall, as such, receive or possess himself of any of the property of such body corporate or public company, otherwise than in payment of a just debt or demand, and shall, with intent to defraud, omit to make, or to cause or direct to be made a full and true entry thereof in the books and accounts of such body corporate or public company, shall be guilty of a misdemeanor." The punishment is the same as for the offence mentioned in the last section.

Destroying or falsifying books, &c.] By s. 83, "Whosoever, being a director, manager, public officer, or member of any body corporate or public company, shall, with intent to defraud, destroy, alter, mutilate, or falsify any book, paper, writing or valuable security belonging to the body corporate or public company, or make, or concur in the making of any false entry, or omit or concur in omitting any material particular in any book of account or other document, shall be guilty of a misdemeanor." The punishment is the same as before.

A similar provision is contained in the 19 & 20 Vict. c. 47, s. 79.

Publishing fraudulent statements.] By s. 84, "Whosoever, being a director, manager, or public officer of any body corporate or public company, shall make, circulate, or publish, or concur in making, circulating, or publishing any written statement or account which he shall know to be false in any material particular, with intent to deceive or defraud any member, shareholder, or creditor of such body corporate or public company, or with intent to induce any person to become a shareholder or partner therein, or to intrust or advance any property to such body corporate or public company, or *to enter into any security for the benefit thereof, shall be guilty [*800] of a misdemeanor."

The same punishment as before.

Interpretation.] As to the meaning of the term "property" see s. 1, *ante*, p. 561.

These offences are not triable at quarter sessions; see s. 87.

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*RAILWAYS—OFFENCES RELATING TO. [*801]

False returns by railway companies to the board of trade, ... 801
Misconduct of servants of railway companies, ... 801
Setting fire to railway stations, ... 802
Doing certain acts, with intent to endanger the safety of passengers, ... 802
Endangering the safety of passengers, ... 802
Doing certain acts, with intent to obstruct or injure engines or carriages, . . . 803
Obstructing engines or carriages, ... 803
Proof of intent, ... 803
Proof of place being a railway, ... 804

False returns by railway companies to the board of trade.] By the 3 & 4 Vict. c. 97, s. 4, "Every officer of any company who shall wilfully make any false return to the lords of the said committee [of privy council for trade] shall be deemed guilty of a misdemeanor."

Misconduct of servants of railway companies.] By the 3 & 4 Vict. c. 97, s. 13, "It shall be lawful for any officer or agent of any railway company, or for any special constable duly appointed, and all such persons as they may call to their assistance, to seize and detain any engine-driver, guard, porter, or other servant in the employ of such company, who shall be found drunk while employed upon the railway, or commit any offence against any of the by-laws, rules, or regulations of such company, or shall wilfully, maliciously, or negligently do or omit to do any act whereby the life or limb of any person passing along or being upon the railway belonging to such company, or to the works thereof respectively, shall be or might be injured or endangered,

or whereby the passage of any of the engines, carriages, or trains shall be or might be obstructed or impeded, and to convey such engine-driver, guard, porter, or other servant so offending, or any person counselling, aiding, or assisting in such offence, with all convenient despatch, before some justice of the peace for the place within which such offence shall be committed, without any other warrant or authority than this act; and every such person so offending, and every person counselling, aiding, or assisting therein as aforesaid, shall, when convicted before such justice as aforesaid (who is hereby authorized and required, upon complaint to him made, upon oath, without information in writing, to take cognizance thereof, and to act summarily in the premises), in the discretion of such justice, be imprisoned, with or without hard labor, for any term not exceeding two calendar months, or, in the like discretion of such justice, shall, for every such offence, forfeit to his majesty any sum not exceeding ten pounds, and in default of the payment thereof shall be imprisoned, with or [*802] without hard labor as aforesaid, for such period not exceeding *two calendar months, as such justice shall appoint; such commitment to be determined on payment of the amount of the penalty; and every such penalty shall be returned to the next ensuing court of quarter sessions in the usual manner." See the provisions of this section extended by the 5 & 6 Vict. c. 55, s. 17 (U. K.)

By the 3 & 4 Vict. c. 97, s. 14 (if, upon the hearing of such complaint, he shall think fit), "it shall be lawful for any such justice, instead of deciding upon the matter of complaint summarily, to commit the person or persons charged with such offence for trial for the same at the quarter sessions for the county or place wherein such offence shall have been committed, and to order that any such person so committed shall be imprisoned and detained in any of her majesty's gaols or houses of correction in the said county or place in the meantime, or to take bail for his appearance, with or without sureties, in his discretion; and every such person so offending and convicted before such court of quarter sessions as aforesaid (which said court is hereby required to take cognizance of and hear and determine such complaint), shall be liable, at the discretion of such court, to be imprisoned, with or without hard labor, for any term not exceeding two years."

Setting fire to railway stations.] See 24 & 25 Vict. c. 97, s. 4, *supra*, p. 260.

Doing certain acts, with intent to endanger the safety of passengers.] By the 24 and 25 Vict. c. 100, s 32, "Whosoever shall unlawfully and maliciously put or throw upon or across any railway any wood, stone, or other matter or thing, or shall unlawfully and malicious take up, remove, or displace any rail, sleeper, or other matter or thing belonging to any railway, or shall unlawfully and maliciously turn, move, or divert any points or other machinery belonging to any railway, or shall unlawfully and maliciously make or show, hide or remove any signal or light upon or near to any railway, or shall unlawfully and maliciously do or cause to be done any other matter or thing, with intent, in any of the cases aforesaid, to endanger the safety of any person travelling or being upon such railway, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and if a male, under the age of sixteen years, with or without whipping."

By s. 33, "Whosoever shall unlawfully and maliciously throw, or cause to fall or strike at, against, into, or upon any engine, tender, carriage, or truck used upon any railway, any wood, stone, or other matter or thing, with intent to injure or endanger

the safety of any person being in or upon such engine, tender, carriage, or truck, or in or upon any other engine, tender, carriage, or truck of any train of which such first-mentioned engine, tender, carriage, or truck shall form part, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor."

Endangering the safety of passengers.] By s. 34, "Whosoever, by any unlawful act, or by any wilful omission or neglect, shall endanger *or cause to be en- [*803] dangered the safety of any person conveyed or being in or upon a railway, or shall aid or assist therein, shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labor."

Doing certain acts with intent to obstruct or injure engines or carriages.] By the 24 & 25 Vict. c. 97, s. 35, "Whosoever shall unlawfully and maliciously put, place, cast, or throw upon or across any railway any wood, stone, or other matter or thing, or shall unlawfully and maliciously take up, remove, or displace any rail, sleeper, or other matter or thing belonging to any railway, or shall unlawfully and maliciously turn, move, or divert any points or other machinery belonging to any railway, or shall unlawfully and maliciously make or show, hide or remove any signal or light upon or near to any railway, or shall unlawfully and maliciously do or cause to be done any other matter or thing, with intent, in any of the cases aforesaid, to obstruct, upset, overthrow, injure, or destroy any engine, tender, carriage, or truck using such railway, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, —or to be imprisoned for any term not exceeding two years, with or without hard labor, and if a male, under the age of sixteen, with or without whipping."

Obstructing engines or carriages.] By s. 36, "Whosoever, by any unlawful act, or by any wilful omission or neglect, shall obstruct or cause to be obstructed any engine or carriage using any railway, or shall aid or assist therein, shall be guilty of a misdemeanor, and being convicted thereof, shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labor."

Proof of intent.] A party designedly placing on a railway substances which would be likely to produce an obstruction of the carriages, though he might not have done the act expressly with that object, was held to be indictable under the 3 & 4 Vict. c. 97, s. 15, which corresponds to the 24 & 25 Vict. c. 100, s. 33.

In R. v. Rooke, F. & F. 107, the prisoner was indicted under s. 7 for wilfully and maliciously throwing a stone into a railway carriage, with intent to endanger the safety of a person in it. It appeared that there had been considerable popular excitement against a person who was about to travel by the train, and there was a crowd assembled at the time of his departure, and that the prisoner threw a stone at this person whilst he was in the carriage. Erle, J., after consulting Williams, J., said, "Looking at the preamble of the sections of this statute relating to this class of offences, which recites that it is 'expedient to make further provision for the punishment of aggravated assaults,' and looking also to the provision of these clauses as indicated by the terms of the sixth section immediately preceding the section upon

which this indictment is framed, I consider that the *intent to endanger the safety of any person* travelling on the railway, spoken of in both sections, must appear to have been an intent to inflict some grievous bodily harm, and such as would sustain an in- [*804] dictment for assaulting or wounding a person, with intent to do *some grievous bodily harm." And the learned judge accordingly took the opinion of the jury whether such was the intent of the prisoner.

Proof of place being a railway.] A railway intended for the conveyance of passengers, and completely constructed and used for conveying workmen and materials, but not open to the public, is within the provisions of the 3 & 4 Vict. c. 97, s. 15. R. v. Bradford, 29 L. J. M. C. 171. See, as to the interpretation of the word "railway," s. 21 of this statute.

[*805] *RAPE AND DEFILEMENT.

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Rape.] By the 24 & 25 Vict. c. 100, s. 48, "Whosoever shall be convicted of the crime of rape shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor."

Procuring the defilement of a girl under the age of twenty-one years.] By s. 49, "Whosoever shall, by false pretences, false representations, or other fraudulent means, procure any woman or girl under the age of twenty-one years to have illicit carnal connection with any man shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labor."

Carnally knowing a girl under ten years of age.] By s. 50, "Whosoever shall unlawfully and carnally know and abuse any girl under the age of ten years shall be guilty of felony, and, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor."

Carnally knowing a girl between the ages of ten and twelve.] By s. 51, "Who-

soever shall unlawfully and carnally know and abuse any girl being above the age of ten years and under the age of twelve years shall be guilty of a misdemeanor, and, being convicted thereof, *shall be liable, at the discretion of the court, to be [*806] kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labor."

Indecent assault.] See s. 52, *supra*, p. 276.

Abduction.] See ss. 53—56, *supra*, p. 244.

Definition of carnal knowledge.] By s. 63, "Whenever upon the trial of any offence punishable under this act, it may be necessary to prove carnal knowledge, it shall not be necessary to prove the actual emission of seed in order to constitute a carnal knowledge, but the carnal knowledge shall be deemed complete upon proof of penetration only."

Definition of rape.] The provision as to rape in the 13 Edw. 1, s. 1, c. 34, is as follows: "It is provided that if a man from henceforth do ravish a woman, married, maid, or other, where she did not consent, neither before nor after, he shall have judgment of life and of member." This statute is repealed by the 9 Geo. 4, c. 31, s. 1, but it is held notwithstanding to contain the right definition of rape, except so far as the subsequent consent is concerned. R. v. Fletcher, Bell, C. C. 63; S. C. 28 L. J. M. C. 85. And in accordance with this definition, that case and R. v. Camplin, 1 C. & K. 149, were decided. See these cases stated *infra*. In the definitions, therefore, given in 1 Hale, P. C. 628, 3 Inst. 60, Hawk. P. C. b. 1, c. 41, s. 2, where rape is said to be the carnal knowledge of a woman *against her will*, the words "against her will" must be taken to mean no more than "without her consent."

It has never been doubted that having connection with a child under ten years is rape, whether she consent or not.(1) See the passages in Hale, Leach, Coke, and Hawkins, already referred to.

Proof with regard to the person committing the offence of rape.] An infant under the age of fourteen years is presumed by law unable to commit a rape, but he may be a principal in the second degree, as aiding and assisting, if it appear by the circumstances of the case that he had a mischievous intent. 1 Hale, P. C. 630; R. v. Elderhaw, 3 C. & P. 396: 14 E. C. L. R.; R. v. Groombridge, 7 C. & P. 582: 32 E. C. L. R. Where a lad under fourteen was charged with an assault to commit a rape, Patteson, J., said, "I think that the prisoner could not in point of law be guilty of the offence of assault with intent to commit a rape, if he was at the time of the offence under the age of fourteen. And I think also that if he was under that age, no evidence is admissible to show that in point of fact he could commit the offence of rape." R. v. Phillips, 8 C. & P. 736: 34 E. C. L. R. See also R. v. Jordan, 9 C. & P. 118: 38 E. C. L. R., where Williams, J., held that a boy under fourteen years of age could not be convicted of carnally knowing and abusing a girl under ten years old, although it was proved that he had arrived at puberty.(2)

(1) A child under ten years of age cannot consent to sexual intercourse, so as to rebut the presumption of force. Stephen v. The State, 11 Georgia, 225.

(2) The People v. Randolph, 2 Parker's C. R. 174; The Commonwealth v. Scannel, 11 Cushing, 547.

Although a husband cannot be guilty of a rape upon his own wife, he may be guilty as a principal in assisting another person to commit a rape upon her. R. v. Lord Audley, 1 St. Tr. 387, fo. ed. 1 Hale, P. C. 629. The wife in this case is a competent witness against her husband. Id.

[*807] *Where a prisoner was convicted of a rape on an indictment, which charged that he "in and upon E. F.," &c., violently and feloniously did make (omitting the words "an assault") upon her the said E. F., then and there against her will violently and feloniously did ravish and carnally know against the form of the statute, &c.; it was held by ten of the judges, that the omission of these words was no ground for arresting the judgment. R. v. Allen, 9 C. & P. 521 : 38 E. C. L. R.

Proof with regard to the person upon whom the offence is committed.] It must appear that the offence was committed without the consent of the woman; but it is no excuse that she yielded at last to the violence, if her consent was forced from her by fear of death or by duress. Nor is it any excuse, that she consented after the fact, or that she was a common strumpet; for she is still under the protection of the law and may not be forced; or that she was first taken with her own consent, if she was afterwards forced against her will; or that she was a concubine to the ravisher, for a woman may forsake her unlawful course of life, and the law will not presume her incapable of amendment. All these circumstances, however, are material, to be left to the jury in favor of the accused, more especially in doubtful cases, and where the woman's testimony is not corroborated by other evidence. 1 East, P. C. 444; 1 Hale, 628, 631; Hawk. P. C. b. 1, c. 41, s. 2; R. v. Fletcher, Bell, C. C. 63; S. C. 28 L. J. M. C. 6.

The opinion that, where the woman conceived, it could not be rape, because she must have consented, is now completely exploded. 1 East, P. C. 445; 1 Russ. by Grea. 677.

Whether carnal knowledge of a woman, who, at the time of the commission of the offence, supposed a man to be her husband, is a rape, came in question in the following case. The prisoner was indicted for a burglary, with intent to commit a rape. It appeared that the prisoner got into the woman's bed, as if he had been her husband, and was in the act of copulation, when she made the discovery; upon which, and before completion, he desisted. The jury found that he had entered the house with intent to pass for her husband, and to have connection with her, but not with the intention of forcing her, if she made the discovery. The prisoner being convicted, upon a case reserved, four of the judges thought that the having carnal knowledge of a woman, while she was under the belief of the man being her husband, would be a rape; but the other eight judges thought that it would not: several of the eight judges intimated that if the case should occur again, they would advise the jury to find a special verdict.(1) R. v. Jackson, Russ. & Ry. 487. The point was again reserved, recently, in R. v. Clarke, 1 Dears, C. C. R. 397; S. C. 24 L. J. M. C. 25, where the Court of Criminal Appeal upheld the decision come to in R. v. Jackson, and decided that under the circumstances the prisoner was not guilty of rape. See also R. v. Stanton, 1 C. & K. 415 : 47 E. C. L. R.

In R. v. Camplin, 1 C. & K. 146; S. C. 1 Den. C. C. 89, it was proved that the

(1) It seems that it is as much a rape when effected thus by stratagem, as by force. People v. Barton, 1 Wheeler, C. C. 378, 381, n.; Commonwealth v. Fields, 4 Leigh, 648.

If a man accomplishes his purpose by fraud or by surprise without intending to use force, it is not rape. Pleasant v. The State, 8 English, 360; Wyatt v. The State, 2 Swan, 394; Lewis v. The State, 30 Alabama, 54; Pollard v. The State, 2 Clarke, 567.

prisoner made the prosecutrix quite drunk, and that, when she was in a state of insensibility, the prisoner took advantage of it, and had connection with her. The jury found the prisoner guilty, but said that the prisoner gave the prosecutrix the liquor for the purpose of exciting her, and not with the intention of rendering her insensible, and then having connection with her. It was held *that the prisoner [*808] was properly convicted of rape. This decision was approved of in R. v. Fletcher, *supra*. There the prisoner had carnal knowledge of a girl thirteen years of age, who, from defect of understanding, was incapable of giving consent, or of exercising any judgment in the matter, and the prisoner was held to be guilty of rape.

See further, as to the difference between consent and submission, and consent obtained by fraud, *supra*, pp. 278, 279.

Proof of the offence of rape having been completed.] Upon the two cases reserved, R. v. Reekspear, 1 Moo. C. C. 342, and R. v. Cox, Id. 337, 5 C. & P. 297: 24 E. C. L. R., it was held by the judges that proof of penetration is sufficient, notwithstanding emission be negatived; and in a more recent case, in which it was suggested by the counsel for the defence that R. v. Cox was not argued before the judges by counsel, and that doubts of the propriety of the decision were said to be entertained by the two judges not present, Patteson, J., said, "It is true that the case was not argued, but still I cannot act against their decision." The learned judge afterwards said, that if it should prove necessary, the case should be further considered. The prisoner, however, was acquitted. R. v. Brook, 2 Lew. C. C. 267.

It has been made a question, upon trials for this offence, how far the circumstances of the hymen not being injured, is proof that there has been no penetration. In one case, where it was proved not to have been broken, Ashurst, J., left it to the jury to say whether penetration was proved; for that if there were any, however small, the rape was complete in law. The prisoner being convicted, the judges held the conviction right. They said that, in such cases, the least degree of penetration was sufficient, though it might not be attended with the deprivation of the marks of virginity. R. v. Russen, 1 East, P. C. 438. But in a late case, Gurney, B., said, "I think that if the hymen is not ruptured, there is not a sufficient penetration to constitute the offence. I know that there have been cases in which a less degree of penetration has been held to be sufficient; but I have always doubted the authority of those cases." R. v. Gammon, 5 C. & P. 321. So in Beck's Medical Jurisprudence, p. 53, it is said that it would be difficult to support an accusation of rape where the hymen is found entire.(1) In a late case, where the prisoner was indicted for carnally knowing a child under ten years of age, the surgeon stated that her private parts internally were very much inflamed, so much so that he was not able to ascertain whether the hymen had been ruptured or not. Bosanquet, J. (Coleridge and Coltman, JJ., being present), said, "It is not necessary, in order to complete the offence, that the hymen should be ruptured, provided that it is clearly proved that there was penetration; but where that which is so very near to the entrance has not been ruptured, it is very difficult to come to the conclusion that there has been penetration so as to sustain a charge of rape." The prisoner was found guilty of an assault. R. v. McRue, 8 C. & P. 641: 34 E. C. L. R. But in the case of R. v. Hughes, 2 Moo. C. C. 190, it was held, on a case reserved, that penetration, short of rupturing the hymen, is sufficient to constitute the crime of rape. So in the case of R. v. Lines, 1 C. & K. 393: 47 E. C. L. R., Parke, B., told the jury that if any part of the *mem-*

(1) State v. Le Blanc, 1 Const. Rep. 354; Pennsylvania v. Sullivan, Addison, 143.

brum virile was within the *labia* of the *pudendum*, no matter how little, this was [*809] *sufficient to constitute a penetration, and the jury ought to convict the prisoner.

If the evidence be insufficient to support the charge of rape, but sufficient to establish the offence of attempting to commit a rape, the prisoner may be found guilty thereof. See 14 & 15 Vict. c. 100, s. 9, *ante*, p. 284.

Accessories.] An indictment, charging the prisoner both as principal in the first degree, and as aiding and abetting other men in committing a rape, was held, after conviction, to be valid, upon the count charging the prisoner as principal. Upon such an indictment, it was held that evidence might be given of several rapes on the same woman, at the same time, by the prisoner and other men each assisting the other in turn, without putting the prosecutor to elect on which count to proceed. R. v. Folkes, 1 Moo. C. C. 354. So a count charging A. with rape as a principal in the first degree, and B. as principal in the second degree, may be joined with another count charging B. as a principal in the first degree, and A. as principal in the second degree. R. v. Gray, 7 C. & P. 164: 32 E. C. L. R.

Competency and credibility of the witnesses.] The party ravished, says Lord Hale, may give evidence upon oath, and is in law a competent witness; but the credibility of her testimony, and how far she is to be believed, must be left to the jury, and is more or less credible, according to the circumstances of fact that concur in that testimony. For instance, if the witness be of good fame, if she presently discover the offence, and make pursuit after the offender, showed circumstances and signs of the injury (whereof many are of that nature that women only are the most proper examiners and inspectors); if the place in which the fact was done was remote from people, inhabitants, or passengers; if the offender fled for it; these and the like are concurring evidences to give greater probability to her testimony when proved by others as well as herself. 1 Hale, 633; 1 East, P. C. 448. On the other hand, if she concealed the injury for any considerable time, after she had an opportunity to complain; if the place, where the fact was supposed to have been committed, was near to inhabitants, or the common recourse or passage of passengers, and she made no outcry when the fact was supposed to be done, where it was probable she might have been heard by others; such circumstances carry a strong presumption that her testimony is false.(1) Ibid. The fact that the prosecutrix made a complaint soon after the transaction is admissible, but the particulars of her complaint cannot be given in evidence; see *ante*, p. 24. She may be asked whether she named a person as having committed the offence, but not whose name she mentioned. Per Creswell, J., R. v. Osborne, Carr. & M. 622: 41 E. C. L. R. But though the particulars of what she said cannot be asked in chief of the confirming witness, they may in cross-examination. R. v. Walker, 2 Moo. & R. 212.

A strict caution is given by Lord Hale, with regard to the evidence for the prosecution in cases of rape: "An accusation easily to be made, and hard to be proved, and harder to be defended by the party accused, though never so innocent." 1 Hale, 635.

As a general rule, the only point in which a witness's character can be impeached is his credibility. But there is, in cases of rape, an exception to this rule, which [*810] permits the character of the woman who *brings a charge of rape to be im-

(1) See The State v. De Wolf, 9 Conn. 93.

peached in respect of her chastity also; and the same principle applies to charges of assault with intent to commit a rape. R. v. Clarke, 2 Stark. N. P. 244: 3 E. C. L. R.; 1 Phill. Ev. 468, 9th ed. It was formerly held, that in these cases *generol* evidence of character only was admissible, and not evidence of particular facts; and that, if the woman were asked whether she had not before had connection with other persons, and with a particular person named, she was not bound to answer such questions, as they tended to criminate and disgrace her. R. v. Hodgson, Russ. & Ry. 211. In R. v. Robins, 2 Moo. & R. 512, the prosecutrix having denied on cross-examination that she was acquainted or had had connection with several men named and pointed out to her, the counsel for the defence proposed to call these persons to contradict her. The evidence was objected to, and R. v. Hodgson was cited. But Coleridge, J., after consulting Erskine, J., said, that neither he nor that learned judge had any doubt upon the question; that it was not immaterial to the question, whether the prisoner had had carnal knowledge of the prosecutrix against her consent, to show that she had permitted other men to have connection with her, which on her cross-examination she has denied. The prisoners were accordingly examined. So in R. v. Barker, 3 C. & P. 589: 14 E. C. L. R.; on a trial for rape, Park, J., after consulting Parke, J., allowed the prisoner's counsel to ask the prosecutrix, *with a view to contradict her*, whether she had not walked the streets of Oxford, with a particular woman, as a common prostitute. It is clear, therefore, that these learned judges thought the inquiry into the woman's character for chastity relevant to the issue; and as their opinion has been generally acquiesced in, the decision in R. v. Hodgson may be considered as overruled.(1)

The woman may seek to re-establish her character for chastity by calling witnesses to contradict the evidence brought to impeaoh it, in the same way as a witness may re-establish his credibility. See *supra*, p. 95.

The admissibility of evidence of complaint in cases of rape has been fully considered, *supra*, p. 24.

Proof of age.] In proseeutions for the defilement of children the age of the child must be proved. Where the offence was committed on the 5th of February, 1832, and the father proved that, on his return home on the 9th of February, 1822, after an absence of a few days, he found the child had been born, and was told by the grandmother that she had been born the day before, and the register of baptism showed that she had been baptized on the 9th of February, 1822; this evidence was held insufficient to prove the age. R. v. Wedge, 5 C. & P. 298: 24 E. C. L. R. See also p. 248.

Assault with intent to ravish.] It is very common to prefer an indictment for an assault with intent to ravish, under the 24 & 25 Vict. c. 100, s. 38, *supra*, p. 275, where it is doubtful whether a rape has actually been committed.

A boy under fourteen cannot be found guilty of an assault with intent to commit a rape. See *ante*, p. 808.

On an indictment for an assault with intent to commit a rape, Patteson, J., held that the evidence of the prisoner having, on a prior occasion, taken liberties with the prosecutrix, was not receivable to show the prisoner's intent.

*In the same case, the learned judge held, that in order to convict on a [*811] charge of assault with intent to commit a rape, the jury must be satisfied, not only that

(1) The People v. Benson, 6 California, 221; The State v. Johnson, 28 Vermont, 512; The People v. Jackson, 3 Parker, C. R. 391.

the prisoner intended to gratify his passions on the person of the prosecutrix, but that he intended to do so at all events, and notwithstanding any resistance on her part. R. v. Lloyd, 6 C. & P. 318.

If upon an indictment for this offence the prosecutrix prove a rape actually committed, the defendant may nevertheless be convicted. See 14 & 15 Vict. c. 100, s. 12, *ante*, p. 76.

[*812] *RECEIVING STOLEN GOODS.

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Receiving where the principal is guilty of felony.] By the 24 & 25 Vict. c. 96, s. 91, "Whosoever shall receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, extorting, obtaining, embezzling, or otherwise disposing whereof shall amount to a felony, either at common law, or by virtue of this act, knowing the same to have been feloniously stolen, taken, extorted, obtained, embezzled, or disposed of, shall be guilty of felony, and may be indicted and convicted, either as an accessory after the fact, or for a substantive felony; and in the latter case, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice; and every such receiver, howsoever convicted, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping."

Separate receivers, how triable.] By s. 93, "Whenever any property whatsoever shall have been stolen, taken, extorted, obtained, embezzled, or otherwise disposed of in such a manner as to amount to a felony, either at common law or by virtue of this act, any number of receivers at different times of such property, or of any part or parts thereof, may be charged with substantive felonies in the same indictment, and may be tried together, notwithstanding that the principal felon shall not be included in the same indictment, or shall not be in custody or amenable to justice."

[*813] **Persons indicted jointly may be convicted separately.*] By s. 94, "If upon the trial of any two or more persons indicted for jointly receiving any property it shall be proved that one or more of such persons separately received any part or parts of

such property, it shall be lawful for the jury to convict, upon such indictment, such of the said persons as shall be proved to have received any part or parts of such property."

Receiving where the principal is guilty of a misdemeanor.] By s. 95, "Whosoever shall receive any chattel, money, valuable security, or other property whatsoever, the stealing, taking, obtaining, converting, or disposing whereof is made a misdemeanor by this act, knowing the same to have been unlawfully stolen, taken, obtained, converted, or disposed of, shall be guilty of a misdemeanor, and may be indicted and convicted thereof, whether the person guilty of the principal misdemeanor shall or shall not have been previously convicted thereof, or shall or shall not be amenable to justice; and every such receiver, being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping."

Receiving goods belonging to wrecks or ships in distress.] By the 1 & 2 Geo. 4, c. 75, s. 12, "If any person shall knowingly and wilfully, and with intent to defraud and injure the true owner or owners thereof, or any person interested therein as aforesaid, purchase or receive any anchors, cables, or goods or merchandise, which may have been taken up, weighed, swept for, or taken possession of, whether the same shall have belonged to any ship or vessel in distress or otherwise, or whether the same shall have been preserved from any wreck, if the directions hereinbefore contained, with regard to such articles, shall not have been previously complied with, such person or persons shall, on conviction thereof, be deemed guilty of receiving stolen goods, knowing the same to be stolen, as if the same had been stolen on shore, and suffer the like punishment as for a misdemeanor at the common law, or be liable to be transported for seven years, at the discretion of the court, before which he, she, or they shall be tried."

Venue.] By the 24 & 25 Vict. c. 96, s. 96, "Whosoever shall receive any chattel, money, valuable security, or other property whatsoever, knowing the same to have been feloniously or unlawfully stolen, taken, obtained, converted, or disposed of, may, whether charged as an accessory after the fact to the felony, or with a substantive felony, or with a misdemeanor only, be dealt with, indicted, tried, and punished in any county or place in which he shall have or shall have had any such property in his possession, or in any county or place in which the party guilty of the principal felony or misdemeanor may by law be tried, in the same manner as such receiver may be dealt with, indicted, tried, and punished in the county or place where he actually received such property."

Joining counts for stealing and receiving.] See s. 92, *supra*, p. 562.

**Form of indictment.*] It is not necessary to state in the indictment the [*814] name of the principal felon; and the usual practice in an indictment against a receiver for a substantive felony is, merely to state the goods to have been "before then feloniously stolen," &c., without stating by whom.

Where it was objected to a count charging the goods to have been stolen by "a certain evil-disposed person," that it ought either to have stated the name of the principal, or else that he was unknown, Tindal, C. J., said, the offence created by the act

of Parliament is not the receiving the stolen goods from any particular person, but receiving them, knowing them to have been stolen. The question, therefore, is, whether the goods were stolen, and whether the prisoner received them, knowing them to have been stolen. R. v. Jervis, 6 C. & P. 156: 25 E. C. L. R; see also R. v. Wheeler, 7 C. & P. 170: 32 E. C. L. R.; *post.*

Where the goods had been stolen by some person unknown, it was formerly the practice to insert an averment to that effect in the indictment, and such averment was held good. R. v. Thomas, 2 East, P. C. 781. But where the principal was known, the name was stated according to the truth. 2 East, P. C. 781. Where the goods were averred to have been stolen by persons unknown, a difficulty sometimes arose as to the proof, the averment being considered not to be proved, where it appeared that in fact the principals were known. Thus where, upon such an indictment, it was proposed to prove the case by the evidence of the principal himself, who had been a witness before the grand jury, Le Blanc, J., interposed, and directed an acquittal. He said he considered the indictment wrong in stating that the property had been stolen by a person unknown; and asked how the person who was the principal felon could be alleged to be unknown to the jurors when they had him before them, and his name was written on the back of the bill. R. v. Walker, 3 Campb. 264.

It is difficult to reconcile this decision with the resolution of the judges in the following case. The indictment stated that a certain person or persons, to the jurors unknown, stole the goods, and that the prisoner received the same, knowing them to have been feloniously stolen. The grand jury also found a bill, charging one Henry Moreton with stealing the same goods, and the prisoner with receiving them. It was objected that the allegation, that the goods were stolen by a person unknown, was negatived by the other record, and that the prisoner was entitled to an acquittal. The prisoner being convicted, the point was reserved, and the judges held the conviction right, being of opinion that the finding by the grand jury of the bill, imputing the principal felony to Moreton, was no objection to the second indictment, although it stated the principal felony to have been committed by certain persons to the jurors unknown. R. v. Bush, Russ. & Ry. 372.

An indictment charging that a certain evil-disposed person feloniously stole certain goods, and that A. B. feloniously incited the said evil-disposed person to commit the said felony, and that C. W. and E. F. feloniously received the said goods, knowing them to have been stolen, is bad as against A. B., the statement that an evil-disposed person stole, being too uncertain to support the charge against the accessory before the fact; but the indictment was held to be good as against the receivers as for a substantive felony. R. v. Caspar, 2 Moo. C. C. 101; S. C. 9 C. & P. 289: 38 E. C. L. [*815] R. It has been doubted whether, *where the indictment alleges that the prisoner received the goods in question from a person named, it must be proved that the receipt was in fact from that person. But where A. B. was indicted for stealing a gelding, and C. D. for receiving it, knowing it to have been "so feloniously stolen as aforesaid," and A. B. was acquitted, the proof failing as to the horse having been stolen by him; Patteson, J., held that the other prisoner could not be convicted upon that indictment. R. v. Woolford, 1 Moo. & R. 384. But where a prisoner was indicted in one count for stealing goods, and in another for receiving the said goods "so as aforesaid feloniously stolen," and the jury acquitted him of the stealing, but found him guilty of the receiving, and the counsel for the prisoner moved in arrest of judgment, upon the ground that the jury, having acquitted him of the stealing, could not, under the second count as it was recorded, find him guilty of receiving;

upon a case reserved for the opinion of the Court of Criminal Appeal, they held the conviction to be good. R. v. Craddock, 2 Den. C. C. R. 31; S. C. 20 L. J. M. C. 31.

Where the indictment stated that the prisoner received the goods from the person who stole them, and that the person who stole them was a person to the jurors unknown, and it appeared that the person who stole the property handed it to J. S., who delivered it to the prisoner; Parke, J., held, that on this indictment it was necessary to prove that the prisoner received the property from the person who actually stole it, and would not allow it to go to the jury to say whether the person from whom he was proved to have received it was an innocent agent or not of the thief. R. v. Elsworthy, 1 Lewin, C. C. 117.

But where three persons were charged with a larceny, and two others as accessories, in separately receiving portions of the stolen goods, and the indictment also contained two other counts, one of them charging each of the receivers separately with a substantive felony, in separately receiving a portion of the stolen goods, the principals were acquitted, but the receivers were convicted on the last two counts of the indictment. R. v. Pulham, 9 C. & P. 280: 38 E. C. L. R.

The first count of an indictment charged the prisoner with stealing certain goods and chattels, and the second count charged him with receiving "the goods and chattels aforesaid, of the value aforesaid, so as aforesaid feloniously stolen." The prisoner was acquitted upon the first count and convicted on the second. It was held, that the words "so as aforesaid," might be rejected as immaterial, and the indictment read as alleging simply that the prisoner had received goods feloniously stolen, and that the conviction was good. R. v. Huntley, Bell, C. C. 236; S. C. 29 L. J. M. C. 70.

The two first counts of an indictment charged A. and B. with stealing, on two different occasions, and the third count charged B. with receiving. A. was acquitted, no evidence having been offered against him, and he was called as a witness against the other prisoner. Upon his and other evidence, which showed that B. was an accessory before the fact to the stealing, the jury found a general verdict of guilty against B. It was held, that the conviction on all the counts was good, for that as the 11 & 12 Vict. c. 46, s. 1, makes the being an accessory before the fact a substantive felony, the conviction of the principal is not now a condition precedent to the conviction of the accessory; and that there was no inconsistency in an accessory before *the fact being also a receiver. R. v. Hughes, Bell, C. C. 242; S. C. 29 [*816] L. J. M. C. 71.

Where it was averred that the prisoner, "*Francis* Morris, the goods and chattels, &c., feloniously did receive and have, he, the said *Thomas* Morris, then and there well knowing the said goods and chattels to have been feloniously stolen," &c., it was moved in arrest of judgment that the indictment was bad, for that the fact of receiving, and the knowledge of the previous felony, must reside in the same person, whereas this indictment charged them in two different persons; but the judges held that the indictment would not be good without the words, "the said Thomas Morris," which might be struck out as surplusage. R. v. Morris, 1 Leach, 109. But where an indictment alleged that the prisoner received the goods of A. B., "he, the said A. B., then knowing them to have been stolen," it was held to be good ground of motion in arrest of judgment that the *scienter* was omitted. R. v. Larkin, 1 Dears. C. C. R. 365; S. C. 23 L. J. M. C. 125.

Proof of guilt of principal.] Where the indictment states a previous conviction of the principal, such conviction must be proved by the production of an examined copy of the record of the conviction, and it is no objection to such record that it ap-

pears therein that the principal was asked if he was (not *is*) guilty; that it does not state that issue was joined, or how the jurors were returned, and that the only award against the principal is, that he be in mercy, &c. R. v. Baldwin, Russ. & Ry. 241; 3 Campb. 265; 2 Leach, 928 (*n*). But if the indictment state not the *conviction*, but the *guilt* of the party, it seems doubtful how far the record of conviction would be evidence of that fact. R. v. Turner, 1 Moo. C. C. 347, *ante*, p. 49. The opinion of Mr. Justice Foster, however, is in favor of the affirmative. When the accessory, he says, is brought to trial after the conviction of his principal, it is not necessary to enter into a detail of the evidence on which the conviction was founded. Nor does the indictment aver that the principal was in fact guilty. It is sufficient if it recites with proper certainty the record of the conviction. This is evidence against the accessory, to put him on his defence, for it is founded on a legal presumption that everything in the former proceeding was rightly and properly transacted. Foster, 365. Where the principal felon has been convicted, it is sufficient in the indictment to state the *conviction*, without stating the judgment. R. v. Hyman, 2 Leach, 925; 2 East, P. C. 782; R. v. Baldwin, 3 Campb. 265.

The party charged as receiver may controvert the guilt of the principal felon, even after his conviction, and though that conviction is stated in the indictment. For, as against him, the conviction is only presumptive evidence of the principal's guilt, under the rule that it is to be presumed that in the former proceeding everything was rightly and properly transacted. It being *res inter alios acta*, it cannot be conclusive as to him. Foster, 365. If, therefore, it should appear on the trial of the receiver, that the offence of which the principal was convicted did not amount to felony (if so charged), or to that species of felony with which he is charged, the receiver ought to be acquitted. Id. Thus, where the principal had been convicted, and on the trial of the receiver the conviction was proved, but it appeared on the cross-examination of the prosecutor, that, in fact, the party convicted had only been guilty [*817] of a breach of trust, the *prisoner, on the authority of Foster, was acquitted. R. v. Smith, 1 Leach, 288; R. v. Prosser, Id. 290 (*n*).

The principal felon is a competent witness for the crown to prove the whole case against the receiver. R. v. Haslam, 1 Leach, 418; R. v. Price, R. v. Patram, Id. 419 (*n*); 2 East, P. C. 732. As to the *confession* of the principal felon not being evidence against the receiver, see *supra*, p. 49.

What is stolen property.] A lad having stolen a brass weight from his masters, it was taken from him by another servant in the presence of one of them, and was then returned to him, in order that he might take it for sale to the prisoner, to whom he had been in the habit of selling similar articles. The lad accordingly took it and sold it to the prisoner. It was contended that the brass could not be considered as stolen property, having been restored to the possession of one of the owners, and by him given to the lad to sell it to the prisoner with a view to his detection, and that such restoration, for however short a time, was sufficient to prevent its being treated afterwards as stolen property, because it was in law in possession of the owners. Coleridge, J., said he should consider the evidence as sufficient in point of law to sustain the indictment, but would take a note of the objection. The jury found the prisoner guilty, and subsequently the learned judge, without reserving the point, passed sentence. R. v. Lyon, Carr. & M. 217: 41 E. C. L. R. But this case must be considered as now overruled by R. v. Dolan, 1 Dears. C. C. R. 436; S. C. 24 L. J. M. C. 59. There the goods alleged to have been feloniously received, had been found by the owner in the pockets of the thief; but were subsequently, a policeman

having been called in, returned to him, and he was sent by the owner to sell them where he had sold others. The thief thereupon went to the shop of the prisoner and sold the goods, and gave the money to the owner. It was held that the conviction was wrong; Campbell, C. J., in the course of his judgment, saying, "If an article once stolen has been restored to the master of that article, and he having had it fully in his possession bails it for any particular purpose, how can any person who receives the article from the bailee be said to be guilty of receiving stolen goods within the meaning of the act of Parliament?"

Presumption arising from the possession of stolen property.] The presumption arising from the possession of stolen property is that the party stole the property, not that he received it. *Supra*, p. 18.

Stolen property having been discovered concealed in an outhouse, the prisoners were detected in the act of carrying it away from thence, and were indicted as receivers. Patteson, J., said, "There is no evidence of any other person having stolen the property. If there had been evidence that some one person had been seen near the house, from which the property was taken, or if there had been strong suspicions that some one person stole it, those circumstances would have been evidence that the prisoners received it, knowing it to have been stolen. If you are of opinion that some other person stole, and that the prisoners received it knowing that fact, they may be convicted of receiving. But I confess, it appears to me rather dangerous on this evidence to convict them of receiving. It is evidence on which persons are constantly convicted of stealing." The prisoners were acquitted. R. v. Densley, 6 C. & P. 399: 25 E. C. L. R.

**Proof of the receiving—distinction between receiving and stealing.*] There [*818] must be pooof of an actual taking into possession of the goods alleged to have been feloniously received. Thus where the persons who stole some fowls, sent them by coach in a hamper to Birmingham, with directions that they would be called for, and the prisoner when claiming the hamper as hers at the coach-office, was immediately taken into custody, the Court of Criminal Appeal held the conviction of the prisoner, as receiver, to be wrong, on the ground, that "whoever had possession of the fowls at the coach office when the prisoner claimed to receive them, never parted with the possession; the prisoner by claiming to receive the fowls, which never were actually or potentially in her possession, never in fact in law received them." R. v. Hill, 1 Den. C. C. R. 453; S. C. 18 L. J. M. C. 199. R. v. Wiley, 2 Den. C. C. R. 37; S. C. 20 L. J. M. C. 4, was twice argued. The facts were these: A., B., and C. were jointly indicted for stealing and receiving five hens and two cocks. It was proved that about half-past four in the morning A. and B. were seen to go into C.'s father's house with a loaded sack, carried by A. C. lived with his father in the house, and was a higgler. A. and B. remained in the house about ten minutes, and were then seen to come out of the back-door preceded by C. with a candle, A. again carrying the sack on his shoulders, and to go into a stable belonging to the same house; the stable-door was shut by one of them, and on the policemen going in they found the sack on the floor tied at the mouth, and the three men standing around it as if they were bargaining, but no words were heard. The sack had a hole in it, through which poultry feathers were protruding. The bag when opened was found to contain *inter alia* the stolen property. On C. being charged with receiving the poultry knowing it to be stolen, he said, "he did not think he would have bought the hens." Upon this evidence eight to four of the judges held that C. could not be convicted of re-

ceiving stolen goods, inasmuch as though there was evidence of a criminal intent to receive, and of a knowledge that the goods were stolen, yet the exclusive possession of them still remained in the thieves, and therefore C. had no possession, either actual or constructive. But Patteson, J., one of the majority, said, "I don't consider a manual possession or even a touch essential to a receiving; but it seems to me, there must be a control over the goods by the receiver, which there was not here." In accordance with this opinion, in a case where the jury found that the stolen property (a watch) was in A.'s hands or pocket, but in the prisoner's absolute control, the Court of Criminal Appeal held that he might be indicted as a receiver of stolen property, although he had never touched the property, or had manual possession of it. R. v. Smith, 1 Dears. C. C. R. 494; S. C. 24 L J. M. C. 135. It frequently happens that a doubt arises whether the acts done by the person amount to a receiving, or to a stealing, as in the following cases; from which it appears that if the prisoner took part in the transaction, while the act of larceny by others was continuing, he will be guilty as a principal in the larceny, and not as a receiver. Dyer and Disting were indicted for stealing a quantity of barilla, the property of Hawker. The goods, consigned to Hawker, were on board ship at Plymouth. Hawker employed Dyer, who was the master of a large boat, to bring the barilla on shore, and Disting was employed as a laborer, in removing the barilla after it was landed in Hawker's ware-[*819] house. The jury found that while the barilla was in Dyer's *boat, some of his servants, without his consent, removed part of the barilla, and concealed it in another part of the boat. They also found that Dyer afterwards assisted the other prisoner, and the persons on board who had separated this part from the rest, in removing it from the boat for the purpose of carrying it off. Graham, B. (after consulting Buller, J.), was of opinion, that though, for some purposes, as with respect to those concerned in the actual taking, the offence would be complete, as an asportation, in point of law, yet, with respect to Dyer, who joined in the scheme before the barilla had been actually taken out of the boat where it was deposited, and who assisted in carrying it from thence, it was one continuing transaction, and could not be said to be completed till the removal of the commodity from such place of deposit, and Dyer having assisted in the act of carrying it off, was, therefore, guilty as principal. R. v. Dyer, 2 East, P. C. 767. Another case arose out of the same transaction. The rest of the barilla having been lodged in Hawker's warehouse, several persons, employed by him as servants, conspired to steal a portion of it, and accordingly removed part nearer to the door. Soon afterwards the persons who had so removed it, together with Atwell and O'Donnell, who had in the meantime agreed to purchase part, came and assisted the others (who took it out of the warehouse) in carrying it from thence. Being all indicted as principals in larceny, it was objected that two were only receivers, the larceny being complete before their participation in the transaction; but Graham, B., held that it was a continuing transaction as to those who joined in the plot before the goods were actually carried away from the premises; and all the defendants having concurred in, or been present at, the act of removing the goods from the warehouse where they had been deposited, they were all principals; and the prisoners were convicted accordingly. R. v. Atwell, 2 East, P. C. 768.

In the following case the removal of the goods was held to be so complete, that a person concerned in the further removal was held not to be a party to the original larceny. Hill and Smith, in the absence of the prisoner, broke open the prosecutors' warehouse, and took thence the goods in question, putting them in the street about thirty yards from the warehouse door. They then fetched the prisoner, who was

apprised of the robbery, and who assisted in carrying the property to a cart, which was in readiness. The learned judge who tried the case was of opinion that this was a continuing larceny, and that the prisoner, who was present aiding and abetting in a continuation of the felony, was a principal in that portion of the felony, and liable to be found guilty; but on a case reserved, the judges were of opinion, that as the property was removed from the owner's premises before the prisoner was present, he could not be considered as the principal, and the conviction, as such, was held wrong. R. v. King, Russ. & Ry. 332. The same conclusion was come to in the following case. One Heaton having received the articles in question into his cart, left it standing in the street. In the meantime the prisoner McMakin came up and led away the cart. He then gave it to another man to take it to his (McMakin's) house, about a quarter of a mile distant. Upon the cart arriving at the house, the prisoner Smith, who was at work in the cellar, having directed a companion to blow out the light, came up and assisted in removing the articles from the cart. For Smith it was argued, that the *asportavit* was *complete before he interfered, [*820] and R. v. Dyer, *ante*, was cited, and Lawrence, J., after conferring with Le Blanc, J., was of this opinion, and directed an acquittal. R. v. McMakin, Russ. & Ry. 333 (*n*). Upon the authority of R. v. King, the following decision proceeded. The prisoner was indicted for stealing two horses. It appeared that he and one Whinroe went to steal the horses. Whinroe left the prisoner when they got within half a mile of the place where the horses were, stole the horses, and brought them to the place where the prisoner was waiting for him, and he and the prisoner rode away with them. Mr. Justice Bayley at first thought that the prisoner's joining in riding away with the horses might be considered a new larceny; but on adverting to R. v. King, he thought this opinion wrong, and on a case reserved, the judges were of opinion that the prisoner was an accessory only, and not a principal, because he was not present at the original taking. R. v. Kelly, Russ. & Ry. 421.

The circumstances in the next case were held not to constitute a receiving. The prisoner was indicted for receiving goods stolen in a dwelling-house by one Debenham. Debenham, who lodged in the house, broke open a box there and stole the property. The prisoner was seen walking backwards and forwards before the house, and occasionally looking up; and he and Debenham were seen together at some distance, when he was apprehended, and part of the property found on him. The jury found that Debenham threw the things out of the window, and that the prisoner was in waiting to receive them. Mr. Justice Gaselee thought, that under this finding it was doubtful, whether the prisoner was guilty of receiving, and reserved the point for the opinion of the judges, who held that the prisoner was a principal, and that the conviction of him as receiver was wrong.(1) R. v. Owen, 1 Moody, C. C. 96. And in R. v. Perkins, 2 Den. C. C. R. 459, the Court of Criminal Appeal held that a principal in the second degree, *particeps criminis*, could not, at the same time be treated as a receiver. Maule, J., said: "The judge seems to have intended to have asked us whether in a case where a prisoner was, in a popular sense, guilty of receiving, he might be treated as a receiver, notwithstanding the fact that he was a principal in the theft; and it is clear that he cannot."

The two prisoners were indicted for larceny. It appeared that the prisoner A. (being in the service of the prosecutor), was sent by him to deliver some fat to C.

(1) If a stranger pursuant to an arrangement with one whom he knows has stolen goods invite an interview with the owner and afterwards receive the goods under the mere color of an agency, but really to make a profit out of the larceny, he is within the statute against receiving stolen goods. The People v. Wiley, 3 Hill, 194.

He did not deliver all the fat to C., having previously given part of it to the prisoner B. It being objected that B. ought to have been charged as receiver, Gurney, B., said it was a question for the jury whether B. was present at the time of the separation. It was in the master's possession till the time of the separation. R. v. Butteris, 6 C. & P. 147: 25 E. C. L. R.

W. stole a watch from A., and while W. and L. were in custody together, W. told L. that he had "planted" the watch under a flag in the soot cellar of L.'s house. After this L. was discharged from custody, and went to the flag and took up the watch, and sent his wife to pawn it. It was held by Pollock, C. B., that if L. took the watch in consequence of W.'s information, W. telling L. in order that he might use the information by taking the watch, L. was indictable for this as a receiver of stolen goods, but that, if this was an act done by L. in opposition to W., or against his will, it might be a question whether it would be a receiving. R. v. Wade, 1 C. & K. 739: 47 E. C. L. R.

[*821] **Proof of receiving—joint receipt.*] Where two persons are indicted as joint receivers, it is not sufficient to show that one of them received the property in the absence of the other, and afterwards delivered it to him. This point having been reserved for the opinion of the judges, they unanimously held that upon a joint charge it was necessary to prove a joint receipt; and that as one of the persons was absent when the other received the property, it was a separate receipt by the latter. R. v. Messingham, 1 Moo. C. C. 257. So where D. and G. were charged with jointly receiving stolen goods, and the evidence was that D. first received the goods on the road between B. and S., and that subsequently G. received a portion of them at S., Jervis, C. J., delivering the judgment of the Court of Criminal Appeal, said, "We are of opinion that the first receiver, D., was properly convicted; and as R. v. Messingham shows that several persons cannot be convicted of distinct felonies which are charged in an indictment as a joint felony, the evidence ought to have been confined to the case of the first receiver, and a verdict of acquittal taken in favor of G." R. v. Gray, 2 Den. C. C. R. 86. But now, by the 24 & 25 Vict. c. 96, s. 94, *supra*, p. 875, this difficulty is removed.

A doubt has been raised upon the corresponding enactment of the 14 & 15 Vict. c. 100, s. 14, but not decided, whether this statute applies to a case where A and B. are indicted for a joint receipt, and it turns out that A. received the goods, and then handed them over to B. R. v. Dring, *infra*, p. 824.

A. and B. were charged with stealing molasses, and C. and D. with receiving them, knowing them to have been stolen. It appeared that A. and B. brought the goods to C.'s warehouse, and left them with D., his servant, who, after some hesitation, accepted them. C. was absent at the time, but it was clear on the facts that shortly after he came home he was aware of the molasses having been left, and there was strong ground for suspecting that he then knew they had been stolen. It was also clear that D., soon after the goods were left with him, was aware they had been unlawfully procured, as he was found disguising the barrels in which they were contained. Maule, J., told the jury that if they were satisfied that C. had directed the goods to be taken into the warehouse, knowing them to have been stolen, and that D., in pursuance of that direction, had received them into the warehouse (he also knowing them to have been stolen), they might properly convict the prisoners of a joint receiving. The prisoners were convicted. R. v. Parr, 2 Moo. & R. 356.

Husband and wife were indicted jointly as receivers. The goods were found in their house. Graham, B., told the jury that, generally speaking, the law does not impute to the wife those offences which she may be supposed to have committed by

the coercion of her husband, and particularly where his house is made the receptacle of stolen goods; but if the wife appears to have taken an active and independent part, and to have endeavored to conceal the stolen goods more effectually than her husband could have done, and by her own acts, she would be responsible as for her own uncontrolled offence. The learned judge resolved, that as the charge against the husband and wife was joint, and it had not been left to the jury to say whether she received the goods in the absence of her husband, the conviction of the wife could not be supported, though she had been more active than her husband. R. v. Archer, 1 Moo. C. C. 143. The prisoner, a married woman, was indicted for receiving stolen *goods. The evidence showed that the property had been stolen by the hus- [*822] band from his employer, where he worked, and afterwards taken home and given to his wife. The Court of Criminal Appeal held, that under these circumstances, she could not be convicted of the offence. R. v. Brookes, 1 Dears. C. C. R. 184; S. C. 22 L. J. M. C. 121.

The two prisoners, husband and wife, were jointly indicted for receiving goods, knowing them to have been stolen. The jury found both the prisoners guilty, and that the wife received the goods without the control or knowledge of, and apart from her husband, and that he afterwards *adopted his wife's receipt*. The Court of Criminal Appeal thought that upon this finding the husband could not be convicted, as it did not show that he had taken any active part in the matter, or do anything more than barely consent to what his wife had done. R. v. Dring, Dear. & B. C. C. 329.

Where a husband and wife are indicted for jointly receiving, it is proper that the jury should be asked, whether the wife received the goods either from or in the presence of her husband. And where the counsel for the defence suggested that these questions should be put, and they were not put, the court, under the circumstances, quashed the conviction as against the wife. It appeared in that case that the goods were received in the husband's house; it was probable, therefore, that the husband was present, from which it would be presumed that the wife was acting under his control. It does not seem necessary that these questions should be put in every case in which the husband and wife are both indicted for receiving, but only where the circumstances of the case do not negative the presence of the husband. R. v. Wardroper, Bell, C. C. 249; S. C. 29 L. J. M. C. 116.

An indictment in one count charged A. and B. with a burglary, and with stealing, and C. with stealing part of the stolen property, and D. with receiving other part of the stolen property; another count charged C. and D. with the substantive felony of jointly receiving the whole of the stolen property; and there were two other counts charging C. and D. separately with the substantive felony of each receiving part of the stolen property. It was proved that A. and B. had committed the burglary and stolen the property, but the evidence as to the receiving showed that C. and D. had received the stolen property on different occasions, and quite unconnectedly with each other. It was objected, that the count charging a joint receiving was not proved (see R. v. Messingham, *supra*), and that as distinct felonies had been committed by C. and D., they ought to have been tried separately. Per Littledale, J., "There is certainly some inconsistency in this indictment; but the practice in cases of receivers is to plead in this manner." The prisoners were all convicted. R. v. Hartall, 7 C. & P. 475: 32 E. C. L. R.

Where two receivers are charged in the same indictment with separate and distinct acts of receiving, it is too late after verdict to object that they should have been indicted separately. R. v. Hayes, 2 Moo. & Rob. 156.

An indictment in the first count charged W. and R. C. with killing a sheep, "with

intent to steal one of the hind legs of the said sheep," and in another count charged J. C. with receiving nine pounds' weight of mutton "of a certain evil-disposed person," he then knowing that the mutton had been stolen. Coleridge, J., said, "This [*823] count is for receiving stolen goods, and it is joined not *with another count against other persons for stealing anything, but with a count for killing, with intent to steal, which appears to me to be an offence quite distinct in its nature from that imputed to the prisoner (J. C.). I shall not stop the case, but I will take care that the prisoner has any advantage which can arise from the objection, if, upon consideration, I should think it well founded." The prisoners were all convicted. R. v. Wheeler, 7 C. & P. 170: 32 E. C. L. R.

Proof of receiving by an agent.] In R. v. Woodward, 10 W. R. 298, the stolen property was delivered by the principal felon to the prisoner's wife, in the absence of the prisoner, on which occasion she paid sixpence on account of the goods, but no price was fixed. Afterwards the prisoner and the principal felon met, agreed on the price, and the prisoner paid the balance. The prisoner was convicted, and the Court of Criminal Appeal affirmed the conviction. Wilde, B., said, "The wife received these goods as agent of the prisoner, and her act was capable of ratification."

Proof of guilty knowledge and intention.] Evidence must be given of the prisoner's guilty knowledge, that he received the goods in question, knowing them to have been stolen. In general, this evidence is to be collected from all the various circumstances of the case. The usual evidence is, that the goods were bought at an under value by the receiver. Proof that he concealed the goods is presumptive evidence to the same effect. So evidence may be given that the prisoner pledged or otherwise disposed of other articles of stolen property besides those in the indictment, in order to show the guilty knowledge. R. v. Dunn, 1 Moo. C. C. 150. See this question discussed, *ante*, p. 92.

The *intention* of the party in receiving the goods is not material, provided he knew them to be stolen. Where it was objected that there was no evidence of a conversion by the receiver, Gurney, B., said, if the receiver takes, without any profit or advantage, or whether it be for the purpose of profit or not, or merely to assist the thief, it is precisely the same. R. v. Davis, 6 C. & P. 178. If a receiver of stolen goods receive them for the mere purpose of concealment, without deriving any profit at all, he is just as much a receiver as if he had purchased them. Per Taunton, J., R. v. Richardson, 6 C. & P. 335: 25 E. C. L. R.(1)

Election.] A person may be legally charged in different counts of the same indictment, both as the principal felon and as the receiver of the same goods. R. v. Galloway, 1 Moo. C. C. 234. But the judges, on a case reserved, were equally divided in opinion whether the prosecutor should in such case be put to his election. They all agreed, however, that directions should be given to the respective clerks of assize not to put both charges in the same indictment. Id. Now, however, by the 24 & 25 Vict. c. 96, s. 92, these counts may be joined: *supra*, p. 190. There may be as many counts charging a felonious receiving as there are counts charging stealing, and the prosecutor cannot be put to his election on what count or counts he will proceed. R. v. Beeton, 1 Den. C. C. R. 414; S. C. 18 L. J. M. C. 117.

(1) Where a person suffered a trunk, containing stolen goods, to be put on board a vessel in which he had taken his passage, as part of his baggage, it was held that this was such a receipt of the goods, as purchaser or bailee, as justified a conviction for receiving stolen goods. State v. Soovel, 1 Const. Rep. 274.

Venue.] One half of a note issued at S., in Wiltshire, *was stolen in its transit through the post, and the prisoner was proved to have received it with guilty knowledge, but it was not proved to have been in his possession in Wiltshire. He posted it in Somersetshire in a letter, addressed it to the bank at S., requesting payment, which letter was duly delivered. It was held that, upon an indictment for receiving, where the venue was laid in Wiltshire, the prisoner might be convicted, for the possession of the post-office servants, who were the agents of the prisoner to present the note at the bank at S., might be treated as the possession of the prisoner; and that, therefore, the prisoner might be tried in Wiltshire under the 7 & 8 Geo. 4, c. 29, s. 56. R. v. Cryer, 26 L. J. M. C. 192; see R. v. Garton, *supra*, tit. Post-office.(1)

The prisoners were indicted in the county of Dorset, on an indictment which charged them in several counts with stealing and receiving. J. M., one of the prisoners, was convicted on a count which charged him with felonious receiving, "at M., in the county of Somerset." It was held, that upon this indictment he could not be convicted, though by other counts it appeared that the goods were stolen in the county of Dorset. R. v. Martin, 1 Den. C. C. 298; S. C. 18 L. J. M. C. 137.

See also *supra*, p. 815.

*RESCUE. [*825]

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Nature of the offence.] THE offence of rescue nearly resembles that of prison breach, which has already been treated of, *ante*.

Where the party rescued is imprisoned on a charge of felony, the rescuing is felony also. 1 Hale, P. C. 606. Where the offence of the former is a misdemeanor, that of the latter will be a misdemeanor also. Hawk. P. C. b. 2, c. 21, s. 6.

If the party rescued was imprisoned for felony, and was rescued before indictment, the indictment for the rescue must surmise a felony done, as well as an imprisonment for felony, or on suspicion of felony, but if the party was indicted and taken upon a *capias*, and then rescued, there needs only a recital that he was indicted *prout*, &c., and taken and rescued. 1 Hale, P. C. 607.

Though the party rescued may be *indicted* before the principal be convicted and attainted, yet he shall not be arraigned or tried before the principal is attainted. Id. In such case, however, he may, as it seems, be indicted and tried for a misdemeanor, though not for a felony. 1 Hale, P. C. 399.

Proof of the custody of the party rescued.] To make the offence of rescuing a party felony, it must appear that he was in custody for felony, or suspicion of felony, but it is immaterial whether he was in the custody of a private person, or of an offi-

(1) An indictment for receiving stolen goods lies against one who receives goods in one State, though stolen in another. Commonwealth v. Andrews, 2 Mass. 14.

cer, or under a warrant of a justice of the peace, for where the arrest of a felon is lawful, the rescue of him is felony. But it seems necessary that the party rescuing should have knowledge that the other is under arrest for felony, if he be in the custody of a private person, though if he be in the custody of a constable or sheriff, or in prison, he is bound to take notice of it. 1 Hale, P. C. 606. If the imprisonment be so far irregular that the party imprisoned would not be guilty of prison-breach by making his escape, a person rescuing him will not subject himself to the punishment of rescue. Hawk. P. C. b. 2, c. 21, ss. 1, 2; 1 Russ. by Grea. 435.

In R. v. Almey, 3 Jur. N. S. 750, Erle, J., is said to have held that the forcible rescue of a person in illegal custody is an indictable offence.

A warrant of a justice to apprehend a party, founded on a certificate of the clerk of the peace, that an indictment for a misdemeanor had been found against such a party, is good; and therefore if upon such warrant the party be arrested, and afterwards rescued, those *who are guilty of the rescue may be convicted of a misdemeanor. R. v. Stoke, 5 C. & P. 146: 24 E. C. L. R.

[*826]

Proof of the rescue.] The word *rescue*, or some word equivalent thereto, must appear in the indictment, and the allegation must be proved by showing that the act was done forcibly, and against the will of the officer who had the party rescued in custody. R. v. Burridge, 3 P. Wms. 483. In order to render the offence of rescue complete, the prisoner must actually get out of the prison. Hawk. P. C. b. 2, c. 18, s. 12.

Punishment.] The offence of rescuing a person in custody for felony was formerly punishable as a felony within clergy at common law. R. v. Stanley, Russ. & Ry. 432. But now by the 1 & 2 Geo. 4, c. 88 (E & I.), s. 1, "If any person shall rescue, or aid and assist in rescuing, from the lawful custody of any constable, officer, headborough, or other person whomsoever, any person charged with, or suspected of, or committed for any felony, or on suspicion thereof, then if the person or persons so offending shall be convicted of felony, and entitled to the benefit of clergy, and be liable to be imprisoned for any term not exceeding one year, it shall be lawful for the court by or before whom any such person or persons shall be convicted, to order and direct, in case it shall think fit, that such person or persons, instead of being so fined and imprisoned as aforesaid, shall be transported beyond the seas for seven years, or be imprisoned only, or be imprisoned and kept to hard labor in the common gaol, house of correction, or penitentiary house, for any term not less than one and not exceeding three years."

Aiding a prisoner to escape.] Under the head of rescue may be classed the analogous offence of aiding a prisoner to escape. This, as an obstruction of the course of justice, was an offence at common law, being a felony where the prisoner was in custody on a charge of felony, and a misdemeanor in other cases, whether the charge were criminal or not. See R. v. Burridge, 3 P. Wms. 439; R. v. Allan, Carr. & M. 295: 41 E. C. L. R.

Aiding a prisoner to escape—offence under various statutes.] The offence of assisting a prisoner to escape has, by various statutes, been subjected to different degrees of punishment.

By the 22 Geo. 2, c. 27, s. 9, if any person or persons whatsoever shall by force set at liberty, or rescue, or attempt to rescue, or set at liberty, any person out of

prison who shall be committed for, or found guilty of murder, or rescue, or attempt to rescue, any person convicted of murder, going to execution, or during execution, every person so offending shall be deemed, taken, and adjudged to be guilty of felony [and shall suffer death without benefit of clergy].

Now by the 7 Wm. 4 & 1 Vict. c. 91, the punishment of death is abolished, and parties guilty of the offences mentioned in the above section, are liable to be transported for life, or for not less than fifteen years, or to be imprisoned for any term not exceeding three years.

By 4 Geo. 4, c. 64, s. 43 (E.), the conveying any disguise or instruments into any prison with intent to aid or assist a prisoner to escape is made a felony, punishable by transportation for fourteen *years, and the assisting any prisoner in at- [*827] tempting to make his escape from any prison, is subject to the same punishment. Similar provisions are contained in the 16 Geo. 2, c. 31 (E.), with respect to the king's bench and fleet prisons, and the other prisons not comprised in the 4 Geo. 4, c. 64.

Upon the 16 Geo. 2, c. 31, it has been held that the act is confined to cases of prisoners committed for felony, expressed in the warrant of commitment or detainer, and therefore a commitment on suspicion only is not within the act. R. v. Walker, 1 Leach, 97; R. v. Greeniff, 1 Leach, 363. It was likewise held on the construction of this statute, that it does not extend to a case where the escape has been actually effected, but only to the attempt. R. v. Tilley, 2 Leach, 662. The delivering the instrument is an offence within the act, though the prisoner has been pardoned of the offence of which he was convicted, on condition of transportation; and a party may be convicted, though there is no evidence that he knew of the specific offence of which the prisoner he assisted had been convicted. R. v. Shaw, Russ. & Ry. 526.

Where the record of the conviction of the person aided is set forth, and is produced by the proper officer, no evidence is admissible to contradict that record. R. v. Shaw, Russ. & Ry. 526.

By the 52 Geo. 3, c. 156 (U. K.), aiding and assisting prisoners of war to escape is felony, punishable with transportation for life, or fourteen, or seven years. See R. v. Martin, R. & R. 196.

As to aiding and assisting persons convicted by a military or naval court-martial to escape, see the 6 Geo. 4, c. 5, s. 13; 6 Geo. 4, c. 6, s. 14.

As to rescuing returned transports, see *post*, title Transportation, returning from.

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*RIOTS, ROUTS, AND UNLAWFUL ASSEMBLIES. [*828]

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Offences under the riot act.] By the 1 Geo. 1, stat. 2, c. 5, s. 1 (commonly called the riot act), it is enacted, that if any persons, to the number of twelve or more, being unlawfully, riotously, and tumultuously assembled together, to the disturbance of the

public peace, and being required or commanded by one or more justice or justices of the peace, or by the sheriff of the county, or by his undersheriff, or by the mayor, bailiff, or bailiffs, or other head officer or justice of the peace of any city or town corporate where such assembly shall be, by proclamation to be made in the king's name in the form thereinafter directed, to disperse themselves, and peaceably to depart to their habitations or to their lawful business, and shall, to the number of twelve or more (notwithstanding such proclamation made), unlawfully, riotously and tumultuously remain or continue together by the space of one hour after such command or request made by proclamation, that then such remaining or continuing together, to the number of twelve or more, after such command or request made by proclamation, shall be adjudged felony without benefit of clergy, and the offenders therein shall be adjudged felons [and shall suffer death, as in the case of felony, without benefit of clergy].

By s. 5, opposing and hindering the making of the proclamation shall be adjudged felony, without benefit of clergy, and persons assembled to the number of twelve, to whom proclamation should have been made, if the same had not been hindered, not dispersing within an hour after such hindrance, having knowledge thereof, shall be adjudged felons [and suffer death].

Now by the 7 Wm. 4 & 1 Vict. c. 91, s. 1, after reciting (*inter alia*) the above statute, it is enacted, "That if any person shall, after the commencement of this act, be convicted of any of the offences hereinbefore mentioned, such person shall not suffer death, or have sentence of death awarded against him or her for the same, but shall be liable at the discretion of the court, to be transported beyond the seas for the term of the natural life of such offender, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years."

[*829] By s. 2, in cases of imprisonment, the court may award hard *labor, and also solitary confinement not exceeding one month at any one time, and three months in any one year.

Riotously injuring or demolishing buildings.] By the 24 & 25 Vict. c. 97, s. 11, "If any persons riotously and tumultuously assembled together to the disturbance of the public peace shall unlawfully and with force demolish, or pull down, or destroy, or begin to demolish, pull down, or destroy, any church, chapel, meeting-house, or other place of divine worship, or any house, stable, coach-house, outhouse, warehouse, office, shop, mill, malthouse, hop-oast, barn, granary, shed, hovel, or fold, or any building or erection used in farming land, or in carrying on any trade or manufacture, or any branch thereof, or any building other than such as are in this section before mentioned, belonging to the queen, or to any county, riding, division, city, borough, poor law union, parish, or place, or belonging to any university, or college or hall of any university, or to any inn of court, or devoted or dedicated to public use or ornament, or erected or maintained by public subscription or contribution, or any machinery, whether fixed or movable, prepared for or employed in any manufacture, or in any branch thereof, or any steam engine or other engine for sinking, working, ventilating, or draining any mine, or any staith, building, or erection used in conducting the business of any mine, or any bridge, wagonway, or trunk for conveying minerals from any mine, every such offender shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor and with or without solitary confinement."

By s. 12, "If any persons riotously and tumultuously assembled together to the disturbance of the public peace shall unlawfully and with force injure or damage any such church, chapel, meeting-house, place of divine worship, house, stable, coach-house, outhouse, warehouse, office, shop, mill, malthouse, hop-oast, barn, granary, shed, hovel, fold, building, erection, machinery, engine, staith, bridge, wagonway, or trunk, as is in the last preceding section mentioned, every such offender shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor."

Persons indicted for felony may be convicted of misdemeanor.] By the same section, it is provided, "That if upon the trial of any person for any felony in the last preceding section mentioned the jury shall not be satisfied that such person is guilty thereof, but shall be satisfied that he is guilty of any offence in this section mentioned, then the jury may find him guilty thereof, and he may be punished accordingly."

Proof of riot.] A riot is defined by Hawkins to be a tumultuous disturbance of the peace, by three persons or more, assembling together of their own authority, with an intent mutually to assist one another, against any one who shall oppose them, in the execution of some enterprise of a private nature, and afterwards actually executing the same, in a violent and turbulent manner, to the *terror of the peo- [*830] ple, whether the act intended were of itself lawful or unlawful. Hawk. P. C. b. 1, c. 65, s. 1. See R. v. Langford, p. 821.(1)

An unlawful assembling must be proved, and therefore, if a number of persons meet together at a fair, and suddenly quarrel, it is an affray, and not a riot: *ante*, p. 253; but if, being so assembled, on a dispute occurring, they form into parties, with promises of mutual assistance, and then make an affray, it will be a riot; and, in this manner, any lawful assembly may be converted into a riot: so a person, joining rioters is equally guilty as if he had joined them while assembling. Hawk. P. C. b. 1, c. 65, s. 3.

Evidence must be given of some circumstances of such actual force or violence, or, at least, of such apparent tendency thereto, as are calculated to strike terror into the public; as a show of arms, threatening speeches, or turbulent gestures. Hawk. P. C. b. 1, c. 65, s. 5. But it is not necessary that personal violence should be done or offered. Thus, if a number of persons come to a theatre, and make a great noise and disturbance, with the predetermined purpose of preventing the performance, it will be a riot, though no personal violence is done to any individual, and no injury done to the house. Clifford v. Brandon, 2 Campb. 358. But the unlawfulness of the object of an assembly, even though they actually carry their unlawful object into execution, does not constitute a riot, unless accompanied by circumstances of force

(1) State v. Brook et al., 1 Hill, 362.

In an indictment for a riot, it is necessary to aver, and on the trial to prove, a previous unlawful assembly; and hence, if the assembly were lawful, as upon summons to assist an officer in the execution of lawful process, the subsequent illegal conduct of the persons so assembled, will not make them rioters. State v. Statcap, 1 Wendell's N. C. Law Rep. 30.

If persons innocently and lawfully assembled, afterwards confederate to do an unlawful act of violence, suddenly proposed and assented to, and thereupon do an act of violence in pursuance of such purpose, although their whole purpose should not be consummated, it is a riot. State v. Snow, 18 Maine, 346.

Four persons acting in concert, went at midnight in a frolic to the prosecutor's stable and shaved his horse's tail, and in so doing made sufficient noise to arouse the prosecutor and alarm his family—held, that they were indictable for a riot. The State v. Alexander, 7 Richardson, 5.

or violence; and in the same manner, three or more persons assembling together peaceably, to do an unlawful act, is not a riot. Hawk. P. C. b. 1, c. 65, s. 5.

In some cases in which the law authorizes force, the use of such force will not constitute a riot, as where a sheriff or constable, or perhaps even a private person, assembles a competent number of persons, in order with force to suppress rebels, or enemies, or rioters. Hawk. P. C. b. 1, c. 65, s. 2. So a private individual may assemble a number of others to suppress a common nuisance, or a nuisance to his own land. Thus where a weir had been erected across a common navigable river, and a number of persons assembled, with spades and other necessary instruments, for removing it, and did remove it, it was held to be neither a forcible entry nor a riot. Dalt. c. 137. So an assembly of a man's friends at his own house, for the defence of his person, or the possession of his house, against such as threaten to beat him, or to make an unlawful entry, is excusable. 5 Burn. 278.

It must appear that the injury or grievance complained of relates to some private quarrel only, as the inclosing of lands in which the inhabitants of a certain town claim a right of common; for where the intention of the assembly is to redress public grievances, as to pull down all inclosures in general, an attempt with force to execute such intention will amount to high treason. Hawk. P. C. b. 1, c. 65, s. 6. Where the object of an insurrection, says Mr. East, is a matter of a private or local nature, affecting, or supposed to affect, only the parties assembled, or confined to particular persons or districts, it will not amount to high treason, although attended with the circumstances of military parade usually alleged in indictments on this branch of treason. As if the rising be only against a particular market, or to destroy particular inclosures (see R. v. Birt, 5 C. & P. 154: 24 E. C. L. R.), to remove a local [*831] nuisance, to release a particular prisoner (unless *imprisoned for high treason), or even to oppose the execution of an act of Parliament, if it only affect the district of the insurgents, as in the case of a turnpike act. 1 East, P. C. 75. As to prize fights, see *ante*, p. 253.

The act for the purpose of executing which the rioters are assembled must be proved, otherwise the defendants must be acquitted. Where persons assemble together for the purpose of doing an act, and the assembly is such as hereinbefore described, if they do not proceed to execute their purpose, it is but an unlawful assembly, not a riot; if, after so assembling, they proceed to execute the act for which they assembled, but do not execute it, it is termed a rout; but if they not only so assemble but proceed to execute their design, and actually execute it, it is then a riot. 1 Hawk. c. 65, s. 1; Dalt. c. 136; R. v. Birt, 5 C. & P. 154: 24 E. C. L. R.

Proof of refusing to aid constable in quelling a riot.] To support an indictment against a person for refusing to aid and assist a constable in the execution of his duty in quelling a riot, it is necessary to prove, 1st, that the constable saw a breach of the peace committed; 2d, that there was a reasonable necessity for calling on the defendant for his assistance; and, 3d, that when duly called upon to assist the constable, the defendant without any physical infirmity or lawful excuse, refused to do so. R. v. Brown, Car. & M. 314: 41 E. C. L. R.; per Alderson, B. It is not a valid ground of defence to such an indictment that from the number of rioters the single aid of the defendant would not have been of any use. Id.

A person charged to aid a constable, and who does so, is protected *eundo, morando, et redeundo.* R. v. Phelps, Car. & M. 180; per Coltman, J.

Proof upon prosecutions under the riot act.] The second section of the riot act

gives the form of the proclamation, concluding with the words, "God save the King." Where, in the reading of the proclamation, these words were omitted, it was held that the persons continuing together did not incur the penalties of the statute. R. v. Child, 4 C. & P. 442: 19 E. C. L. R.

Upon an indictment under the riot act, it was not proved that the prisoner was among the mob during the whole of the hour, but he was proved to have been there at various times during the hour; it was held by Patteson, J., that it was a question for the jury upon all the circumstances, whether he did substantially continue making part of the assembly for the hour; for, although he might have occasion to separate himself for a minute or two, yet, if in substance he was there during the hour, he would not be thereby excused. R. v. James, 1 Russ. by Grea. 277.

The second or subsequent reading of the act does not do away with the effect of the first reading, and the hour is to be computed from the time of the first reading. Per Patteson, J., R. v. Woolcock, 5 C. & P. 517: 24 E. C. L. R.

If there be such an assembly that there would have been a riot if the parties had carried their purpose into effect, the case is within the act, and whether there was a cessation or not, is a question for the jury. Ibid.

An indictment under the riot act for remaining assembled one hour after proclamation made, need not charge the original riot to have *been *terrorem pop-* [*832] *uli;* it is sufficient if it pursue the words of the act. Per Patteson, J., R. v. James, 5 C. & P. 153: 24 E. C. L. R.

Proof of riotously demolishing buildings.] The true meaning of the words "riotously assemble," as under the 24 & 25 Viet. c. 97, not being explained by the act, the common law definition of a riot must be resorted to, and in such case, if any one of her majesty's subjects be terrified, this is sufficient terror and alarm to substantiate that part of the charge of riot. Per Patteson, J., R. v. Langford, Carr. & M. 602: 41 E. C. L. R.

Although the prisoners are charged only with a *beginning* to demolish, pull down, &c., yet in order to secure a conviction under the 24 & 25 Vict., c. 97, s. 11, *supra*, p. 829, it must appear that such a beginning was with intent to demolish the whole. The beginning to pull down, said Park, J., in a case where the prisoners were so charged, means not simply a demolition of a part, but of a part with intent to demolish the whole. If the prisoners meant to stop where they did (*i. e.*, breaking windows and doors), and do no more, they are not guilty; but if they intended, when they broke the windows, &c., to go farther, and destroy the house, they are guilty of a capital offence. If they had the full means of going farther, and were not interrupted, but left off of their own accord, it is evidence that they meant the work of demolition to stop where it did. It was proved that the parties began by breaking the windows; and having afterwards entered the house, set fire to the furniture; but no part of the house was burnt. Park, J., said to the jury, "If you think the prisoners originally came without intent to demolish, and that the setting fire to the premises was an afterthought, but with that intent, then you must acquit, because no part of the house having been burnt, there was no beginning to destroy. If they came originally without such intent, but afterwards set fire to the house, the offence is arson. If you have doubts whether they originally came with an intent to demolish, you may use the setting fire to the furniture under such circumstances, and in such manner as that the necessary consequence, if not for timely interference, would have been the burning of the house, as evidence to show that they had such intent, although they began to demolish in another manner." R. v. Ashton, 1 Lewin,

C. C. 296. The same rule was laid down, in the two following cases: The prisoners about midnight came to the house of the prosecutor, and having in a riotous manner burst open the door, broke some of the furniture, and all the windows, and did other damage, after which they went away, though there was nothing to prevent them committing further injury, Littledale, J., told the jury that this was not a "beginning to demolish," unless they should be satisfied that the ultimate object of the rioters was to demolish the house; and that if they had carried their intentions into full effect, they would in fact have demolished it. That such was not the case here, for that they had gone away, having manifestly completed their purpose, and done all the injury they meant to do. R. v. Thomas, 4 C. & P. 237: 19 E. C. L. R.; and see 6 C. & P. 333: 25 E. C. L. R. See also R. v. Adams, Carr. & M. 301: 41 E. C. L. R., where Coleridge, J., said to the jury, "Before you can find the prisoners guilty, you must be of opinion that they meant to leave the house no house at all in fact. If they intended to leave it still a house, though in a state however dilapidated, they [*833] are not guilty under this highly penal statute." *Injuries not intended for the destruction of the whole house are now provided for by the 24 & 25 Vict. c. 97, s. 12, *supra*, p. 829.

If, in a case of feloniously demolishing a house by rioting, it appears that some of the prisoners set fire to the house itself, and that others carried furniture out of the house, and burnt it in a fire made on a gravel-walk on the outside of the house, it will be for the jury to say whether the latter were not encouraging and taking part in a general design of destroying the house and furniture, and if so, the jury ought to convict them. Per Tindal, C. J., R. v. Harris, Carr. & M. 661: 41 E. C. L. R. If a house be demolished by rioters by means of fire, one of the rioters who is present while the fire is burning may be convicted for the felonious demolition under the statute, although he is not proved to have been present when the house was originally set on fire. R. v. Simpson, Carr. & M. 669.

When an election mob pursued a person who took refuge in a house, upon which they attacked the house, shouting, "Pull it down!" and broke the door and windows, and destroyed much of the furniture, but being unable to find the person they were in search of, went away; Tindal, C. J., ruled, that the case was not within the statute, the object of the rioters not being to destroy the house, but to secure the person they were in search of. R. v. Price, 5 C. & P. 510: 24 E. C. L. R. But the case may fall within the statute, though the intent to demolish may be accompanied with another intent, which may have influenced the conduct of the rioters. Thus, where a party of coal-whippers, having a feeling of ill-will towards a coal-lumper, who paid less than the usual wages, collected a mob and went to the house where he kept his pay-table, exclaiming that they would murder him, and began to throw stones, &c., and broke the windows and partitions, and part of a wall, and after his escape, continued to throw stones, &c., till stopped by the police; Gurney, B., ruled that the parties might be convicted under the 7 & 8 Geo. 4, c. 30, s. 8, of beginning to demolish, though their principal object might be to injure the lumper, provided it was also their object to demolish the house, on account of its having been used by him. R. v. Butt, 6 C. & P. 329: 25 E. C. L. R.

On an indictment for riotously, &c., beginning to demolish and demolishing a dwelling-house, total demolition is not necessary, though the parties were not interrupted. If the house be destroyed as a dwelling, it is enough. Four men, members of and connected with the family of the owner of the cottage, with great violence, and to his terror, drove him from it, and pulled it down, all but the chimney: it was held sufficient to satisfy the statute, though no other persons were within reach of the alarm,

they having no *bonâ fide* claim of right, but intending to injure the owner. R. v. Phillips, 2 Moo. C. C. 552. If rioters destroy a house by fire, this is a felonious demolition of it within the statute, and the persons guilty of such an offence may be convicted on an indictment founded on that enactment, and need not be indicted for arson under s. 2 of the same statute. Per Tindal, C. J., R. v. Harris, Carr. & M. 661: 41 E. C. L. R.

Proof of a rout.] A rout seems to be, according to the general opinion, a disturbance of the peace, by persons assembled together, with an intention to do a thing, which, if executed, would make them rioters, and actually making a motion towards the execution *thereof, but not executing it. Hawk. P. C. b. 1, c. 65, s. 1; [*834] 1 Russ. by Grea. 266.(1)

Proof of an unlawful assembly.] Any meeting whatsoever of great numbers of people, with such circumstances of terror as cannot but endanger the public peace, and raise fears and jealousies amongst the king's subjects, seems properly to be called an unlawful assembly, as where great numbers, complaining of a common grievance, meet together, armed in a warlike manner, in order to consult respecting the most proper means for the recovery of their interests, for no one can foresee what may be the event of such an assembly. Hawk. P. C. b. 1, c. 65, s. 9. The circumstances which constitute an unlawful assembly were much discussed in the case of Redford v. Pirley, 3 Stark. N. P. C. 76: 3 E. C. L. R. In that case, Holroyd, J., said, an unlawful assembly is where persons meet together in a manner and under circumstances which the law does not allow, but makes it criminal in those persons meeting together in such a manner, knowingly and with such purposes as are in point of law criminal. He then proceeded to state what may constitute an unlawful assembly, adopting the language used by Bayley, J., in R. v. Hunt, at York. All persons assembled to sow sedition and bring into contempt the constitution, are an unlawful assembly. With regard to meetings for drillings, he said, if the object of the drilling is to secure the attention of the persons drilled to disaffected speeches, and give confidence by an appearance of strength to those willing to join them, that would be illegal; or if they were to say, we will have what we want, whether it be agreeable to law or not, a meeting for that purpose, however it may be masked, if it is really for a purpose of that kind, would be illegal. If the meeting, from its general appearance, and all the accompanying circumstances, is calculated to excite terror, alarm, and consternation, it is generally criminal and unlawful. And it has been laid down by Alderson, B., that "any meeting assembled under such circumstances as, according to the opinion of rational and firm men, are likely to produce danger to the tranquillity and peace of the neighborhood, is an unlawful assembly; and in viewing this question, the jury should take into their consideration the way in which the meetings were held, the hour at which they met, and the language used by the persons assembled, and by those who addressed them; and then consider whether firm and rational men, having their families and property there, would have reasonable ground to fear a breach of the peace, as the alarm must not be merely such as would frighten any foolish or timid person, but must be such as would alarm persons of reasonable firmness and courage." R. v. Vincent, 9 C. & P. 91: 38 E. C. L. R. All persons who join an assembly of this kind, disregarding its probable effect and the alarm and consternation which are likely to ensue, and all who give countenance and support to it, are criminal parties. Per Littledale, J., R. v. Neale, C. & P. 431.

(1) The State v. Sumner, 2 Spears, 599.

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Robbery or stealing from the person.] By the 24 & 25 Vict. c. 96, s. 40, "Whosoever shall rob any person, or shall steal any chattel, money, or valuable security from the person of another, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Conviction for assault with intent to rob, on indictment for robbery.] By s 41, "If upon the trial of any person upon any indictment for robbery it shall appear to the jury upon the evidence that the defendant did not commit the crime of robbery, but that he did commit an assault with intent to rob, the defendant shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is guilty of an assault with intent to rob; and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for feloniously assaulting with intent to rob; and no person so tried as is herein lastly mentioned shall be liable to be afterwards prosecuted for an assault with intent to commit the robbery for which he was so tried."

Assault with intent to rob.] By s. 42, "Whosoever shall assault any person with intent to rob shall be guilty of felony, and being convicted thereof shall (save and except in the cases where a greater punishment is provided by this act) be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, [*836] —or *to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Robbery with violence or by more than one person.] By s. 43, "Whosoever shall, being armed with any offensive weapon or instrument, rob, or assault with intent to rob, any person, or shall, together with one or more other person or persons, rob, or assault with intent to rob, any person, or shall rob any person, and at the time of or immediately before or immediately after such robbery shall wound, beat, strike, or use any other personal violence to any person, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal ser-

vitude for life, or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Robbery at common law.] Robbery from the person, which is a felony at common law, is thus defined: a felonious taking of money or goods of any value from the person of another, or in his presence against his will, by violence or putting him in fear. 2 East, P. C. 707.

Proof of the goods, &c., taken.] It must be proved that some property was taken, for an assault with intent to rob is an offence of a different and inferior nature. 2 East, P. C. 707. But the value of the property is immaterial, a penny, as well as a pound, forcibly extorted, constitutes a robbery, the gist of the offence being the force and terror. 3 Inst. 69; 1 Hale, P. C. 532; 2 East, P. C. 707; 1 Russ. by Grea. 869; R. v. Morris, 9 C. & P. 349: 38 E. C. L. R. Thus where a man was knocked down and his pockets rifled, but the robbers found nothing, except a slip of paper containing a memorandum, an indictment for robbing him of the paper was held to be maintainable. R. v. Bingley, *coram* Gurney, B., 5 C. & P. 602: 24 E. C. L. R. In the following case it was held that there was no property in the prosecutor so as to support an indictment for robbery. The prisoner was charged with robbing the prosecutor of a promissory note. It appeared that the prosecutor had been decoyed by the prisoner into a room for the purpose of extorting money from him. Upon a table covered with black silk were two candlesticks covered also with black, a pair of large horse pistols ready cocked, a tumbler-glass filled with gunpowder, a saucer with leaden balls, two knives, one of them a prodigiously large carving knife, their handles wrapped in black crape, pens and inkstand, several sheets of paper, and two ropes. The prisoner, Mrs. Phipoe, seized the carving knife, and threatening to take away the prosecutor's life, the latter was compelled to sign a promissory note for 2000*l.* upon a piece of stamped paper which had been provided by the prisoner. It was objected that there was no property in the prosecutor, and the point being reserved for the opinion of the judges, they held accordingly. They said that it was essential to larceny that the property stolen should be of some value; that the note in this case did not on the face of it import either a general or special property in the prosecutor, and that it was so far from being of any the least value to him, that he had not even the property of the paper on which it was written; for it appeared that both the paper and ink were the property of Mrs. Phipoe, and the delivery of it by *her [*837] to him, could not under the circumstances of the case be considered as vesting it in him, but if it had, as it was a property of which he was never, even for an instant, in the peaceable possession, it could not be considered as property taken from his person, and it was well settled that to constitute the crime of robbery, the property must not only be valuable, but it must also be taken from the person and peaceable possession of the owner. R. v. Phipoe, 2 Leach, 673; 2 East, P. C. 599. See R. v. Edwards, 6 C. & P. 515, 521; 25 E. C. L. R., *post*, title Threats.

A servant, who had received money from his master's customers, was robbed of it in his way home. Upon its being objected that the money could not be laid as the property of the master, Alderson, B., inclined to think the objection valid, and would have reserved the point, but as the grand jury were sitting, the learned baron directed the jury to be discharged, and a new indictment to be preferred, containing a count laying the property in the servant. R. v. Rudick, 8 C. & P. 237: 34 E. C. L. R.

Proof of the taking.] In order to constitute a *taking*, there must be a *possession*

of the robber. Therefore, if a man, having a purse fastened to his girdle, is assaulted by a thief, who, in order more readily to get the purse, cuts the girdle, whereby the purse falls to the ground, this is no taking of the purse, for the thief never had it in his possession. 1 Hale, P. C. 533. But if the thief had taken up the purse from the ground, and afterwards let it fall in the struggle, without taking it up again, it would have been robbery, for it would have been once in his possession. Id. However short the period of possession, it is sufficient. The prisoner, taking the prosecutor's purse, immediately returned it, saying, "If you value your purse, you will please to take it back, and give me the contents of it." The prosecutor took it back, and the prisoner at that moment was apprehended. The court (Hotham, B., and Willes, J.) held, that though the prosecutor did not eventually lose either his purse or his money, yet as the prisoner had in fact demanded the money, and under the impulse of that threat and demand the property had been once taken from the prosecutor by the prisoner, it was in strictness of law a sufficient *taking* to complete the offence, although the prisoner's possession had continued for an instant only. R. v. Peat, 1 Leach, 228; 2 East, P. C. 557; see R. v. Lapier, 1 Leach, 326, *ante*, p. 570. It has been observed with regard to cases of this description, that though it was formerly held that a sudden taking or snatching of any property from a person unawares, was sufficient to constitute robbery, the contrary doctrine appears to be now established (see R. v. Gnosil, 1 C. & P. 304: 12 E. C. L. R.); and that no taking by violence will at the present day be considered as sufficient to constitute robbery, unless some injury be done to the person (as in R. v. Lapier, *ante*, p. 570), or unless there be some previous struggle for the possession of the property, or some force used to obtain it. 1 Russ. by Grea. 871, *vide post.*

Proof of the taking—felonious intent.] The robbery must be *animo furandi*, with a felonious intent to appropriate the goods to the offender's own use. And as there must be a felonious intent with regard to the goods charged in the indictment, [*838] it is not enough that *the prisoner had at the same time an intent to steal other goods. A. assaulted B. on the highway, with a felonious intent, and searched his pockets for money, but finding none, pulled off the bridle of B.'s horse, and threw that and some bread which B. had in panniers, about the highway, but did not take anything from B. Upon a conference of all the judges, this was resolved to be no robbery. Anon. 2 East, P. C. 662.

Though the party charged take the goods with violence and menaces, yet if it be under a *bonâ fide* claim, it is no robbery. The prisoner had set wires in which game was caught. The gamekeeper, finding them, was carrying them away, when the prisoner stopped him, and desired him to give them up. The gamekeeper refused, upon which the prisoner, lifting up a large stick, threatened to beat out the keeper's brains if he did not deliver them. The keeper, fearing violence, delivered them. Upon an indictment for robbery, Vaughan, B., said, "I shall leave it to the jury to say, whether the prisoner acted upon an impression that the wires and pheasants were his own property, for, however he might be liable to penalties for having them in his possession, yet if the jury think that he took them under a *bonâ fide* impression that he was only getting back the possession of his own property, there was no *animus furandi*, and the prosecution must fail." The prisoner was acquitted. R. v. Hall, 3 C. & P. 409: 14 E. C. L. R.; see also R. v. Boden, 1 C. & K. 395: 47 E. C. L. R.

It sometimes happens that the original assault is not made with the particular felonious intent of robbing the party of the property subsequently taken; but if the intent arises before the property is taken, it is sufficient, as where money, offered to

a person endeavoring to commit a rape, is taken by him. The prisoner assaulted a woman, with intent to ravish her, and she, without any demand made by him, offered him money, which he took and put into his pocket, but continued to treat the woman with violence, in order to effect his original purpose, till he was interrupted. A majority of the judges held this to be robbery, on the ground that the woman, from the violence and terror occasioned by the prisoner's behavior, and to redeem her chastity, offered the money, which, it was clear, she would not have done voluntarily, and that the prisoner, by taking it, derived an advantage to himself from his felonious conduct, though his original attempt was to commit a rape. R. v. Blackham, 2 East, P. C. 711.

The question of the *animus furandi* often arises in cases where, after a quarrel and assault, part of the property of some of the parties engaged in the transaction has been carried away. The question in these cases is, whether the articles were taken in frolic, or from accident, or from malice, but not *animo furandi.*

Proof of the taking—from the person.] It is not necessary that the goods should actually be taken from off the person of the prosecutor; if they are in his personal custody, and are taken in his presence, it is sufficient. But it is otherwise where they are in the personal custody of a third person. The two prisoners were indicted for assaulting the prosecutor and robbing him of a bundle. It appeared that the prosecutor had the bundle in his own personal custody, in a beer-shop, and when he came out, gave it to his brother, who was with him, to carry it for him. While on the road, the prisoners *assaulted the prosecutor; upon which, his brother [*839] laid down the bundle in the road, and ran to his assistance. One of the prisoners then took up the bundle and made off with it. Vaughan, B., intimated an opinion that the indictment was not maintainable, as the bundle was in the possession of another person at the time of the assault committed. Highway robbery was the felonious taking of the property of another by violence, against his will, either from his person or in his presence. The bundle, in this case, was not in the prosecutor's possession. If the prisoners intended to take the bundle, why did they assault the prosecutor, and not the person who had it? The prisoners were convicted of simple larceny. R. v. Fallows, 5 C. & P. 508: 24 E. C. L. R.

The following evidence was held not to be sufficient. The prosecutor said, "I felt a pressure of two persons, one on each side of me; I had secured my book in an inside pocket of my coat; I felt a hand between my coat and waistcoat. I was satisfied the prisoner was attempting to get my book out. The other person had hold of my right arm, and I forced it from him, and thrust it down to my book; in doing which I brushed the prisoner's hand and arm. The book was just lifted out of my pocket; it returned into my pocket. It was out, how far I cannot tell; I saw a slight glance of a man's hand down fron my breast; I secured the prisoner after a severe struggle." On cross-examination, the prosecutor said, "I am satisfied the book was drawn from my pocket; it was an inch above the top of the pocket." The prisoner being convicted, on a case reserved, six of the judges thought that the prisoner was not rightly convicted of stealing from the person, because, from first to last, the book remained about the person of the prosecutor. Four of their lordships were of a contrary opinion; but the judges were unanimously of opinion that the simple larceny was complete. R. v. Thompson, 1 Moo. C. C. 78. In R. v. Simpson, 1 Dears, C. C. R. 421; S. C. 24 L. J. M. C. 7, the prosecutor carried his watch in a waistcoat-pocket, with a chain attached passing through a button-hole of the waistcoat, being there secured by a watch-key. The prisoner took the watch out of the pocket, and by force drew

the chain out of the button-hole, but the watch-key having been caught in a button of the waistcoat, the watch and the chain remained suspended. It was held there was a sufficient severance to maintain a conviction for stealing from the person. Jervis, C. J., in giving judgment, said, "It is unnecessary to pronounce any opinion on R. v. Thompson. There seems to be some confusion in the use of the expression, 'about the person;' here the watch was temporarily and for one moment in the possession of the prisoner."

Proof of the taking—in presence of the owner.] The taking need not be by the immediate delivery of the party to the offender, or immediately from the person of the party robbed; it is sufficient if it be in his presence.(1) The instances given by Lord Hale are, where a carrier is driving his pack-horses, and the thief takes his horse or cuts his pack, and takes away the goods; or where a thief comes into the presence of A., and with violence, and putting A. in fear, drives away his horse, cattle, or sheep. 1 Hale, P. C. 533. But it must appear in such cases, that the [*840] goods were taken in the presence of the prosecutor. Thus where *thieves struck money out of the owner's hand, and by menaces drove him away, to prevent his taking it up again, and then took it up themselves; these facts being stated in a special verdict, the court said that they could not intend that the thieves took up the money in the sight or presence of the owner, and that, as the striking the money out of the hand was without putting the owner in fear, there was no robbery. R. v. Francis, 2 Str. 1015, Com. Rep. 478; 2 East, P. C. 708. And the same was resolved in another case, with the concurrence of all the judges. R. v. Grey, 2 East, P. C. 708. Where robbers, by putting in fear, made a wagoner drive his wagon from the highway, in the daytime, but did not take the goods till night; some held it to be a robbery from the first force, but others considered that the wagoner's possession continued till the goods were actually taken, unless the wagon were driven away by the thieves themselves. 2 East, P. C. 707; 1 Russ. by Grea. 873.

Proof of the taking—against the will of the owner.] It must appear that the taking was against the will of the owner. Several persons conspired to obtain for themselves the rewards given by statute for apprehending robbers on the highway. The robbery was to be effected upon Salmon, one of the confederates, by Blee, another of the confederates, and two strangers, procured by Blee. It was expressly found, that Salmon consented to part with his goods under pretence of a robbery, and that, for that purpose, he went to a highway at Deptford, where the colorable robbery took place. The judges were of opinion that this did not amount to robbery in any of the prisoners, because Salmon's property was not taken from him against his will. R. v. McDaniell, Fost. 121, 122. But it is otherwise where the party robbed delivers money to the thief, though, at the same time with the intent and power of immediately apprehending him. One Norden, having been informed of several robberies by a highwayman, resolved to apprehend him. For this purpose, he put a little money and a pistol in his pocket, and took a chaise. The robber stopped the chaise, and demanded money. Norden gave him what money he had, jumped out of the chaise, with the pistol in his hand, and with some assistance apprehended the prisoner. The prisoner was convicted of this robbery, and the conviction was approved of by Mr. Justice Foster, who distinguished it from the former case, on the

(1) As if by intimidation he is compelled to open his desk or throw down his purse, and then the money is taken in his presence. United States v. Jones, 3 Wash. C. C. Rep. 209.

ground that there was no concert or connection between Norden and the highwayman. Anon. Foster, 129.(1)

Proof of the violence.] It must be proved that the goods were taken either by violence or that the owner was put in fear; but either of these facts will be sufficient to render the felonious taking a robbery. 2 East, P. C. 708; 1 Russ. by Grea. 874. Where violence is used it is not necessary to prove actual fear. "I am very clear," says Mr. Justice Foster, "that the circumstances of actual fear at the time of the robbery need not be strictly proved. Suppose the man is knocked down, without any previous warning to awaken his fears, and lies totally insensible while the thief rifles his pockets, is not this a robbery?" Foster, 128. And if fear be a necessary ingredient, the law *in odium spoliatoris* will presume it, where there appears to be so just a ground for it. Id. 2 East, P. C. 711.(2)

*With regard to the degrees of violence necessary it has been seen, *ante*, p.[*841] 837, that the sudden taking of a thing unawares from the person, as by snatching anything from the hand or head, is not sufficient to constitute robbery, unless some injury be done to the person, or unless there be some previous struggling for the possession of the property. In R. v. Lapier, *ante*, p. 570, it was held robbery, because an injury was done to the person. 2 East, P. C. 709. A boy was carrying a bundle along the street, when the prisoner ran past him, and snatched it suddenly away, but being pursued, let it fall. Being indicted for robbery, the court (Hotham, B., and Adair, serjeant), said, the evidence in this case does not amount to a robbery; for though he snatched the bundle, it was not with that degree of force and terror that is necessary to constitute this offence. R. v. Macauley, 1 Leace, 217. And the same has been resolved in several other cases, in which it has appeared that there was no struggle for the property. R. v. Baker, 1 Leach, 290; R. v. Robins, Id. (*n*); R. v. Davies, Id. (*n*); R. v. Horner, Id. 191 (*n*). In R. v. Hughes, 2 C. & K. 214: 61 E. C. L. R., where the prisoner having asked the prosecutor to tell him the time, and the prosecutor having taken out his watch in order to answer the prisoner, holding it loosely in both hands, the prisoner caught hold of the ribbon and snatched the watch away, and made off with it, Pattesoo, J., held that this was not a robbery, but a stealing from the person.

But where a degree of violence is used sufficient to cause a personal injury, it is robbery; as where, in snatching a diamond pin fastened in a lady's hair, part of the hair was torn away at the same time. R. v. Moore, 1 Leach, 335, and see R. v. Lapier, Id. 320, *ante*, p. 570. A case is said to have been mentioned by Holroyd, J., which occurred at Kendal, and in which the evidence was that a person ran up against another, for the purpose of diverting his attention while he picked his pocket; and the judges held, that the force was sufficient to make it robbery, it having been used with that intent. Anon. 1 Lewin, C. C. 300. It appeared in evidence that the prisoner and others, in the streets of Manchester, hung around the prosecutor's person, and rifled him of his watch and money. It did not appear that any actual force or menace was used, but they surrounded him so as to render any attempt at resistance hazardous, if not vain. Bayley, J., on the trial of these parties for robbery,

(1) Kit v. The State, 11 Humphrey, 167.

(2) The Commonwealth v. Snelling, 4 Binney, 379; The Commonwealth v. Humphries, 7 Mass. 242; Case of Morris, 6 Rogers's Rec. 86.

If the taking be under such circumstances as would be likely to create an apprehension of danger in the mind of a man of ordinary experience, and induce him to part with his property for the safety of his person, it is robbery. Actual fear need not be strictly proven, it will be presumed. Long v. The State, 12 Georgia, 293; see Seymour v. The State, 15 Indiana, 288.

said, in order to constitute robbery, there must be either force or menaces. If several persons surround another so as to take away his power of resistance, this is robbery. R. v. Hughes, 1 Lewin, C. C. 301.

So if there be a struggle between the offender and the owner, for the possession of the property, it will be held to be such a violence as to render the taking robbery. The prisoner was indicted for taking a gentleman's sword from his side, *clam et secrete;* but, it appearing that the gentleman perceived the prisoner had laid hold of his sword, and that he himself laid hold of it at the same time and struggled for it, this was adjudged a robbery. R. v. Davies, 2 East, P. C. 709. The prisoner coming up to the prosecutor in the street, laid violent hold of the seals and chains of his watch, and succeeded in pulling it out of his fob. The watch was fastened with a steel chain, which went round his neck, and which prevented the prisoner from immediately taking the watch; but, by pulling, and two or three jerks, he broke the steel chain, and made off with the watch. It was objected that this came within the [*842] cases as to snatching; but the judges, on a *case reserved, were unanimously of opinion that the conviction was right, for that the prisoner could not obtain the watch at once, but had to overcome the resistance the steel chain made, and actual force was used for that purpose. R. v. Mason, Russ. & Ry. 419.

In order to constitute the offence of robbery, not only force must be employed by the party charged therewith, but it is necessary to show that such force was used with the intent to accomplish the robbery. Where, therefore, it appeared that a wound had been accidentally inflicted in the hand of the prosecutrix, it was held by Alderson, B., that an indictment for robbing could not be sustained. R. v. Edwards, 1 Cox, C. C. 32.

An indictment for robbery which charges the prisoners with having assaulted G. P. and H. P., and stolen 2*s.* from G. P., and 1*s.* from H. P., is correct, if the robbery of G. P. and H. P. was all one act; and if it were so, the counsel for the prosecution will not be put to elect. R. v. Giddins, Carr. & M. 634 : 41 E. C. L. R.

Proof of violence—under pretence of legal or right proceedings.] Violence may be committed as well by actual unlawful force, as under pretence of legal and rightful proceedings. Merriman, carrying his cheeses along the highway in a cart, was stopped by one Hall, who insisted on seizing them for want of a permit (which was found by the jury to be a mere pretence for the purpose of defrauding Merriman, no permit being necessary). On an altercation, they agreed to go before a magistrate and determine the matter. In the mean time other persons riotously assembled on account of the dearness of provisions, and in confederacy with Hall for the purpose, carried off the goods in Merriman's absence. It was objected that this was no robbery, there being no force used; but Hewitt, J., overruled the objection, and left it to the jury, who found it robbery, and brought in a verdict for the plaintiff; and, upon a motion for a new trial in K. B., the court held that the verdict was right. Merriman v. Hundred Chippenham, 2 East, P. C. 709.

The prosecutrix was brought before a magistrate by the prisoner, into whose custody she had been delivered by a headborough, on a charge of assault. The magistrate recommended the case to be made up. The prisoner (who was not a peace officer) then took her to a public house, treated her very ill, and finally handcuffed and forced her into a coach. He then put a handkerchief into her mouth, and forcibly took from her a shilling, which she had previously offered him, if he would wait till her husband came. The prisoner then put his hand in her pocket, and took out three shillings. Having been indicted for this as a robbery, Nares, J., said, that, in order

to commit the crime of robbery, it was not necessary the violence used to obtain the property should be by the common modes of putting a pistol to the head, or a dagger to the breast; that a violence, though used under a colorable and specious pretence of law or of doing justice, was sufficient, if the real intention was to rob; and he left the case to the jury, that if they thought the prisoner had, when he forced the prosecutrix into the coach, a felonious intent of taking her money, and that he made use of the violence of the handcuffs as a means to prevent her making a resistance, and took the money with a felonious intent, they should find him guilty. The jury having found accordingly, the judges, upon a case reserved, were unanimously of opinion that, as it was found by the verdict that the prisoner *had an original inten- [*843] tion to take the money, and had made use of violence, though under the sanction and pretence of law, for the purpose of obtaining it, the offence he had committed was clearly a robbery. R. v. Gascoigne, 1 Leach, 2 East, P. C. 709.

Proof of putting in fear.] If there has not been such violence used as to raise the offence from that of simple larceny to that of robbery, the prosecutor must show that he was *put in fear*—a fear of injury either to his person, his property, or his reputation.

In order to show a putting in fear, it is not necessary to prove that menaces or threats of violence were made use of by the offender. For instance, under pretence of begging, the prisoner may put the prosecutor in fear. The law (says Mr. Justice Willes) will not suffer its object to be evaded by an ambiguity of expression; for, if a man, *animo furandi*, says, "Give me your money;" "lend me your money;" "make me a present of your money;" or words of the like import, they are equivalent to the most positive order or demand; and if anything be obtained in consequence, it will form the first ingredient in the crime of robbery. R. v. Donnally, 1 Leach, 196. During the riots in London, in 1780, a boy, with a cockade in his hat, knocked violently at the prosecutor's door, and on his opening it, said, "God bless your honor, remember the poor mob." The prosecutor told him to go along; upon which he said he would go and fetch his captain. He went, and soon after the mob came, to the number of one hundred, armed with sticks and headed by the prisoner on horseback, his horse led by the boy. The bystanders said, "You must give them money." The boy said, "Now I have brought my captain;" and some of the mob said, "God bless this gentleman, he is always generous." The prosecutor asked the prisoner, "How much?" and he answered, "Half a crown;" on which the prosecutor, who had before intended to give only a shilling, gave the prisoner half a crown, and, the mob giving three cheers, went to the next house. This was held to be robbery, by Nares, J., and Buller, J., at the Old Bailey. R. v. Taplin, 2 East, P. C. 712.

There may be a putting in fear where the property is taken, under color of regular or legal proceedings, as well as in cases where it is taken by actual violence. See the cases cited *ante*, p. 842.

So there may be a putting in fear where the robbery is effected under color of a purchase. Thus, if a person, by force or threats, compel another to give him goods, and by way of color oblige him to take less than the value, this is robbery. As where the prisoner took a bushel and a half of wheat, worth 8s., and forced the owner to take 13*d.* for it, threatening to kill her if she refused, it was clearly held by all the judges to be robbery. R. v. Simon, 2 East, P. C. 712. Again, where the prisoner and a great mob came to the prosecutor, who had some corn, and one of them said, if he would not sell, they were going to take it away, and the prisoner said they

would give him 30*s*. a load, and if he would not accept that, they would take the corn away; upon which the prosecutor sold it for 30*s*., though it was worth 38*s*.; this was held to be robbery. R. v. Spencer, 2 East, P. C. 712.

In these cases the amount of the money may raise a question for the jury, whether or not the taking was felonious; for though there may be a putting in fear, yet if, in [*844] fact, the party had not the **animus furandi*, it is no felony. A traveller met a fisherman with fish, who refused to sell him any, and he, by force and putting in fear, took away some of his fish, and threw him money much above the value of it. Being convicted of robbery, judgment was respited, because of the doubt whether the intent was felonious. The Fisherman's Case, 2 East, P. C. 661. It has been observed that this was properly a question for the jury to say whether, from the circumstance of the party's offering the full value, his intention was not fraudulent, and consequently not felonious. 2 East, P. C. 662. If the original taking was felonious the payment would make no distinction.

It is a question for the jury, whether the circumstances accompanying the commission of the offence were such as reasonably to create fear in the breast of the party assaulted; and it can seldom happen that such a presumption may not properly be made. It is not, says Willes, J., necessary that there should be *actual danger*, for a robbery may be committed without using an offensive weapon, and by using a tinder-box or candlestick, instead of a pistol. A reasonable fear of *danger*, caused by the exercise of a constructive violence, is sufficient; and where such a terror is impressed upon the mind as does not leave the party a free agent, and in order to get rid of that terror he delivers his money, he may clearly be said to part with it against his will. Nor need the degree of constructive violence be such as, in its effects, necessarily imports a probable injury; for when a villain comes and demands money, no one knows how far he will go. R. v. Donnally, 1 Leach, 196, 197; 2 East, P. C. 727. The rule, as deduced from the last-cited case, is thus laid down by Mr. East: On the one hand, the fear is not confined to an apprehension of bodily injury, and on the other hand, it must be of such a nature as in reason and common experience is likely to induce a person to part with his property against his will, and to put him, as it were, under a temporary suspension of the power of exercising it through the influence of the terror impressed; in which case fear supplies, as well in sound reason as in legal construction, the place of force, or an actual taking by violence or assault upon the person. 2 East, P. C. 713; Ibid. 727.

In R. v. Jackson, 1 East, it seems to have been considered that the fear must be of that description which will operate *in constantem virum*. That case, however, was one of a peculiar nature, and it certainly cannot be required, in order to constitute a robbery, in every case, that the terror impressed should be that of which a man of constancy and courage would be sensible.

Proof of such circumstances as may reasonably induce a fear of personal injury will be sufficient to support the charge of robbery. It would not be sufficient to show, in answer, that there was no real danger, as that the supposed pistol was in fact a candlestick, see *supra;* in short, danger to the person may be apprehended from every assault, with intent to rob, and a jury would be justified in presuming that the party assaulted was under the influence of fear with regard to his personal safety. It seems also that the fear of violence to the person of the child of the party whose property is demanded, is regarded in the same light as fear of violence to his own person. Hotham, B., in R. v. Donnally, East, P. C. 718, stated, that with regard to the case put in argument, if a man, walking with his child, and delivering his [*845] money to another, upon a threat that, unless he *did so, he would destroy

the child, he had no doubt but that it was sufficient to constitute a robbery. So in R. v. Reane, 2 East, P. C. 735, Eyre, C. J., observed, that he saw no sensible distinction between a personal violence to the party himself and the case put by one of the judges, of a man holding another's child over a river, and threatening to throw it in unless he gave him money.

It is sufficient to prove that the conduct of the prisoner put the prosecutor in fear for the safety of his *property*. During certain riots in Cornwall, the prisoners, with a mob, came to the prosecutor's house, and said they must have from him the same they had from his neighbors, which was a guinea, else that they would tear down his mow of corn and level his house. The prosecutor gave them 5*s*., but they demanded and received 5*s*. more, he being terrified. They then opened a cask of cider and drank part of it, ate some bread and cheese, and the prisoners carried away a piece of meat. The prisoners were indicted and convicted of robbing the prosecutor of 10*s*. There was also another count for putting the prosecutor in fear, and taking from him, in his dwelling-house, a quantity of cider, &c., and it was held robbery in the dwelling-house. R. v. Simons, 2 East, P. C. 731. During the Birmingham riots the mob entered the house, and the prisoner who was one of them, demanded money, and said, that if the prosecutor did not give his men something handsome for them to drink, his house must come down. The jury found that the prosecutor did not deliver his money from any apprehension of danger to his life or person, but from an apprehension, that if he refused, his house would at some future time be pulled down in the same manner as other houses in Birmingham. On a case reserved, a majority of the judges held this to be robbery. R. v. Astley, 2 East, P. C. 729; see also R. v. Brown, 2 East, P. C. 731; R. v. Spencer, 2 East, P. C. 712, *ante*, p. 843.

The prosecutrix, a servant maid, was inveigled into a mock auction, and the door was shut. There were about twenty persons present. Refusing to bid, she was told, "You must bid before you obtain your liberty again." She, however, again refused, and at length alarmed by their importunities, she attempted to leave the shop. Being prevented, and, conceiving that she could not gain her liberty without complying, she did bid, and the lot was knocked down to her. She again attempted to go; but the prisoner, who acted as master of the place, stopped her, and told her, if she had not the money, she must pay half a guinea in part, and leave a bundle she had with her. The prisoner, finding she would not comply, said, "Then you shall go to Bow Street, and from thence to Newgate, and be there imprisoned until you can raise the money." And he ordered the door to be guarded, and a constable to be sent for. A pretended constable coming in, the prisoner, who had kept his hand on the girl's shoulder, said, "Take her, constable, take her to Bow Street, and thence to Newgate." The pretended constable said, "Unless you give me a shilling, you must go with me." During this conversation, the prisoner again laid one hand on the girl's shoulder, and the other on her bundle, and while he thus held her, she put her hand into her pocket, took out a shilling, and gave it to the pretended constable, who said, "If Knewland (the prisoner) has a mind to release you, it is well; for I have nothing more to do with you: and she was then suffered to make her escape. She stated upon oath that she was in bodily fear of going to prison, and *that under [*846] that fear she parted with the shilling to the constable, as a means of obtaining her liberty; but that she was not impressed by any fear, by the prisoner Knewland laying hold of her shoulder with one hand, and her bundle with the other; for that she had only parted with her money to avoid being carried to Bow Street, and thence to Newgate, and not out of fear or apprehension of any other personal force or violence.

Upon a case reserved, the judges were of opinion, that the circumstances of this case did not amount to robbery. After adverting to the case of threats to accuse persons of unnatural offences, Mr. Justice Ashurst, delivering the resolution of the judges, thus proceeds: "In the present case the threat which the prisoners made was to take the prisoner to Bow Street, and from thence to Newgate; a species of threat which, in the opinion of the judges, is not sufficient to raise such a degree of terror in the mind as to constitute the crime of robbery; for it was only a threat to put her into the hands of the law, and an innocent person need not in such circumstances be apprehensive of any danger. She might have known, that having done no wrong, the law, if she had been carried to prison, would have taken her under its protection, and set her free. The terror arising from such a source cannot, therefore, be considered of a degree sufficient to induce a person to part with his money. It is the case of a simple duress, for which the party injured may have a civil remedy by action, which could not be, if the fact amounted to felony. As to the circumstances affecting the other prisoner (Wood, the pretended constable), it appears that the force which he used against the prosecutrix was merely that of pushing her into the sale room, and detaining her until she gave the shilling; but as *terror* is, no less than *force*, a component part of the complex idea annexed to the term robbery, the crime cannot be complete without it. The judges, therefore, were all of opinion, that however the prisoners might have been guilty of a *conspiracy* or other misdemeanor, they could not in any way be considered guilty of the crime of robbery." R. v. Knewland, 2 Leach, 721; 2 East, P. C. 732.

Although this decision, so far as the question of putting in fear is concerned, may, perhaps, be regarded as rightly decided upon the express declaration of the prosecutrix herself, that she parted with the money merely to avoid being carried to Bow Street, and thence to Newgate, yet there are some portions of the opinion of the judges which appear to be at variance with the rules of law respecting robbery. The statement that *terror*, no less than *force*, is a component part of the complex idea annexed to the term robbery, is not in conformity with the various decisions already cited, from which it appears that either violence *or* putting in fear is sufficient to constitute a robbery. There seems also to be a fallacy in the reasoning of the court with regard to threats of imprisonment held out to the prosecutrix. The impression made by such threats upon any person of common experience and knowledge of the world (and such the prosecutrix must be taken to have been) would be, not that the prisoner had *in fact* any intention of carrying the injured party before a magistrate, or of affording any such opportunity of redress, but that other artifices (as in the instance of the pretended constable) would probably be resorted to, in order to extort money. It is difficult to imagine any case in which a party might with more reason appre- [*847] hend violence and injury, both to the person and to the property, *than that in which the prosecutrix was placed, and it is stilll more difficult to say, that there was not such *violence* resorted to, as, independently of the question of putting in fear, rendered the act of the prisoners (supposing it to have been done *animo furandi*, of which there could be little doubt) an act of robbery. In R. v. Gascoigne, 1 Leach, 280; 2 East, P. C. 709, *ante*, p. 843, the prisoner not only threatened to carry the prosecutrix to prison, but actually did carry her thither, whence she was in due course discharged, and yet the nature of the threat did not prevent the offence from being considered a robbery. In that case, indeed, some greater degree of personal violence was used, and the money was taken from the prosecutrix's pocket by the prisoner himself; but it is clearly immaterial whether the offender takes the money with his

own hand, or whether the party injured delivers it to him, in consequence of his menaces.

Proof of the putting in fear—by threatening to accuse of unnatural crimes.] There is one case about which there is considerable doubt as to whether or no it amounts to robbery. In ordinary cases, as has already been seen, obtaining money by threats affecting a party's reputation has not been held to amount to robbery; but the doubt has been where the threat is to accuse of unnatural practices. The species of terror, says Mr. Justice Ashurst, which leads a man to apprehend an injury to his character, has never been deemed sufficient, unless in the particular case of exciting it by means of insinuations against, or threats to destroy the character of the party pillaged, by accusing him of sodomitical practices. R. v. Knewland, 2 Leach, 730. The rule is laid down in the same case, in rather larger terms, by Mr. Justice Heath, who says, "The cases alluded to (R. v. Donnally, and R. v. Hickman, *infra*), only go thus far—that to obtain money from a person by accusing him of that which, if proved, would carry *with it an infamous punishment*, is sufficient to support an indictment for robbery; but it has never been decided that a mere charge of imprisonment and extortion is sufficient." 2 Leach, 729.

That obtaining money from a man by threatening to accuse him of unnatural practices amounts to a robbery, was decided in R. v. Jones. The prisoner, drinking with the prosecutor at a public-house, asked him what he meant by the liberties he had taken with his person at the play-house. The prosecutor replied, that he knew of no liberties having been taken; upon which the prisoner said, "Damn you, sir, but you did, and there were several reputable merchants in the house, who will take their oaths of it." The prosecutor being alarmed, left the house; but the prisoner following him, cried out, "Damn you, sir, stop, for if you offer to run, I will raise a mob about you;" and seizing him by the collar, continued, "Damn you, sir, this is not to be borne; you have offered an indignity to me, and nothing can satisfy it." The prosecutor said, "For God's sake, what would you have?" To which the prisoner answered, "A present; you must make me a present." And the prosecutor gave him three guineas and twelve shillings. The prisoner, during the whole conversation, held the prosecutor by the arm. The prosecutor swore, that at the time he parted with the money, he understood the threatened charge to be an imputation of sodomy; that he was so alarmed at the idea, that he had neither courage nor strength to call for assistance; and that the *violence with which the prisoner had detained him in [*848] the street, had put him in fear for the safety of his person. Upon a case reserved, the judges (absent De Grey, C. J., and Ashurst, J., and one vacancy), were of opinion, that although the money had been obtained in a fraudulent way, and under a false pretence, yet that it was a pretence of a very alarming nature, and that a sufficient degree of force had been made use of in effecting it to constitute the offence of robbery. According to the report of the same case by Mr. East, their lordships said, that to constitute robbery there was no occasion to use weapons or real violence, but that taking money from a man in such a situation as rendered him not a free man, as if a person so robbed was in fear of a conspiracy against his life or character, was such a putting in fear as would make the taking of his money under that terror, robbery; and they referred to R. v. Brown, O. B. 1763; R. v. Jones, 1 Leach, 139; 2 East, P. C. 714.

In the above case it does not clearly appear, whether the judges held it to be robbery on the ground of the actual violence offered to the prosecutor in detaining him in the street by the arm, or upon the prosecutor being put in fear of an injury to his

reputation by the menaces employed. However, in subsequent cases it has been held, that it is no less robbery where no personal violence whatever has been used.

The prosecutor passing along the street, was accosted by the prisoner, who desired he would give him a present. The prosecutor asking, for what? the prisoner said, "You had better comply, or I will take you before a magistrate, and accuse you of an attempt to commit an unnatural crime." The prosecutor then gave him half a guinea. Two days afterwards, the prisoner obtained a further sum of money from the prosecutor by similar threats. The prosecutor swore that he was exceedingly alarmed upon both occasions, and under that alarm gave the money; that he was not aware what were the consequences of such a charge; but apprehended that it might cost him his life. The jury found the prisoner guilty of the robbery, and that the prosecutor delivered his money through fear, and under an apprehension that his life was in danger. The case being reserved for the opinion of the judges, they gave their opinions *seriatim* (see 2 East, P. C. 716), and afterwards the result of their deliberations was delivered by Mr. Justice Willes. They unanimously resolved, that the prisoner was rightly convicted of robbery. This, says Mr. Justice Willes, is a threat of personal violence; for the prosecutor had every reason to believe that he should be dragged through the streets as a culprit, charged with an unnatural crime. The threat must necessarily and unavoidably create intimidation. It is equivalent to actual violence, for no violence that can be offered could excite a greater terror in the mind, or make a man sooner part with his money. R. v. Donnally, 1 Leach, 193; 2 East, P. C. 713.

It will be observed, that in the foregoing case the jury found that the prisoner delivered the money under an apprehension that his life was in danger; but this circumstance was wanting in the following case, where the only fear was that of an injury to the party's reputation.

The prosecutor was employed in St. James's Palace, and the prisoner was sentinel on guard there. One night the prosecutor treated the prisoner with something to [*849] eat in his room. About a *fortnight afterwards, the prisoner followed the prosecutor up stairs, and said, "I am come for satisfaction; you know what passed the other night. You are a sodomite; and if you do not give me satisfaction, I will go and fetch a serjeant and a file of men, and take you before a justice, for I have been in the black-hole ever since I was here last, and I do not value my life." The prosecutor asked him what money he must have, and he said three or four guineas, and the prosecutor gave him two guineas. The prisoner took them, saying, "Mind, I don't *demand* anything of you." The prosecutor swore that he was very much alarmed when he gave the two guineas, and that he did not very well know what he did; but that he parted with the money under an idea of preserving his character from reproach and not from the fear of personal violence. The jury found the prisoner guilty of the robbery, and they also found that the prosecutor parted with the money against his will, through a fear that his character might receive an injury from the prisoner's accusation. The case being only the second of the kind (*sed vide* R. v. Jones, *ante*, p. 848), and some doubt having prevailed with regard to R. v. Donnally, because he had not been executed, and because this case differed with regard to the nature of the *fear*, it was reserved for the opinion of the judges. Their resolution was delivered by Mr. Justice Ashurst, who said, that the case did not materially differ from that of R. v. Donnally, for that the true definition of robbery is, the stealing, or taking from the person, or in the presence of another, property of any amount, with such a degree of *force* or terror as to induce the party unwillingly to part with his property; and whether the *terror* arises from real or expected violence to the

person, or from a sense of injury to the character, the law makes no kind of difference: for to most men the idea of losing their fame and reputation is equally, if not more, terrific than the dread of personal injury. The principal ingredient in robbery is a man's being *forced* to part with his property; and the judges were unanimously of opinion, that upon the principles of law, and the authority of former decisions, a *threat* to accuse a man of having committed the greatest of all crimes, was a sufficient *force* to constitute the crime of robbery by putting in fear. R. v. Hickman, 1 Leach, 278; 2 East, P. C. 728.

This decision has since been followed. The prisoner came up to the prosecutor, a gentleman's servant, at his master's door, and demanded 5*l*. On being told by the prosecutor that he had not so much money, he demanded 1*l*, and said, that if the prosecutor did not instantly give it to him, he would go to his master and accuse him of wanting to take diabolical liberties with him. The prosecutor gave him what money he had, and the prisoner demanded his watch, or some of his master's plate. This the prosecutor refused; but went and fetched one of his coats, which the prisoner took away. He was indicted for robbing the prosecutor of his coat. The prosecutor swore that he gave the prisoner his property, under the idea of his being charged with a detestable crime, and for fear of losing both his character and his place. He stated that he was not afraid of being taken into custody, nor had he any dread of punishment. He stated also, that he was absent, fetching the coat, for five minutes; that the servants were in the kitchen, but he did not consult them on account of his agitation, and because he had not a minute to spare, expecting the company to dinner immediately. On a case reserved, *eleven of the judges [*850] thought the case similar to R. v. Hickman (*supra*), and that they could not, with propriety, depart from that decision; Graham, B., thought that R. v. Hickman was not rightly decided, but said that he should on this point be influenced in future by what appeared to be the general opinion of the judges. R. v. Egerton, Russ. & Ry. 375.

Upon a threat of accusing the prosecutor of unnatural practices, he promised to provide a sum of money for the prisoners, which he failed to do, upon which they said they were come from Bow Street, and would take him into custody. They accordingly called a coach, and while on their road to Bow Street, one of the prisoners stopped the coach and said that if the prosecutor would behave like a gentleman, and procure the money, they would not prefer the charge. The prosecutor then went to the house of a friend, where he was absent about five minutes, when he returned with 10*l*., which he gave to the prisoners. He stated that he parted with his money in the fear and dread of being placed in the situation of a criminal of that nature, had they persisted in preferring the charge against him; that he did not conceive they were Bow Street officers, though they held out the threat; that he was extremely agitated, and thought that they would have taken him to the watch-house, and under that idea, and the impulse of the moment, he parted with the money. He stated also that he could not say that he gave his money under any apprehension of danger to his person.

In a case of this kind, where the point of violence was in question, ten of the judges were of opinion that the calling of a coach, and getting in with the prosecutor, was a forcible constraint upon him, and sufficient to constitute a robbery, though the prosecutor had no apprehension of further injury to his person. Lord Ellenborough, Macdonald, C. B., Lawrence, J., Chambre, J., and Graham, B., thought some degree of force or violence essential; and that the mere apprehension of danger to the character would not be sufficient to constitute this offence. Heath, J., Grose,

J., Thompson, B., Le Blanc, J., and Wood, B., seemed to think it would. R. v. Cannon, Russ. & Ry. 146.

The threat in these cases must, of course, be a threat to accuse the party robbed; it is not sufficient to constitute a robbery that the threat is to accuse another person, however nearly connected with the party from whom the property is obtained. The prisoner was indicted for robbing the wife of P. Abraham. It appeared that under a threat of accusing Abraham of an indecent assault, the money had been obtained by the prisoner from Abraham's wife. Littledale, J., said, "I think this is not such a personal fear in the wife as is necessary to constitute the crime of robbery. If I were to hold this a robbery, it would be going beyond any of the decided cases;" and his lordship directed an acquittal. He said that the case was new and perplexing. He thought it was rather a misdemeanor; and even as a misdemeanor the case was new. The principle was, that the person threatened is thrown off his guard and has not firmness to resist the extortion; but he could not apply that principle to the wife of the party threatened. R. v. Edward, 1 Moo. & R. 257; 5 C. & P. 518: 24 E. C. L. R.

The prisoner went twice to the house where the prosecutor lived in service, and called him a sodomite. The prosecutor took him each time before a magistrate, who [*851] discharged him. On being discharged, *the prisoner followed the prosecutor, repeated the expressions, and asked him to make him a present, saying he would never leave him till he had pulled the house down; but if he did make him a handsome present, he would trouble him no more. He mentioned four guineas, and the prosecutor being frightened for his reputation, and in fear of losing his situation, gave him the money. He gave the money from the great apprehension and fear he had of losing his situation. The prisoner was convicted; but a doubt arising in the privy-council, the opinion of the judges was taken. Most of them thought that this was within R. v. Hickman, and nine of them were of opinion that this case was law, but the three others thought it not law. Lord Ellenborough thought that the prosecutor's principal inducement to part with his money was the fear of the loss of his place, and he said he should feel no difficulty in recommending a pardon; and the prisoner did, in the end, receive a pardon. R. v. Elmstead, Russ. by Grea. 894.

In these, as in other cases of robbery, it was always held that it must appear that the property was delivered, or the money extorted, while the party was under the influence of the fear arising from the threats or violence of the prisoner. The prosecutor had been several times solicited for money by the prisoner, under threats of accusing him of unnatural practices. At one of those interviews the prisoner said he must have 20*l.* in cash, and a bond for 50*l.* a year; upon which the prosecutor, in pursuance of a plan he had previously concerted with a friend, told him that he could not give them to him then, but that if he would wait a few days, he would bring him the money and bond. At their next interview the prosecutor offered the prisoner 20*l.*, but he refused to take it without the bond, upon which the prosecutor fetched it, and gave it with nineteen guineas and a shilling, to the prisoner, who took them away, saying, he would not give the prosecutor any further trouble. The prosecutor deposed, that when the charge was first made, his mind was extremely alarmed, and that he apprehended injury to his person and character, but that his fear soon subsided, and that he sought the several interviews with the prisoner for the purpose of parting with his property to him, in order to fix him with the crime of robbery, and to substantiate the fact of his having extorted money from him by means of the charge; but that at the time the prisoner demanded from him the money and the bond, he parted with them without being under any apprehension, either of violence

to his person or injury to his character, although he could not say that he parted with his property voluntarily. The judges having met to consider this case, were inclined to be of opinion that it was no robbery, there being no violence nor fear, at the time when the prosecutor parted with his money. Eyre, C. J., observed, that it would be going a step further than any of the cases, to hold this to be robbery. The principle of robbery was violence; where the money was delivered through fear, that was constructive violence. That the principle he had acted upon in such cases was, to leave the question to the jury, whether the defendant had, by certain circumstances, impressed such a terror on the prosecutor as to render him incapable of resisting the demand. Therefore, where the prosecutor swore that he was under no apprehension at the time, but gave his money only to convict the prisoner, he negatived the robbery. That this was different from R. v. Norden, Foster, 129, where there was actual violence; but here there was neither actual nor constructive *vio- [*852] lence. At a subsequent meeting of the judges, the conviction was held wrong. R. v. Reane, 2 Leach, 616; 2 East, P. C. 734. The same point was ruled in R. v. Fuller, Russ. & Ry. 408, where the prosecutor made an appointment to meet the prisoner, and in the meantime procured a constable to attend, who, as soon as the prisoner received the money, apprehended him. The prosecutor stated that he parted with the money, in order that he might prosecute the prisoner.

Under the circumstances of the following case, it appears to have been held that the fear was not continuing at the time of the delivery of the money, and that therefore it was no robbery. In consequence of a charge similar to that in the above cases having been made, the prosecutor procured a sum of money to comply with the demand, and prevailed upon a friend to accompany him when he went to pay it. His friend (Shelton) advised him not to pay it, but he did pay it. He swore that he was scared at the charge, and that was the reason why he parted with his money. It appeared that after the charge was first made, the prosecutor and one of the prisoners continued eating and drinking together. Shelton confirmed the prosecutor's account, and said he appeared quite scared out of his wits. The judges having met to consider this case, a majority of them were of opinion that it was not robbery, though the money was taken in the presence of the prosecutor, and the fear of losing his character was upon him at the time. Most of the majority thought that, in order to constitute robbery, the money must be parted with from an immediate apprehension of present danger *upon the charge* being made, and not, as in this case, after the parties had separated, and the prosecutor had time to deliberate upon it, and apply for assistance, and had applied to a friend by whom he was advised not to pay it, and who was actually present at the very time when it was paid; all which carried the appearance more of a composition of a prosecution than it did of a robbery, and seemed more like a calculation whether it were better to lose his money or risk his character. One of the judges, who agreed that it was not robbery, went upon the ground that there was not a continuing fear, such as could operate *in constantem virum*, from the time when the money was demanded till it was paid; for in the interval he could have procured assistance, and had taken advice. The minority, who held the case to be robbery, thought the question concluded by the finding of the jury that the prosecutor had parted with his money through fear continuing at the time, which fell in with the definition of robbery long ago adopted and acted upon, and they said it would be difficult to draw any other line; and that this sort of fear so far differed from cases of mere bodily fear, that it was not likely to be dispelled, as in those cases, by having the opportunity of applying to magistrates or

others for their assistance, for the money was given to prevent the public disclosure of the charge. R. v. Jackson, 1 East, P. C. Addenda xxi; 2 Russ. by Grea. 892.

So much doubt was entertained as to the law on this subject, that a statutory provision was made on the subject, which makes it an offence to extort money by such means. The first statute was the 7 & 8 Geo. 4, c. 29; that now in force is the 24 & 25 Vict. c. 96, ss. 46 and 47, *infra*, p. 876.

Semble that now, where money is obtained by any of the threats to accuse speci- [*853] fied in that section, the indictment must be on the *statute; but where the money is obtained by threats to accuse other than those specified in the act, the indictment may be for robbery, if the party was put in fear, and parted with his property in consequence. R. v. Norton, 8 C. & P. 671: 34 E. C. L. R. In a note to this case the recorder is stated to have mentioned it to Parke, B., who concurred in the above opinion. 1 Russ. by Grea. 900 (*n*). It was held on a case reserved, that since the 7 Wm. 4 & 1 Vict. c. 87, s. 4, which is similar to the 24 & 25 Vict. c. 96, s. 47, *infra*, p. 876, an indictment in the ordinary form for robbery cannot be supported by proof of extorting money by threats of charging an infamous crime, and that a person present to aid A. B. to extort money by such charges, cannot be convicted of robbery with A. B., effected by him with actual violence, the prisoner being no party to such violence. R. v. Henry, 2 Moo. C. C. 118; 9 C. & P. 309: 38 E. C. L. R. But it has since been decided, that assaulting and threatening to charge with an infamous crime (but in terms not within the above section), with intent thereby to extort money, was an assault with intent to rob. R. v. Stringer, 2 Moo. C. C. 361; 1 C. & K. 188: 47 E. C. L. R. In this latter case the judges doubted whether R. v. Henry was rightly decided, on the ground on which it was decided, viz., that it was not robbery to obtain money by threat of a charge of sodomy.

It is no defence to a charge of robbery by threatening to accuse a man of an unnatural crime, that he has in fact been guilty of such crime. Where the prisoner set up that defence, and stated that the prosecutor had voluntarily given him the money not to prosecute him for it, Littledale, J., said, that it was equally a robbery to obtain a man's money by a threat to accuse him of an infamous crime, whether the prosecutor was really guilty or not; as, if he was guilty, the prisoner ought to have prosecuted him for it, and not to have extorted money from him; but if the money was given voluntarily without any previous threat, the indictment could not be supported. The jury acquitted the prisoner. R. v. Gardner, 1 C. & P. 479: 12 E. C. L. R. See also, *post*, tit. Threats.

Proof of the putting in fear—must be before the taking.] It must appear that the property was taken while the party was under the influence of the fear; for if the property be taken first, and the menaces or threats inducing the fear, be used afterwards, it is not robbery. The prisoner desired the prosecutor to open a gate for him. While he was so doing, the prisoner took his purse. The prosecutor seeing it in the prisoner's hands, demanded it, when the prisoner answered, "Villain, if thou speakest of this purse, I will pluck thy house over thy ears," &c., and then went away; and because he did not take it with violence, or put the prosecutor in fear, it was ruled to be larceny only, and no robbery, for the words of menace were used after the taking of the purse. R. v. Harman, 1 Hale, P. C. 534; 1 Leach, 198 (*n*).

*SACRILEGE.

Breaking and entering place of worship and committing a felony.] By the 24 & 25 Vict. c. 96, s. 50, "Whosoever shall break and enter any church, chapel, meeting-house, or other place of divine worship, and commit any felony therein, or being in any church, chapel, meeting-house or other place of divine worship shall commit any felony therein and break out of the same, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Breaking and entering a place of worship with intent to commit a felony.] See 24 & 25 Vict. c. 96, s. 57, *supra*, p. 400.

Riotously demolishing or injuring place of worship.] See 24 & 25 Vict. c. 97, ss. 11 & 12; *supra*, p. 831.

Proof that the building is a church or chapel.] It must appear that the building in which the offence was committed, was a church or chapel. Where the goods stolen had been deposited in the church tower, which had a separate roof, but no outer door, the only way of going to it being through the body of the church, from which the tower was not separated by a door or partition of any kind, Park, J., was of opinion, that this tower was to be taken as a part of the church. R. v. Wheeler, 3 C. & P. 585: 14 E. C. L. R.

The vestry of a parish church was broken open and robbed. It was formed out of what before had been the church-porch; but had a door opening into the churchyard, which could only be unlocked from the inside. It was held by Coleridge, J., that this vestry was part of the fabric of the church, and within the act. R. v. Evans, Carr. & M. 298.

Property how laid in the indictment.] In R. v. Wortley, 1 Den. C. C. R. 162, the prisoner was indicted for breaking into a church and stealing a box and money. The box was a very ancient box, firmly fixed by two screws at the back to the outside of a pew in the centre aisle of the church, and by a third screw at the bottom, to a supporter beneath, and over the box was an ancient board, with the inscription painted thereon, "Remember the Poor." The court "thought that the box might be presumed, in the absence of any contrary evidence, to have been placed in the church pursuant to the canon; Burn's Eccl. Law, 369, tit. Church; and that the money therein placed was constructively in the possession of the vicar and churchwardens."

Frequently the property is laid in the parishioners; sometimes in the rector alone, and sometimes in the churchwardens alone. See 1 Hale, P. C. 51, 81; 2 East, P. C. 681. In a private chapel the property ought perhaps to be laid in the private owner.

*SEA AND RIVER BANKS, PONDS, MILL-DAMS, &c.

Damaging sea and river banks and works belonging to ports, harbors, &c.] By the 24 & 25 Vict. c. 97, s. 30, "Whosoever shall unlawfully and maliciously break down, or cut down, or otherwise damage or destroy any sea bank or sea wall, or the bank, dam, or wall of or belonging to any river, canal, drain, reservoir, pool, or marsh, whereby any land or building shall be, or shall be in danger of being overflowed or damaged, or shall unlawfully and maliciously throw, break, or cut down, level, undermine, or otherwise destroy any quay, wharf, jetty, lock, sluice, floodgate, weir, tunnel, towing-path, drain, watercourse, or other work belonging to any port, harbor, dock, or reservoir, or on or belonging to any navigable river or canal, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement; and if a male under the age of sixteen years, with or without whipping."

By s. 31, "Whosoever shall unlawfully and maliciously cut off, draw up, or remove any piles, chalk, or other materials fixed in the ground, and used for securing any sea bank or sea wall, or the bank, dam, or wall of any river, canal, drain, aqueduct, marsh, reservoir, pool, port, harbor, dock, quay, wharf, jetty, or lock, or shall unlawfully and maliciously open or draw up any floodgate or sluice, or do any other injury or mischief to any navigable river or canal, with intent and so as thereby to obstruct or prevent the carrying on, completing, or maintaining the navigation thereof, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement; and, if a male under the age of sixteen years, with or without whipping."

Injuries to fish-ponds, mill-dams, &c.] By s. 32, "Whosoever shall unlawfully and maliciously cut through, break down, or otherwise destroy the dam, floodgate, or sluice of any fish-pond, or of any water which shall be private property, or in which there shall be any private right of fishery, with intent thereby to take or destroy any of the fish in such pond or water, or so as thereby to cause the loss or destruction of any of the fish, or shall unlawfully and maliciously put any lime or other noxious material in any such pond or water with intent thereby to destroy any of the fish that may then be or that may thereafter be put therein, or shall unlawfully and maliciously cut through, break down, or otherwise destroy the dam or floodgate of any [*856] millpond, reservoir, or pool, shall be guilty of a misdemeanor, and *being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement; and if a male under the age of sixteen years, with or without whipping."

*SEAMEN, OFFENCES RELATING TO.

Forcing seamen on shore.] By the 17 & 18 Vict. c. 104, s. 206, "If the master or any other person belonging to any British ship, wrongfully forces on shore and leaves behind, or otherwise wilfully and wrongfully leaves behind, in any place on shore or at sea in or out of her majesty's dominions, any seaman or apprentice belonging to such ship before the completion of the voyage for which such person was engaged, or the return of the ship to the United Kingdom, he shall for each such offence be deemed guilty of a misdemeanor."

Wrongfully discharging or leaving behind seamen.] By s. 207, "If the master of any British ship does any of the following things (that is to say):

(1.) Discharges any seaman or apprentice in any place situate in any British possession abroad (except the possession in which he was shipped), without previously obtaining the sanction in writing, indorsed on the agreement of some public shipping master or other officer duly appointed by the local government in that behalf, or (in the absence of any such functionary) of the chief officer of customs resident at or near the place where the discharge takes place:

(2.) Discharges any seaman or apprentice at any place out of her majesty's dominions, without previously obtaining the sanction so indorsed as aforesaid of the British consular officer there or (in his absence) of two respectable merchants resident there:

(3.) Leaves behind any seaman or apprentice at any place situate in any British possession abroad, on any ground whatever, without previously obtaining a certificate in writing, so indorsed as aforesaid, from such officer or person as aforesaid, stating the fact and the cause thereof, whether such cause be unfitness or inability to proceed to sea, or desertion, or disappearance:

(4.) Leaves behind any seaman or apprentice at any place out of her majesty's dominions, on shore or at sea, on any ground whatever, without previously obtaining the certificate, indorsed in manner and to the effect last aforesaid, of the British consular officer there or (in his absence) of two respectable merchants, if there is any such at or near the place where the ship then is:

he shall for each such default be deemed guilty of a misdemeanor, and the said functionaries shall, and the said merchants may, examine into the ground of such proposed discharge, or into the allegation of such unfitness, inability, desertion, or disappearance as aforesaid, in a summary way, and may for that purpose, if they think fit so to do, administer oaths, and may either grant or refuse such sanction or certificate as appears to them to be just."

On whom burden of proof lies.] By s. 208, "Upon the trial of *any in- [*858] formation, indictment, or other proceeding against any person for discharging or leaving behind any seaman or apprentice, contrary to the provisions of this act, it shall lie upon such person either to produce the sanction or certificate hereby required, or to prove that he had obtained the same previously to having discharged or left behind such seaman or apprentice, or that it was impracticable for him to obtain such sanction or certificate."

Punishment.] By s. 517, "Every offence declared by this act a misdemeanor shall be punishable by fine or imprisonment, with or without hard labor."

*SHIPS AND VESSELS.

Stealing from ships, docks, wharves, &c., ... 859
ship in distress or wrecked, ... 859
Setting fire to, casting away, or destroying ship, ... 859
casting away, or destroying ship, with intent to murder, . . . 859
&c., ship, with intent to prejudice owner or underwriter, . . . 860
Attempting to set fire to, cast away, or destroy ship, ... 860
Blowing up or attempting to blow up ships, ... 860
Otherwise damaging ships, ... 860
Exhibiting false signals or otherwise endangering ships, ... 860
Removing or concealing buoys and other sea-marks, ... 860
Injuries to wrecks and articles belonging thereto, ... 861
Receiving anchors, &c., ... 861
Misconduct endangering ship or safety of persons on board, ... 861
Venue, ... 862

Stealing from ships, docks, wharves, &c.] By the 24 & 25 Vict. c. 96, s. 63, "Whosoever shall steal any goods or merchandise in any vessel, barge, or boat, of any description whatsoever, in any haven, or in any port of entry or discharge, or upon any navigable river or canal, or in any creek or basin belonging to or communicating with any such haven, port, river, or canal, or shall steal any goods or merchandise from any dock, wharf, or quay adjacent to any such haven, port, river, canal, creek, or basin, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Stealing from ships in distress or wrecked.] By s. 64, "Whosoever shall plunder or steal any part of any ship or vessel which shall be in distress or wrecked, stranded or cast on shore, or any goods, merchandise, or articles of any kind belonging to such ship or vessel, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen years, and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Setting fire to, casting away, or destroying ship.] See 24 & 25 Vict. c. 97, s. 42, *supra*, p. 262.

Setting fire to, casting away, or destroying ship, with intent to murder.] See 24 & 25 Vict. c. 100, s. 18, *supra*, p. 262.

[*860] **Setting fire to or casting away ship, with intent to prejudice owner or underwriter.*] See 24 & 25 Vict. c. 97, s. 43, *supra*, p. 262.

Attempting to set fire to, cast away, or destroy ship.] See 24 & 25 Vict. c. 97, s. 44, *supra*, p. 264.

Blowing up or attempting to blow up ships.] See 24 & 25 Vict. c. 97, s. 45, and c. 100, s. 30, *supra*, p. 533.

Otherwise damaging ships.] By the 24 & 25 Vict. c. 97, s. 46, "Whosoever shall unlawfully and maliciously damage otherwise than by fire, gunpowder, or other explosive substance, any ship or vessel, whether complete or in an unfinished state, with intent to destroy the same or render the same useless, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years, and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping."

Exhibiting false signals or otherwise endangering ships] By s. 47, "Whosoever shall unlawfully mask, alter, or remove any light or signal, or unlawfully exhibit any false light or signal, with intent to bring any ship, vessel, or boat into danger, or shall unlawfully and maliciously do anything tending to the immediate loss or destruction of any ship, vessel, or boat, and for which no punishment is hereinbefore provided, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping."

Removing or concealing buoys and other sea-marks.] By s. 48, "Whosoever shall unlawfully and maliciously cut away, cast adrift, remove, alter, deface, sink, or destroy, or shall unlawfully and maliciously do any act, with intent to cut away, cast adrift, remove, alter, deface, sink, or destroy, or shall in any other manner unlawfully and maliciously injure or conceal any boat, buoy, buoy-rope, perch, or mark used or intended for the guidance of seamen or for the purpose of navigation, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and if a male under the age of sixteen years, with or without whipping."

Also, by the 1 & 2 Geo. 4, c. 75, s. 1, "If any person or persons shall wilfully cut away, cast adrift, remove, alter, deface, sink, or destroy, or in any other way injure or conceal any buoy, buoy-rope, or mark belonging to any ship or vessel, or which may be attached to any anchor or cable belonging to any ship or vessel whatever, whether in distress or otherwise, such person or persons so offending *shall, [*861] on being convicted of such offence, be deemed and adjudged to be guilty of felony, and shall be liable to be transported for any term not exceeding seven years, or to be imprisoned for any number of years, at the discretion of the court in which the conviction shall be made."

Injuries to wrecks and articles belonging thereto.] By the 24 & 25 Vict. c. 97, s. 49, "Whosoever shall unlawfully and maliciously destroy any part of any ship or vessel which shall be in distress, or wrecked, stranded, or cast on shore, or any goods, merchandise, or articles of any kind belonging to such ship or vessel, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Receiving anchors, &c.] By the 1 & 2 Geo. 4, c. 75, s. 12, "If any person shall knowingly and wilfully, and with intent to defraud and injure the true owner or owners thereof, or any person interested therein as aforesaid, purchase or receive any anchors, cables, or goods or merchandise, which may have been taken up, weighed, swept for, or taken possession of, whether the same shall have belonged to any ship or vessel in distress or otherwise, or whether the same shall have been preserved from any wreck, if the directions thereinbefore contained, with regard to such articles, shall not have been previously complied with, such person or persons shall, on conviction thereof, be deemed guilty of receiving stolen goods, knowing the same to have been stolen, as if the same had been stolen on shore, and suffer the like punishment as for a misdemeanor at the common law, or be liable to be transported for seven years, at the discretion of the court before which he, she, or they shall be tried."

And by sect. 15, persons carrying anchors and cables abroad may be transported for any term not exceeding seven years.

By 1 & 2 Geo. 4, c. 76, similar provisions are made for the Cinque Ports.

See also the 2 Geo. 2, c. 28, s. 13, and the 2 & 3 Vict. c. 47, ss. 27, 28, as to cutting and destroying, &c., cordage, &c., on the Thames.

Misconduct endangering ship or safety of persons on board.] By the 17 & 18 Vict. c. 104, s. 239, "Any master of, or any seaman or apprentice belonging to any British ship, who by wilful breach of duty, or by neglect of duty, or by reason of drunkenness, does any act tending to the immediate loss, destruction, or serious damage of such ship, or tending immediately to endanger the life or limb of any person belonging to or on board of such ship, or who by wilful breach of duty, or by neglect of duty, or by reason of drunkenness, refuses or omits to do any lawful act proper and requisite to be done by him for preserving such ship from immediate loss, destruction, or serious damage, or for preserving any person belonging to or on board of such ship from immediate danger to life or limb, shall for every such offence be deemed guilty of a misdemeanor."

By s. 366, the same provision is made with respect to pilots "when in charge of any ship."

[*862] *By s. 518, "Every offence by this act declared to be a misdemeanor shall be punishable by fine or imprisonment with or without hard labor."

Venue.] By the 24 & 25 Vict. c. 96, s. 64 (*supra*), in offences under that section, "the offender may be indicted and tried either in the county or place in which the offence shall have been committed, or in any county or place next adjoining." By the 17 & 18 Vict. c. 104, s. 520, "For the purpose of giving jurisdiction under this act, every offence shall be deemed to have been committed, and every cause of complaint to have arisen, either in the place in which the same actually was commited or arose, or in any place in which the offender or person complained against may be."

Also by the 1 & 2 Geo. 4, c. 75, s. 22, all felonies, misdemeanors, and other offences under that act "shall and may be laid to be committed, and shall be tried in any city or county (being a county) where any such article, matter, or thing in relation to which such offence shall have been committed, shall have been found in the possession of the person committing the same."

*SHOOTING.

Shooting or attempting to shoot, with intent to murder.] See 24 & 25 Vict. c. 100, s. 14, *supra*, p. 720.

Shooting or attempting to shoot, with intent to do grievous bodily harm.] See 24 & 25 Vict. c. 100, s. 18, *supra*, p. 274.

What shall constitute loaded arms.] By the 24 & 25 Vict. c. 100, s. 19, "Any gun, pistol, or other arms which shall be loaded in the barrel with gunpowder, or any other explosive substance, and ball, shot, slug, or other destructive material, shall be deemed to be loaded arms within the meaning of this act, although the attempt to discharge the same may fail from want of proper priming or from any other cause."

Proof of arms being loaded.] It makes no difference what the gun or other arm is loaded with, if it is capable of effecting the intent with which the prisoner is charged. Per Le Blanc, J., R. v. Kitchen, Russ. & Ry. 95. Upon an indictment under the 43 Geo. 3, c. 48, s. 1, for priming and levelling a blunderbuss, loaded with gunpowder and leaden shot, and attempting, by drawing the trigger, to discharge the same, with intent to murder, the jury found that the blunderbuss was not primed when the prisoner drew the trigger, but found the prisoner guilty. On a case reserved, a majority of the judges considered the verdict of the jury as equivalent to finding by them that the blunderbuss was not so loaded as to be capable of doing mischief by having the trigger drawn, and if such were the case, they were of opinion in point of law that it was not loaded within the meaning of the statute. R. v. Carr, Russ. & Ry. 377. So upon an indictment under the 9 Geo. 4, c. 31, for attempting to discharge a loaded pistol, by drawing the trigger, with intent, &c., the defence was, that the touch-hole was plugged; Patteson, J., said to the jury, "If you think that the pistol had its touch-hole plugged, so that it could not by possibility do mischief, the prisoner ought to be acquitted, because I do not think that a pistol so circumstanced ought to be considered as loaded arms within the meaning of the act." R. v. Harris, 5 C. & P. 159: 24 E. C. L. R. A rifle, which is loaded, but which, for want of priming, will not go off, is not a *loaded arm* within the third section; and the pointing a rifle thus circumstanced at a person, and pulling the trigger of it, whereby the cock and hammer were thrown, and the pan opened, will not warrant a conviction under the third section. R. v. James, 1 C. & K. 530: 47 E. C. L. R. But see now 24 & 25 Vict. c. 100, s. 19, *supra*.

Where the prisoner, by snapping a percussion cap, discharged a gun-barrel detached from the stock, Patteson, J., held this to be shooting with "loaded arms" within the 9 Geo. 4, c. 31, and, after consulting several of the judges, refused to reserve the point. R. v. Coates, 6 C. & P. 394: 25 E. C. L. R.

**Proof of shooting.*] Where the prisoner fired into a room in which he [*864] supposed the prosecutor to be, but in point of fact he was in another part of his house, where he could not by possibility be reached by the shot, Gurney, B., held that the indictment could not be supported. R. v. Lovell, 2 Moo. & R. 30. An indictment for maliciously shooting at A. B. is supported, if he be struck by the shot, though the gun be aimed at a different person. R. v. Jarvis, 2 Moo. & R. 40.

Some act must be done to prove an attempt to discharge fire-arms. Merely presenting them is not sufficient. R. v. Lewis, 9 C. & P. 523: 38 E. C. L. R. If a

person, intending to shoot another, put his finger on the trigger of a loaded fire-arm, but is prevented from pulling the trigger, this is not an attempt to discharge loaded arms within the statute. R. v. St. George, 9 C. & P. 483.

Sending a tin box, filled with gunpowder and peas, to the prosecutor, so contrived that the prosecutor should set fire to the powder by opening the box, was held by the judges not to be an attempt to discharge loaded arms within the 9 Geo. 4, c. 31, s. 11. R. v. Mountford, 1 Moo. C. C. 441.

[*865] *SHOP.

Breaking in or out of, and committing any felony in a shop, warehouse, or counting-house.] THIS offence is provided for by the 24 & 25 Vict. c. 96, s. 56, *supra*, p. 400. The general law on this subject will be found under the heads of Burglary and Dwelling-house.

What buildings are within the section.] It was held by Alderson, B., that a workshop, such as a carpenter's or blacksmith's shop, was not within the 7 & 8 Geo. 4, c. 29, s. 15, a similar act to that now in force. R. v. Sanders, 9 Carr. & P. 79. But was subsequently held by Lord Denman, C. J., in R. v. Carter, 1 C. & K. 173: 47 E. C. L. R., that a person who breaks into an ordinary blacksmith's shop, containing a forge and used as a workshop only, not being inhabited nor attached to any dwelling-house, and who steals goods therein, may be convicted of breaking into a shop and stealing goods, under the foregoing section. A building formed part of premises employed as chemical works; it was commonly called "the machine house," a weighing-machine being there, where all the goods sent out were weighed, and a book being kept there, in which entries of the goods so weighed were made. It appeared that the account of the time of the workmen employed in the works was kept in that place; that the wages of the men were paid there; that the books in which the entries of time and the payment of wages were entered, were brought to the building for the purpose of making entries and paying wages, but that at other times they were kept in what was called "the office," where the general books and accounts of the concern were kept. It was held, that this building was a counting-house within this section. R. v. Potter, 2 Den. C. C. R. 235; S. C. 20 L. J. M. C. 170. A cellar used merely for the deposit of goods intended for removal and sale, is a warehouse within this section. Per Rolfe, B., in R. v. Hill, 2 Moo. & R. 458.

[*866] *SMUGGLING.

AND OTHER OFFENCES CONNECTED WITH THE CUSTOMS.

Making signals to smuggling vessels, ... 866
Assembling armed to assist in smuggling, ... 867
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armed with offensive weapons, ... 868
Shooting at a vessel belonging to the navy, &c., ... 868
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THE statutes against the offence of smuggling were included in the 6 Geo. 4, c.

108; but other statutes having been subsequently passed, the whole were consolidated in the 3 & 4 Wm. 4, c. 53. This latter statute, and the parts of acts subsequently passed for the amendment of the law, were consolidated in the 8 & 9 Vict. c. 87 (U. K.), which was repealed by the 16 & 17 Vict. c. 107. This act contains various regulations with regard to prosecutions by the customs in general.

Making signals to smuggling vessels.] By the 16 & 17 Vict. c. 107, s. 244, "No person shall, after sunset and before sunrise, between the 21st day of September and the 1st day of April, or after the hour of eight in the evening and before the hour of six in the morning, at any other time of the year, make, aid, or assist in making any signal in or on board, or from any ship or boat, or on or from any part of the coast or shore of the United Kingdom, or within six miles of any part of such coast or shore, for the purpose of giving notice to any person on board any smuggling ship or boat, whether any person on board of any such ship or boat be or not within distance to notice any such signal; and if any person, contrary to this act, shall make or cause to be made, or aid or assist in making any such signal, such person so offending shall be guilty of a misdemeanor; and any person may stop, arrest, and detain the person so offending, and convey him before any justice, who, if he see cause, shall commit the offender to the next county gaol, there to remain until delivered by due course of law; and it shall not be necessary to prove on any indictment or information in such case that any ship or boat was actually on the coast; and the offender, being duly convicted, shall, by order of the court before whom he shall be convicted, either forfeit the penalty of one hundred pounds, or, at the discretion of such *court, be committed to the common gaol or house of correction, [*867] there to be kept to hard labor for any term not exceeding one year."

By s. 245, "If any person be charged with and indicted for having made, or caused to be made, or for aiding or assisting in making any such signal as aforesaid, the burden of proof that such signal, so charged as having been made with intent and for the purpose of giving such notice as aforesaid, was not made with such intent and for such purpose, shall be upon the defendant against whom such charge is made or such indictment is found."

By s. 246, any person may prevent such signals being made, and may enter lands for that purpose.

Assembling armed to assist in smuggling.] By the 16 & 17 Vict. c. 107, s. 246, "If any persons to the number of three or more, armed with fire-arms or other offensive weapons, shall within the United Kingdom, or within the limits of any port, harbor, or creek thereof, be assembled in order to be aiding and assisting in the illegal landing, running, or carrying away of any prohibited goods, or any goods liable to any duties which have not been paid or secured, or in rescuing or taking away any such goods as aforesaid, after seizure, from the officer of the customs, or other officer authorized to seize the same, or from any person or persons employed by them, or assisting them, or from the place where the same shall have been lodged by them, or in rescuing any person who shall have been apprehended for any of the offences made felony by this or any act relating to the customs, or in the preventing of the apprehension of any person who shall have been guilty of such offence, or in case any persons to the number of three or more, so armed as aforesaid, shall, within the United Kingdom, or within the limits of any port, harbor, or creek thereof, be so aiding or assisting, every person so offending, and every person aiding, abetting, or assisting therein, shall, being thereof convicted, be adjudged guilty of felony, and shall be liable, at the discretion of the court, before which he shall be convicted,

to be transported beyond the seas for the term of his natural life, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years." This is *verbatim* the same as the 8 & 9 Vict. c. 87, s. 63.

On the part of the prosecution, the evidence will be—1, that the defendants to the number of three or more were assembled together; 2, for the purpose of aiding and abetting; 3, that they, or some of them (see R. v. Smith, Russ. & Ry. 386, *ante*, p. 523), were armed; 4, with offensive weapons.

Proof of being assembled together.] It must be proved that the prisoners to the number of three or more, were assembled together, and as it seems, deliberately, for the purpose of aiding and assisting in the commission of the illegal act. Where a number of drunken men come from an alehouse, and hastily set themselves to carry away some Geneva which had been seized, it was considered very doubtful whether the case came within the statute 19 Geo. 2, c. 34, the words of which manifestly allude to the circumstance of great multitudes of people coming down upon the beach of the sea, for the purpose of escorting uncustomed goods. R. v. Hutchinson, 1 Leach, 343.

Reasonable proof must be given from which the jury may infer that the goods were uncustomed. See R. v. Shelley, 1 Leach, 340 (*n*).

[*868] **Proof of being armed with offensive weapons.*] Although it may be difficult to define what is to be called an offensive weapon, yet it would be going too far to say, that nothing but guns, pistols, daggers, and instruments of war are to be so considered; bludgeons, properly so called, and clubs, and anything not in common use for any other purpose than a weapon, being clearly offensive weapons within the meaning of the act. R. v. Cosan, 1 Leach, 342, 343 (*n*). Large sticks, in one case, were held not to be offensive weapons; the preamble of the statute showing that they must be what the law calls dangerous. R. v. Ince, 1 Leach, 342 (*n*). But on an indictment with intent to rob, a common walking-stick has been held to be an offensive weapon. R. v. Johnson, Russ. & Ry. 492, and R. v. Fry, 2 Moo. & R. 42, *ante*, p. 523. See also R. v. Sharwin, 1 East, P. C. 321. A whip was held not to be "an offensive weapon," within the 9 Geo. 2, c. 35: R. v. Fletcher, 1 Leach, 23; and, under the 6 Geo. 4, c. 138, *bats*, which are poles used by smugglers to carry tubs, were held not to be offensive weapons. R. v. Noake, 5 C. & P. 326: 24 E. C. L. R. If in a sudden affray a man snatch up a hatchet, this does not come within the statute. R. v. Rose, 1 Leach (*n*). See *supra*, p. 523.

Shooting at a vessel belonging to the navy, &c.] By s. 64 of the 16 & 17 Vict. c. 107, s. 249, "If any person shall maliciously shoot at any vessel or boat belonging to her majesty's navy, or in the service of the revenue, within one hundred leagues of any part of the coast of the United Kingdom, or shall maliciously shoot at, maim or wound any officer of the army, navy, or marines, being duly employed for the prevention of smuggling and on full pay, or any officer of customs or excise, or any person acting in his aid or assistance, or duly employed for the prevention of smuggling, in the execution of his office or duty (see section 306, *post*, p. 869), every person so offending, and every person aiding, abetting, or assisting therein, shall, being lawfully convicted, be adjudged guilty of felony, and shall be liable, at the discretion of the court before which he shall be convicted, to be transported beyond the seas, for the term of the natural life of such person, or for any term not less than fifteen years, or to be imprisoned for any term not exceeding three years."

Upon an indictment under the first part of this section, the prosecutor must prove —1, the shooting; 2, the malice; 3, that the vessel shot at was belonging to the navy, or in the service of the revenue; 4, that the vessel was within 100 leagues of the coast.

Upon the statute 52 Geo. 3, c. 143, it was held, that if a custom-house vessel chased a smuggler, and fired into her without hoisting such a pendant and ensign as the statute 56 Geo. 3, st. 2, c. 104, s. 8, required, the returning of the fire by the smuggler was not malicious within the act. R. v. Reynolds, Russ. & Ry. 465.

Being in company with others having prohibited goods.] By the 16 & 17 Vict. c. 107, s. 260, "If any person, in company with more than four others, be found with any goods liable to forfeiture under this or any other act relating to the customs or excise, or in company with one other person, within five miles of the sea-coast, or of any tidal river, and carrying offensive arms or weapons, or disguised in any way, every such person shall be adjudged guilty of felony, and shall, on conviction of such offence, be transported as a felon for the term of seven years."

**Assaults upon revenue officers.*] Assaults upon revenue officers in the [*869] execution of their duty are included in the general provisions of the 24 & 25 Vict. c. 100, s. 38; *supra*, p. 274; and by the 16 & 17 Vict. c. 107, s. 201, "If any person shall by force or violence, assault, resist, or obstruct any officer of the army, navy, or marines, being duly employed for the prevention of smuggling, and on full pay, or any officer of customs or excise, or other person duly employed for the prevention of smuggling, in the due execution of his or their duty or any person acting in his or their aid, every person so offending, being thereof convicted, shall be transported for seven years, or sentenced to be imprisoned in any house of correction or common gaol, and be kept to hard labor, for any term not exceeding three years, at the discretion of the court before whom such offender shall be tried and convicted as aforesaid."

Compensations and rewards.] See as to compensations and rewards to officers and others employed in preventing smuggling, 16 & 17 Vict. c. 107, ss. 254—261.

Indictments—how preferred and found.] By the 16 & 17 Vict. c. 107, s. 301, "No indictment shall be preferred for any offence against this or any other act or acts relating to the customs or excise, nor shall any suit be commenced for the recovery of any penalty or forfeiture for any such offence, except in the cases of persons detained and carried before one or more justices in pursuance for such act or acts as aforesaid, unless such indictment shall be preferred under the direction of the commissioners of customs or inland revenue, or unless such suit shall be commenced in the name of her majesty's attorney-general for England or Ireland, or in the name of the lord advocate of Scotland, or in the name of some officer of customs or excise, under the direction of the lord commissioners respectively." See s. 306, *infra*.

Limitation of prosecution.] By the 16 & 17 Vict. c. 107, s. 303, "All suits, indictments, or information brought, or exhibited for any offence against this or any other act relating to the customs in any court, shall be brought, or exhibited within three years next after the date of the offence committed."

Venue.] By the 16 & 17 Vict. c. 107, s. 304, "Any indictment, prosecution, or information which may be instituted or brought under the direction of the commis-

sioners of customs relating to the customs shall and may be inquired of, examined, tried, and determined in any county of England, when the offence is committed in England, and in any county of Scotland, when the offence is committed in Scotland, and in any county of Ireland, when the offence is committed in Ireland, in such manner and form as if the offence had been committed in the said county, where the said indictment or information shall be tried."

Presumptions.] By s. 306, "The averment that the commissioners of customs or inland revenue have directed or elected that any information or proceedings under this or any other act relating to the customs or excise shall be instituted, or that any ship or boat is foreign, or belonging wholly or in part to her majesty's subjects, or [*870] *that any person detained or found on board any ship or boat liable to seizure, is or is not a subject of her majesty . . . . . or that any person is an officer of customs or excise, or that any person was employed for the prevention of smuggling, or that the offence was committed within the limits of any port, or where the offence is committed in any port of the United Kingdom, the naming of such in any information or proceeding shall be deemed to be sufficient, without proof of such fact or facts, unless the defendant in any such case shall prove to the contrary." By s. 107, "If upon any trial a question shall arise whether any person is an officer of the army, navy, or marines, being duly employed for the prevention of smuggling, and on full pay, or an officer of customs or excise, his own evidence thereof, and other evidence of his having acted as such, shall be deemed sufficient, and such person shall not be required to produce his commission or deputation, unless sufficient proof shall be given to the contrary."

[*871] *SODOMY.

By the 24 & 25 Vict. c. 100, s. 61, "Whoever shall be convicted of the abominable crime of buggery committed either with mankind or with any animal, shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than ten years."

If the offence be committed on a boy under fourteen years of age, it is felony in the agent only. 1 Hale, 670; 3 Inst. 59. In R. v. Allen, 1 Den. C. C. R. 364, the prisoner induced a boy of twelve years of age to have carnal knowledge of his person, the prisoner having been the pathic in the crime; and the court were unanimously of opinion that the conviction was right.

In one case a majority of the judges were of opinion that the commission of the crime with a woman was indictable. R. v. Wiseman, Fortescue, 91; and see R. v. Jellyman, 8 C. & P. 604: 34 E. C. L. R., where Patteson, J., held that a married woman who consents to her husband committing an unnatural offence with her, is an accomplice in the felony, and as such that her evidence requires confirmation, though consent or non-consent is not material to the offence.

The act in a child's mouth does not constitute the offence. R. v. Jacob, Russ. & Ry. 331.

The offence would be complete on proof of penetration only; see 24 & 25 Vict. c. 100, s. 63; *supra*, p. 807.(1)

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(1) Davis v. The State, 3 Har. & Johns. 154.

*SPRING GUNS.

By the 24 & 25 Vict c. 100, s. 31, "Whosoever shall set or place, or cause to be set or placed, any spring gun, man-trap, or other engine calculated to destroy human life or inflict grievous bodily harm, with the intent that the same or whereby the same may destroy or inflict grievous bodily harm upon a trespasser or other person coming in contact therewith, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labor; and whosoever shall knowingly and wilfully permit any such spring gun, man-trap, or other engine which may have been set or placed in any place then being in or afterwards coming into his possession or occupation by some other person to continue so set or placed, shall be deemed to have set and placed such gun, trap, or engine with such intent as aforesaid: provided that nothing in this section contained shall extend to make it illegal to set or place any gin or trap such as may have been or may be usually set or placed with the intent of destroying vermin: provided also, that nothing in this section shall be deemed to make it unlawful to set or place or cause to be set or placed, or to be continued set or placed, from sunset to sunrise, any spring gun, man-trap, or other engine which shall be set or placed, or caused, or continued to be set or placed, in a dwelling-house, for the protection thereof."

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*TELEGRAPHS, INJURIES TO. [*873]

By the 24 & 25 Vict. c. 97, s. 37, "Whosoever shall unlawfully and maliciously cut, break, throw down, destroy, injure, or remove any battery, machinery, wire, cable, post, or other matter or thing whatsoever, being part of or being used or employed in or about any electric or magnetic telegraph, or in the working thereof, or shall unlawfully and maliciously prevent or obstruct in any manner whatsoever, the sending, conveyance, or delivery of any communication by any such telegraph, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labor: provided that if it shall appear to any justice, on the examination of any person charged with any offence against this section, that it is not expedient to the ends of justice that the same should be prosecuted by indictment, the justice may proceed summarily to hear and determine the same, and the offender shall on conviction thereof, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labor, for any term not exceeding three months, or else shall forfeit and pay such sum of money not exceeding ten pounds, as to the justices shall seem meet."

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*TENANTS AND LODGERS. [*874]

Injuries committed by tenants or lodgers.] By the 24 & 25 Vict. c. 97, s. 13, "Whosoever, being possessed of any dwelling-house or other building, or part of any

dwelling-house or other building, held for any term of years or other less term, or at will, or held over after the termination of any tenancy, shall unlawfully and maliciously pull down or demolish, or begin to pull down or demolish, the same or part thereof, or shall unlawfully and maliciously pull down or sever from the freehold any fixture being fixed in or to such dwelling-house or building, or part of such dwelling-house or building, shall be guilty of a misdemeanor."

Larceny by tenant or lodger.] By the 24 & 25 Vict. c. 96, s. 74, "Whosoever shall steal any chattel or fixture let to be used by him or her in or with any house or lodging, whether the contract shall have been entered into by him or her or by her husband, or by any person on behalf of him or her or her husband, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and if a male under the age of sixteen years with or without whipping, and in case the value of such chattel or fixture shall exceed the sum of five pounds, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and if a male under the age of sixteen years with or without whipping; and in every case of stealing any chattel in this section mentioned it shall be lawful to prefer an indictment in the common form as for larceny, and in every case of stealing any fixture in this section mentioned to prefer an indictment in the same form as if the offender were not a tenant or lodger, and in either case to lay the property in the owner or person letting to hire."

[*875] *THREATS.

Sending letters threatening to murder, ... 875
demanding property with menaces, ... 875
Demanding property with menaces, with intent to steal, ... 875
Sending letters threatening to accuse of crime, with intent to extort money, . . 876
Accusing or threatening to accuse, with intent to extort, ... 876
Inducing a person by threats to execute deeds, &c., ... 876
Immaterial from whom menaces proceed, ... 877
Sending letters threatening to burn or injure property, ... 877
Proof of sending or delivering the letter or writing, ... 877
the demand, ... 878
the threat, ... 879
To accuse of an infamous crime, ... 881

Sending letters threatening to murder.] By the 24 & 25 Vict. c. 100, s. 16, "Whosoever shall maliciously send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing threatening to kill or murder any person, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding ten years, and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and if a male under the age of sixteen years, with or without whipping."

Sending letters demanding property with menaces.] By the 24 & 25 Vict. c. 96, s. 44, "Whosoever shall send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing demanding of any person with menaces, and without any reasonable and probable claim, any property, chattel, money, valuable security, or other valuable thing, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and if a male under the age of sixteen years, with or without whipping."

Demanding property with menaces, with intent to steal.] By s. 45, "Whosoever shall with menaces or by force demand any property, chattel, money, valuable security, or other valuable thing, of any person, with intent to steal the same, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned *for any term not exceeding two years, with or without hard labor, and with [*876] or without solitary confinement."

Sending letters threatening to accuse of crime, with intent to extort money.] By s. 46, "Whosoever shall send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing accusing, or threatening to accuse, any other person of any crime punishable by law with death or penal servitude for not less than seven years, or for any assault, with intent to commit any rape, or for any attempt or endeavor to commit any rape, or of any infamous crime as hereinafter defined, with a view or intent in any of such cases to extort or gain, by means of such letter or writing, any property, chattel, money, valuable security, or other valuable thing, from any person, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and if a male under the age of sixteen years, with or without whipping; and the abominable crime of buggery, committed either with mankind or with beast, and every assault, with intent to commit the said abominable crime, and every attempt or endeavor to commit the said abominable crime, and every solicitation, persuasion, promise, or threat, offered or made to any person whereby to move or induce such person to commit or permit the said abominable crime, shall be deemed to be an infamous crime within the meaning of this act."

Accusing or threatening to accuse, with intent to extort.] By s. 47, "Whosoever shall accuse, or threaten to accuse, either the person to whom such accusation or threat shall be made, or any other person, of any of the infamous or other crimes lastly hereinbefore mentioned, with the view or intent in any of the cases last aforesaid to extort or gain from such person so accused or threatened to be accused, or from any other person, any property, chattel, money, valuable security, or other valuable thing, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and if a male under the age of sixteen years, with or without whipping."

Inducing a person by threats to execute deed, &c.] By s. 48, "Whosoever, with intent to defraud or injure any other person, shall, by any unlawful violence to or restraint of, or threat or violence to or restraint of, the person of another, or by accusing or threatening to accuse, any person of any treason, felony, or infamous crime as hereinbefore defined, compel or induce any person to execute, make, accept, indorse, alter, or destroy, the whole or any part of any valuable security, or to write, impress, or affix his name or the name of any other person, or of any company, firm, or copartnership, or the seal of any body corporate, company, or society, upon or to any paper or parchment, in order that the same may be afterwards made or converted into, or used or dealt with as a valuable security, shall be guilty of felony, and being [*877] convicted thereof, shall be liable, at the *discretion of the court, to be kept in penal servitude for life, or for any term not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

Immaterial from whom menaces proceed.] By s. 49, "It shall be immaterial whether the menaces or threats hereinbefore mentioned be of violence, injury, or accusation, to be caused or made by the offender or by any other person."

Sending letters threatening to burn or injure property.] By the 24 & 25 Vict. c. 97, s. 50, "Whosoever shall send, deliver, or utter, or directly or indirectly cause to be received, knowing the contents thereof, any letter or writing threatening to burn or destroy any house, barn, or other building, or any rick or stack of grain, hay, or straw, or other agricultural produce, or any grain, hay, or straw, or other agricultural produce in or under any building, or any ship or vessel, or to kill, maim, or wound any cattle, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding ten years, and not less than three years,—or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and if a male under the age of sixteen years, with or without whipping."

Proof of the sending or delivering of the letter or writing.] The sending or delivering of the letter need not be immediately by the prisoner to the prosecutor; if it be proved to be sent or delivered by his means and directions, it is sufficient. Upon an indictment on the repealed statute 27 Geo. 2, c. 15, for sending a threatening letter to William Kirby, it appeared that the threats were, in fact, directed against two persons, named Rodwell and Brook. Kirby received the letter by the post. The judges held, that as Kirby was not threatened, the judgment must be arrested, but they intimated that if Kirby had delivered the letter to Rodwell or Brook, and a jury should think that the prisoner intended he should so deliver it, this would be a sending by the prisoner to Rodwell or Brook, and would support a charge to that effect. R. v. Paddle, Russ. & Ry. 484. Where the prisoner dropped the letter upon the steps of the prosecutor's house, and ran away, Abbott, C. J., left it to the jury to say, whether they thought the prisoner carried the letter and dropped it, meaning that it should be conveyed to the prosecutor, and that he should be made acquainted with its contents, directing them to find him guilty if they were of opinion in the affirmative. R. v. Wagstaff, Russ. & Ry. 398. So in a case upon the 9 Geo. 1, c. 22, for sending a letter demanding money, Yates, J., observed, that it seemed to be very immaterial whether the letter were sent directly to the prosecutor or were put into a more oblique course of conveyance by which it might finally come to his hands. The

fact was, that the prisoner dropped the letter into a vestry-room, which the prosecutor frequented every Sunday morning, before the service began, where the sexton picked it up, and delivered it to him. R. v. Lloyd, 2 East, P. C. 1122. In a note upon this case, Mr. East says, *quære*, whether, if one intentionally put a *letter in a place where it is likely to be seen and read by the party for [*878] whom it is intended, or to be found by some other person who, it is expected, will forward it to such party, this may not be said to be a *sending* to such party? The same evidence was given in R. v. Springett (2 East, P. C. 1115), in support of the allegation of sending a threatening letter to the prosecutor, and no objection was taken on that ground. 2 East, P. C. 1123 (*n*). So where the evidence was that the letter was in the handwriting of the prisoner, who had sent it to the post-office, whence it was delivered in the usual manner, no objection was made. R. v. Hemings, 2 East, P. C. 1116.

An indictment for sending a threatening letter charged G. with sending to R., and threatening to burn houses, the property of B., who was R.'s tenant; it was proved that G. dropped the letter in a public road near R.'s house, that A. found it, and gave it to H., who opened it, read it, and gave it to E., who showed it both to B. and R. The court held that this was a sending within the statute, and that the conviction was good. R. v. Grimwade, 1 Den. C. C. R. 30.

Affixing a threatening letter on a gate in a public highway, near which the prosecutor would be likely to pass from his house, is some evidence to go to the jury of a sending of the letter to him. Per Cresswell, J., R. v. Williams, 1 Cox, C. C. 16.

The slightly altered wording of the present statutes might perhaps facilitate the proof in these cases.

Where there is no person in existence of the precise name which the letter bears as its address, it is a question for the jury whether the party into whose hands it falls was really the one for whom it was intended. Per Maule, J., R. v. Carruthers, 1 Cox, C. C. 139.

Proof of the demand.] On an indictment for demanding money with menaces, there must be evidence that the prisoner demanded some chattel, money, or valuable security; but it does not appear to be necessary that the demand should be made in words, if the conduct of the prisoner amount to a demand in fact. Where the prisoner seized the prosecutor, and one of them said, "Not a word, or I will blow your brains out!" and the other repeated the words, and appeared to be searching for some offensive weapon in his pocket, when, upon the prosecutor seizing him, the other prisoner ran away without anything more being said; on an objection that this was no *demand* (within the old statute 7 Geo. 2, c. 21, which enacts, that if any person shall, by menaces or by any forcible or violent manner, *demand* any money, &c., with intent, &c.), the court said, that *an actual demand* was not necessary, and that this was a fact for the jury, under all the circumstances of the case. The case was afterwards disposed of on the form of the indictment. R. v. Jackson, 1 Leach, 267; 1 East, P. C. 419; see 5 T. R. 169.

In another case upon the same statute, but upon an indictment for an assault, with an intent to rob, the circumstances were, that the prisoner did not make any demand or offer to demand the prosecutor's money, but only held a pistol in his hand towards the prosecutor, who was a coachman on his box, Willes, C. J., said, "A man who is dumb may make a demand of money, as if he stop a person on the highway and put his hand or hat into the carriage, or the like; but *in this case the prisoner [*879] only held a pistol to the coachman and said to him nothing but 'Stop.' That was no

such demand of money as the act requires." R. v. Parfait, 1 East, P. C. 416. Upon this Mr. East justly remarks, that the fact of stopping another on the highway, by presenting a pistol at his breast, is, if unexplained by other circumstances, sufficient evidence of a demand to go to a jury. The unfortunate sufferer understands the language but too well; and why must courts of justice be supposed ignorant of that which common experience teaches to all men? 1 East, P. C. 417; 1 Russ. by Grea. 767.

Where the prisoner in one count of the indictment was charged under the 7 Wm. 4 & 1 Vict. c. 87, s. 7, with demanding the money of the prosecutor with intent to steal the same, and it appeared that he had actually obtained money from the prosecutor; Law, recorder, said he should hold that, if menaces were used to obtain money, that count was sustained, although the money was actually obtained. The prisoner was found guilty upon the above count, but was subsequently sentenced upon another count in the same indictment. R. v. Norton, 8 C. & P. 671: 34 E. C. L. R.; see *ante*, p. 879.

A mere request, such as asking charity, without imposing any conditions, does not come within the sense or meaning of the word "demand." R. v. Robinson, 2 Leach, 749; 2 East, P. C. 1110.

The prisoner was indicted for sending a letter to the prosecutor, demanding money, with menaces. The letter was as follows:

"Sir, as you are a gentleman and highly respected by all who know you, I think it is my duty to inform you of a conspiracy. There is a few young men who have agreed to take from you personally a sum of money, or injure your property. I mean to say your building property. In the manner they have planned, this dreadful undertaking would be a most serious loss. They have agreed, &c. Sir, I could give you every particular information how you may preserve your property and your person, and how to detect and secure the offenders. Sir, if you will lay me a purse of thirty sovereigns upon the garden edge, close to Mr. T.'s garden gate, I will leave a letter in the place to inform you when this is to take place. I hope you wont attempt to seize me, when I come to take up the money and leave the note of information. Sir, you will find I am doing you a most serious favor, &c. &c." Bolland, B., doubted whether this letter contained either a *menace* or a *demand*, and reserved the point for the opinion of the judges, who held that the conviction was wrong. R. v. Pickford, 4 C. & P. 227: 19 E. C. L. R.

Proof of the threat.] Whether or not the letter amounts to a threat to kill or murder, &c., within the words of the statute, is a question for the jury. The prisoner was indicted (under the 27 Geo. 2, c. 15) for sending a letter to the prosecutor, threatening to kill or murder him. The letter was as follows:

"Sir: I am sorry to find a gentleman like you would be guilty of taking McAllester's life away for the sake of two or three guineas, but it will not be forgot by one who is but just come home to revenge his cause. This you may depend upon; whenever I meet you I will lay my life for him in this cause. I follow the road, [*880] though I have been *out of London; but on receiving a letter from McAllester, before he died, for to seek revenge, I am come to town. I remain a true friend to McAllester, J. W."

Hotham, B., left it to the jury to consider whether this letter contained in the terms of it an actual threatening to kill or murder, directing them to acquit the prisoner if they thought the words might import anything less than to kill or murder.

The jury having found the prisoner guilty, on a case reserved, the judges were of opinion that the conviction was right. R. v. Girdwood, 1 Leach, 142; 2 East, P. C. 1121.

The prisoners were indicted on the 27 Geo. 2, c. 15, for sending to the prosecutor the following letter:

"Sir: I am very sorry to acquaint you, that we are determined to set your mill on fire, and likewise to do all the public injury we are able to do you, in all your farms and seteres [lettings] which you are in possession of, without you on next —— day release that Ann Wood which you put in confinement. Sir, we mention in a few lines, and we hope if you have any regard for your wife and family, you will take our meaning without anything further; and if you do not, we will persist as far as we possibly can; so you may lay your hand at your heart, and strive your uttermost ruin. I shall not mention nothing more to you, until such time as you find the few lines a fact, with our respect. So no more at this time from me. R. R."

It was proved that this was in the handwriting of one of the prisoners, and that it was thrown by the other prisoner into the prosecutor's yard, when it was taken by a servant, and delivered to the prosecutor. The prosecutor swore that he had had a share in a mill three years before this letter was written, but had no mill at that time; that he held a farm when the letter was written and came to his hands, with several buildings upon it. On a case reserved, it was agreed by the judges, that as the prosecutor had no such property at the time as the mill which was threatened to be burnt, that part of the letter must be laid out of the question. As to the rest, Lord Kenyon, C. J., and Buller, J., were of opinion, that the letter must be understood as also importing a threat to burn the prosecutor's farmhouse and buildings, but the other judges, not thinking that a necessary construction, the conviction was held wrong, and a pardon recommended. R. v. Jepson and Springett, 2 East, P. C. 1115.

The prisoners were charged in one count with sending a letter to the prosecutor, threatening to kill and murder him, and a second count with threatening to burn and destroy his houses, stacks, &c. The writing was as follows: "Starve Gut Butcher, if you don't go on better great will be the consequence; what do you think you must alter an (or) must be set on fire; this came from London. i say your nose is as long rod gffg sharp as a flint 1835. You ought to pay your men." The jury negatived the threat to put the prosecutor to death, but found that the latter threatened to fire his houses, &c. Lord Denman, C. J., had some doubt whether the question ought to have been left to the jury, and whether the latter could be, in point of law, a threatening letter to the effect found. On the case being considered by the judges, they held the conviction good after verdict. R. v. Tyler, 1 Moo. C. C. 428.

*The rule that a threat is not of a criminal character, unless it be such as may [*881] overcome the ordinary free will of a firm man, has reference to the general nature of the evil threatened, and not to the probable effect of the threat on the mind of the particular party addressed. The Court of Criminal Appeal, therefore, held that a letter sent to the prosecutor, stating that the writer knew that persons with whom he was in some way connected intended to burn the prosecutor's premises, and that the writer could avert the catastrophe if the prosecutor would give him a sum of money, but not otherwise, was a threatening letter within the statute. R. v. Smith, 1 Den. C. C. R. 510; S. C. 19 L. J. M. C. 80.

Proof of the threat—to accuse of infamous crimes.] If the party has been already

accused, threatening to procure witnesses to support that accusation is not within the statute. "It is one thing to accuse, and another to procure witnesses to support a charge already made; this is at most a threat to support it by evidence." Per Bayley, J., R. v. Gill, York Sum. Ass. 1829; Greenwood's Stat. 191 (*n*), 1 Lewin, C. C. 305. An indictment upon the 4 Geo. 4, c. 54, s. 5 (which used the words "threaten to accuse"), charged the prisoners with "charging and accusing J. N., and with menacing and threatening to prosecute J. N." Upon an objection taken, that the indictment had not pursued the statute, Garrow, B. (after consulting Burrough, J.), was of that opinion. If, he said, the indictment had followed the statute, and it had been proved that the prisoners threatened to *prosecute* J. N., I should have left it to the jury to say whether that was not a threatening to accuse him. R. v. Abgood, 2 C. & P. 436: 12 E. C. L. R.

It was held that the threatening to accuse under the 7 & 8 Geo. 4, c. 29, s. 7 (now repealed, see *ante*), in which the same words, "accuse or threaten to accuse," were used as in the 8th section, need not have been a threat to accuse before a judicial tribunal, a threat to charge before any third person being enough. R. v. Robinson, 2 Moo. & R. 14.

It must be shown that the accusation, made or threatened, was of the nature of those specified in the statute. Where the meaning is ambiguous, it is for the jury to say whether it amounts to the accusation or threat imputed.

Declarations subsequently made by the prisoner are also admissible to explain the meaning of a threatening letter. The prisoner was indicted for sending a letter, threatening to accuse the prosecutor of an infamous crime. The prosecutor meeting the prisoner, asked him what he meant by sending him that letter, and what he meant by "*transactions five nights following*" (a passage in the letter). The prisoner said that the prosecutor knew what he meant. The prosecutor denied it, and the prisoner afterwards said, "I mean by taking indecent liberties with my person." This evidence having been received, and the point having been reserved for the opinion of the judges, they unanimously resolved that the evidence had been rightly received. R. v. Tucker, 1 Moo. C. C. 134. And see as to the necessity of particularizing in the indictment the specific charge to which the accusation or threat refers, and as to the evidence necessary to support such indictment, R. v. Middleditch, 1 Den. C. C. R. 92.

[*882] *TRANSPORTATION—RETURNING FROM.

Punishment, ... 883
Reward to prosecutor, ... 884

By the 5 Geo. 4, c. 84, s. 22, "If any offender who shall have been, or shall be so sentenced or ordered to be transported or banished, or who shall have agreed, or shall agree, to transport or banish himself or herself on certain conditions, either for life or any number of years, under the provisions of this or any former act, shall be afterwards at large within any part of his majesty's dominions, without some lawful cause, before the expiration of the term for which such offender shall have been sentenced or ordered to be transported or banished, or shall have so agreed to transport or banish himself or herself, every such offender, so being at large, being thereof

lawfully convicted [shall suffer death as in cases of felony, without the benefit of clergy]; and such offender may be tried either in the county or place where he or she shall be apprehended, or in that from whence he or she was ordered to be transported or banished; and if any person shall rescue, or attempt to rescue, or assist in rescuing, or in attempting to rescue, any such offender from the custody of such superintendent or overseer, or of any sheriff, or gaoler, or other person conveying, removing, transporting, or reconveying him or her, or shall convey, or cause to be conveyed, any disguise, instrument for effecting escape, or arms, to such offender, every such offender shall be punishable in the same manner as if such offender had been confined in a gaol or prison in the custody of the sheriff or gaoler, for the crime of which such offender shall have been convicted; and whoever shall discover and prosecute to conviction any such offender so being at large within this kingdom, shall be entitled to a reward of 20*l.* for every such offender so convicted."

By s. 23, in any indictment against any offender for being found at large, contrary to that or any other act now or thereafter to be made, it shall be sufficient to charge and allege the order made for the transportation or banishment of such offender, without charging or alleging any indictment, trial, conviction, judgment, sentence, or any pardon or intention of mercy, or signification thereof, of or against or in any manner relating to such offender.

By s. 24, "The clerk of the court, or other officer having the custody of the records of the court where such sentence or order of transportation or banishment shall have been passed or made, shall at the request of any person on his majesty's behalf, make out and give a certificate in writing, signed by him, containing the effect and substance only (omitting the formal part) of every indictment and conviction of such offender, and of the sentence or order for his *or her transporta- [*883] tion, or banishment (not taking for the same more than 6*s.* 8*d.*), which certificate shall be sufficient evidence of the conviction and sentence, or order for the transportation or banishment of such offender; and every such certificate, if made by the clerk or officer of any court in Great Britain, shall be received in evidence, upon proof of the signature and official character of the person signing the same; and every such certificate, if made by the clerk or officer of any court out of Great Britain, shall be received in evidence, if verified by the seal of the court, or by the signature of the judge, or one of the judges of the court, without further proof."

Upon a prosecution for this offence, the prosecutor must prove, 1, the conviction of the offender, by producing a certificate according to the above section of the statute; 2, the sentence or order of transportation, in like manner. The signature and official character of the person signing the certificate must be proved. If the certificate is made by the clerk or officer of a court out of Great Britain, it is admissible when verified by the seal of the court or the signature of the judge. The "effect and substance" of the former conviction must be stated in the certificate; merely stating that the prisoner was convicted of "felony" is not sufficient. R. v. Sutcliffe, Russ. & Ry. 469 (*n*); R. v. Watson, Id. 468. 3. Proof must then be given of the prisoner's identity; and 4, that he was at large before the expiration of his term.

On the trial of an indictment against a person for being at large without lawful cause before the expiration of his term of transportation, a certificate of his former conviction and sentence was put in: it purported to be that of J. G., "deputy clerk of the peace" for the county of L., "and clerk of the courts of general quarter sessions of the peace holden in and for the said county, and having the custody of the records of the courts of general quarter sessions of the peace, holden in and for the said county." It was proved that Mr. H. was clerk of the peace at L., and that he

had three deputy partners, of whom J. G., who had signed the certificate, was one, and that each of them acted as clerk of the peace; and that for forty years they had kept the sessions' records at their office. Under these circumstances, Coleman, J., held, that the conviction and sentence were sufficiently proved. R. v. Jones, 2 C. & K. 524. In R. v. Finney, Id. 774, Alderson, B., held that the fact of the former sentence being in force at the time the prisoner was found at large, was sufficiently proved by the certificate of his conviction and sentence, the judgment not having been reserved, although on the face of such certificate it appeared that the sentence, viz., transportation for fourteen years, was one which could not have been inflicted on him, for the offence of which, according to the certificate, he had been convicted, viz., larceny.

Punishment.] By the 4 & 5 Wm. 4, c. 67, reciting the 22d section of the 5 Geo. 4, c. 84, it is enacted, "That every person convicted of any offence above specified in the said act of the 6th year of the reign of his late majesty King George 4, or of aiding or abetting, counselling, or procuring the commission thereof, shall be liable to be transported beyond the seas for his or her natural life, and previously to transportation shall be imprisoned, with or without hard labor, in any common gaol or house of correction, prison, or penitentiary, for any term not exceeding four years."

[*884] **Reward to prosecutor.*] The judge before whom a prisoner is tried for returning from transportation has power to order the county treasurer to pay the prosecutor the reward under the act. R. v. Emmons, 2 Moo. & R. 279.

The Irish statutes relative to the offence of returning from transportation are the 11 Geo. 3, c. 7, s. 2, and the 9 Geo. 4, c. 54, ss. 16, 17, 18, the punishment being modified, as in the above statute of the 4 & 5 Wm. 4, c. 67, by the 5 Vict. st. 2, c. 28, s. 12 (I.).

[*885] *TREES AND OTHER VEGETABLE PRODUCTIONS.

Stealing or destroying trees, shrubs, &c., in a pleasure ground of the value of 1*l.*, or elsewhere of the value of 5*l.*, ... 885
Stealing or destroying with intent to steal trees, shrubs, &c., wherever growing, to the value of 1*s.*, ... 885
Setting fire to trees and other vegetable produce, ... 886
Setting fire to stacks of corn, wood, &c., ... 886
Injuring hopbinds, ... 886
Injuring trees, shrubs, &c., in a pleasure ground to the value of 1*l.* and upwards, . 886
Injuring trees, shrubs, &c., wheresoever growing, to the value of 1*s.*, ... 886
Injuring vegetable productions in a garden, ... 887

Stealing, or destroying with intent to steal, trees, shrubs, &c., in a pleasure ground of the value of 1l., or elsewhere of the value of 5l.] By the 24 & 25 Vict. c. 96, s. 32, "Whosoever shall steal, or shall cut, break, root up, or otherwise destroy or damage with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, respectively growing in any park, pleasure ground, garden, orchard, avenue, or in any ground adjoining or belonging to any dwelling-house, shall (in case the value of the article or articles stolen, or the amount of the injury done, shall exceed the sum of one pound), be guilty of felony, and being convicted thereof shall be liable to be punished as in the case of simple larceny; and whosoever shall steal, or shall cut, break, root up, or otherwise destroy or damage with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, respectively grow-

ing elsewhere than in any of the situations in this section before mentioned, shall (in case the value of the article or article stolen, or the amount of the injury done, shall exceed the sum of five pounds), be guilty of felony, and being convicted thereof shall be liable to be punished as in the case of simple larceny."

Stealing or destroying with intent to steal, trees, shrubs, &c., wherever growing, to the value of 1*s.*] By s. 33, "Whosoever shall steal, or shall cut, break, root up, or otherwise destroy or damage with intent to steal, the whole or any part of any tree, sapling, or shrub, or any underwood, wheresoever the same may be respectively growing, the stealing of such article or articles, or the injury done, being to the amount of a shilling at the least, shall, on conviction thereof before a justice of the peace, forfeit and pay, over and above the value of the article or article stolen, or the amount of the injury done, such sum of money not exceeding five pounds as to the justice shall seem meet; and whosoever having been convicted of any such offence, either against this or any former act of Parliament, shall afterwards commit any of the said offences in this section before mentioned, and shall be convicted *thereof in [*886] like manner, shall for such second offence be committed to the common gaol or house of correction, there to be kept to hard labor for such term not exceeding twelve months as the convicting justice shall think fit; and whosoever, having been twice convicted of any such offence (whether both or either of such convictions shall have taken place before or after the passing of this act), shall afterwards commit any of the offences in this section before mentioned, shall be guilty of felony, and being convicted thereof shall be liable to be punished in the same manner as in the case of simple larceny."

Setting fire to trees and other vegetable produce.] See 24 & 25 Vict. c. 97, s. 16, *supra*, p. 261.

Setting fire to stacks of corn, wood, &c.] See 24 & 25 Vict. c. 97, s. 17, *supra*, p. 262.

Injuring hopbinds.] By s. 19, "Whosoever shall unlawfully and maliciously cut or otherwise destroy any hopbinds growing on poles in any plantation of hops shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding fourteen and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping."

Injuring trees in a pleasure ground to the value of 1*l. and upwards.*] By s. 20, "Whosoever shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood, growing in any park, pleasure ground, garden, orchard, or avenue, or in any ground adjoining or belonging to any dwelling-house (in case the amount of the injury done shall exceed the sum of one pound), shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping."

By s. 21, "Whosoever shall unlawfully and maliciously cut, break, bark, root up,

or otherwise destroy or damage the whole or any part of any tree, sapling, or shrub, or any underwood growing elsewhere than in any park, pleasure ground, garden, orchard, or avenue, or in any ground adjoining to or belonging to any dwelling-house (in case the amount of injury done shall exceed the sum of five pounds), shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping."

By the 24 & 25 Vict. c. 96, s. 36, "Whosoever shall steal, or shall destroy or damage with intent to steal any plant, root, fruit, or vegetable production growing in any garden, orchard, pleasure ground, nursery ground, hothouse, greenhouse, or conservatory, shall, on conviction thereof before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labor for any term not exceeding six months, or else shall forfeit and pay, over and above the value of the article or articles so stolen, or the amount of the injury done, such sum of money not exceeding 20*l.* as to the justice shall seem meet; and whosoever having been convicted of any such offence, either against this or any former act of Parliament, shall afterwards commit any of the offences in this section before mentioned, shall be guilty of felony, and being convicted thereof, shall be liable to be punished in the same manner as in the case of simple larceny."

Injuring trees, &c., wheresoever growing, to the amount of 1*s.*] By s. 22, "Whosoever shall unlawfully and maliciously cut, break, bark, root up, or otherwise destroy [*887] or damage the whole or any part of any *tree, sapling, or shrub, or any underwood, wheresoever the same may be growing, the injury done being to the amount of one shilling at the least," is for the first and second offence made liable to conviction before a justice of the peace; "and whosoever having been twice convicted of any such offence (whether both or either of such convictions shall have taken place before or after the passing of this act) shall afterwards commit any of the said offences in this section before mentioned, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement; and, if a male under the age of sixteen years, with or without whipping."

Injuring vegetable productions in gardens.] By s. 23, "Whosoever shall unlawfully and maliciously destroy or damage with intent to destroy, any plant, root, fruit, or vegetable production, growing in any garden, orchard, nursery ground, hothouse, greenhouse, or conservatory, shall, on conviction thereof, before a justice of the peace, at the discretion of the justice, either be committed to the common gaol or house of correction, there to be imprisoned only, or to be imprisoned and kept to hard labor, for any term not exceeding six months, or else shall forfeit and pay, over and above the amount of the injury done, such sum of money not exceeding twenty pounds as to the justice shall seem meet; and whosoever, having been convicted of such offence, either against this or any former act of Parliament, shall afterwards commit any of the said offences in this section before mentioned, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding

two years, with or without hard labor, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping."

Upon the statute 9 Geo. 1, c. 22, s. 1, the words of which were "shall cut down or otherwise destroy," it was held that the cutting down of fruit trees, though such cutting down did not destroy the trees, was within the act. R. v. Taylor, Russ. & Ry. 373.

The actual injury to the trees themselves must exceed the value mentioned in the section. Where, therefore, the prisoner was indicted for having done damage to trees in a hedge amounting to 5*l.*, and it appeared that the injury to the trees amounted to 1*l.* only, but that it would be necessary to stub up the old hedge and replace it, the expense of which would be 4*l.* 14*s.* more, the conviction was held to be wrong. R. v. Whiteman, Dears. C. C. 353; S. C. 23 L. J. M. C. 120.

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*TRUSTEES—FRAUDS BY. [*888]

Definition of term trustee.] By the 24 & 25 Vict. c. 96, s. 1, "The term 'trustee' shall mean a trustee on some express trust created by some deed, will, or instrument in writing, and shall include the heir, or personal representative of any such trustee, and any other person upon or to whom the duty of such trust shall have devolved or come, and also an executor and administrator, and an official manager, assignee, liquidator, or other like officer acting under any present or future act relating to joint stock companies, bankruptcy, or insolvency."

The prisoner was a trustee, treasurer, and secretary of a savings bank constituted under 9 Geo. 4, c. 92, 3 Wm. 4, c. 14, and 7 & 8 Vict. c. 83, and acted as such. By the rules of the bank, the trustee and manager was declared to be personally responsible and liable for all moneys actually received by him on account of, or to and for the use of the institution, and not paid over or disposed of according to the rules; and the secretary was to be liable for all money received, and pay regularly to the treasurer the balance due after each day's business. By another rule, "the several sums of money belonging to the institution, which the trustees thereof were authorized to invest under the 9 Geo. 4, c. 92, or under the rules and regulations of this institution, were to be paid into, and invested in the Bank of England, in the names of the commissioners for the reduction of the national debt, according to the provisions of the said act, and no such sum or sums of money were to be paid or laid out by the trustees in any other manner, or upon any other security whatever, except such sums of money as from time to time should necessarily remain in the hands of the treasurer to answer the emergencies thereof;" and further, "that the trustees shall pay into the Bank of England any sum or sums of money not being less than 50*l.* to the account of the commissioners for the reduction of the national debt, upon the declaration of the trustees, or any two or more of them, that such moneys belong exclusively to the institution." There was the usual power given to depositors of depositing and drawing money. The jury found as a fact that the prisoner was a trustee of the savings bank, and that, whilst he was such trustee, he converted and appropriated to his own use large sums of money (amounting to upwards of 8000*l.*), which had been paid into or deposited in the savings bank. Held, first, that the prisoner was a trustee for the benefit of other persons within the meaning of s. 1, of the 20 & 21 Vict. c. 54, but *semble* he was not a trustee for "public or charitable purposes."

Secondly, that the rules of the savings bank were an instrument in writing within the meaning of s. 17, but, *semble*, an act of Parliament is not such an instrument. Thirdly, that there was an express trust created by the rules within the meaning of s. 17, although they preceded the appointment of the trustee (and the existence of the trust fund). R. v. Fletcher, 1 L. & C. C. C. 180. This decision is applicable to the 24 & 25 Vict. c. 96, ss. 1, 80.

Trustees fraudulently disposing of property.] By s. 80, "Whosoever, being a trustee of any property for the use or benefit, either wholly or partially, of some other person, or for any public or charitable purpose, shall, with intent to defraud, convert, or appropriate the same or any part thereof to or for his own use or benefit, or the use or benefit of any person other than such person as aforesaid, or for any purpose other than such public or charitable purpose as aforesaid, or otherwise dispose of or destroy such property, or any part thereof, shall be guilty of a misdemeanor, and being convicted thereof shall be liable, at the discretion of the court, to any of the punishments which the court may award as hereinbefore last mentioned." The punishment is, penal servitude not exceeding seven years and not less than three years, or imprisonment not exceeding two years, with or without hard labor, and with or without solitary confinement. See s. 75, *supra*, p. 254.

As to the meaning of the word "property," see 24 & 25 Vict. c. 96, s. 1, *supra*, p. 561.

As to what persons are within the section, see R. v. Fletcher, C. C. A. T. 1862, not yet reported.

[*889] *TURNPIKE GATES—INJURIES TO.

Destroying turnpike gates, toll-house, &c.] By the 24 & 25 Vict. c. 97, s. 34, "Whosoever shall unlawfully and maliciously throw down, level, or otherwise destroy, in whole or in part, any turnpike gate or toll-bar, or any wall, chain, rail, post, bar, or other fence, belonging to any turnpike gate or toll-bar, or set up or erected to prevent passengers passing by without paying any toll directed to be paid by any act of Parliament relating thereto, or any house, building, or weighing engine, erected for the better collection, ascertainment, or security of any such toll, shall be guilty of a misdemeanor."

[*890] *WOUNDING.

Wounding, with intent to murder.] See 24 & 25 Vict. c. 100, s. 11, *supra*, p. 720.

Wounding, with intent to do grievous bodily harm.] See 24 & 25 Vict. c. 100, s. 18, *supra*, p. 274.

Unlawfully wounding.] See 24 & 25 Vict. c. 100, s. 20, *supra*, p. 274.

Power to convict of unlawfully wounding on indictment for felony.] By the 14 & 15 Vict. c. 19, s. 5, "If, upon the trial of any indictment for any felony, except murder or manslaughter, where the indictment shall allege that the defendant did

cut, stab, or wound any person, the jury shall be satisfied that the defendant is guilty of the cutting, stabbing, or wounding charged in such indictment, but are not satisfied that the defendant is guilty of the felony charged in such indictment, then, and in every such case, the jury may acquit the defendant of such felony, and find him guilty of unlawfully cutting, stabbing, or wounding, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for the misdemeanor of cutting, stabbing, or wounding."

Wounding cattle.] See 24 & 25 Vict. c. 97, s. 40, *supra*, p. 351.

Proof of wounding.] Where the prisoner is indicted for *wounding*, it must appear that the skin is broken; a mere contusion is not sufficient. Where the prisoner had struck the prosecutor with a *bludgeon*, and the skin was broken, and blood flowed, Patteson, J., said, that it was not material what the instrument used was, and held the case to be within the statute. R. v. Payne, 4 C. & P. 558. In a case which occurred before Littledale, J., on the Oxford circuit, he directed a prisoner to be acquitted, it not appearing that the skin was broken or incised. Anon. cited 1 Moo. C. C. 280; see Moriarty v. Brooks, 6 C. & P. 684. But in a case which came soon afterwards before Parke, J., where there was no proof of an incised wound, the learned judge told the jury that he was clearly of opinion that it need not be an incised wound, for that he believed the act of Parliament (9 Geo. 4) had introduced the word *wound* for the purpose of destroying the distinction, which, as the words in the old statute were only *stab* or *cut*, it was always necessary to make, between the contused and incised wounds, and that it was not necessary either that the skin should be broken or incised, or that a cutting instrument should be used, for that otherwise the thing intended to be remedied by the new act should remain as before. The prisoner being found guilty, the case was reserved for the decision of the *judges, amongst whom there was considerable discussion and difference of [*891] opinion. Lord Tenterden said he thought the word *wound* was not introduced to cure the difficulty whether a cutting or stabbing instrument was used. In this case, from the continuity of the skin not being broken, it was thought by all, except Bayley, B., and Parke, J., that there was no wound within the act, and that the conviction was wrong. R. v. Wood, 1 Moo. C. C. 278; 4 C. & P. 381: 19 E. C. L. R. So a scratch is not a wound within the statute; there must at least be a division of the external surface of the body. Per Parke, B., R. v. Beckett, 1 Moo. & R. 526. So it was held by Bosanquet, Coleridge, and Coltman, JJ., that to constitute a wound it is necessary that there should be a separation of the whole skin, and a separation of the cuticle is not sufficient. R. v. McLoughlin, 8 C. & P. 635: 34 E. C. L. R. But where a blow given with a hammer broke the lower jaw in two places, and the skin was broken internally, but not externally, and there was not much blood, Lord Denman, C. J., and Parke, J., held this a wounding within the act. R. v. Smith, 8 C. & P. 173. Where the prisoner was indicted under the 9 Geo. 4 for cutting and wounding the prosecutor, with intent, &c., and it appeared that he threw a hammer at him, which struck him on the face, and broke the skin for an inch and a half, the prisoner being convicted, a case was reserved for the opinion of the judges, whether the injury could be considered either as a stab, cut, or wound, within the true construction of the statute, and it was unanimously resolved, by those who were present, that the case amounted to a *wound* within the statute, and that the conviction was right. R. v. Withers, 1 Moo. C. C. 294; 4 C. & P. 446: 19 E. C. L. R. Where the prisoner struck the prosecutor on the outside of his hat with an air-gun, and the hard rim of

the hat wounded the prosecutor, but the gun did not come directly in contact with his head, the judges held this to be a wounding within the statute. R. v. Sheard, 7 C. & P. 846: 32 E. C. L R.; S. C. 2 Moo. C. C. 13.

Throwing vitriol in the face of the prosecutor was held not to be a wounding within the 9 Geo. 4, c. 31, s. 12. R. v. Murrow, 1 Moo. C. C. 456.

In R. v. Gray, Dears. & B. C. C. 303; S. C. 26 L. J. M. C. 203, the Court of Criminal Appeal thought that the exposure of a child in an open field, thereby causing congestion of the lungs and heart, there being no lesion of any part of the child's body, was not a *wounding*.

As to the form of indictment, see *supra*, p. 721.

[*892] *WRITTEN INSTRUMENTS.

Larceny or destruction of valuable securities and documents of title, . . . 892
Form of indictment, ... 892
Stealing, injuring, or concealing wills, ... 892
Effect of disclosure, ... 893
Stealing records or other legal documents, ... 893
What instruments are within the statute, ... 893

Larceny or destruction of valuable securities and documents of title.] By the 24 & 25 Vict. c. 96, s. 27, "Whosoever shall steal, or shall for any fraudulent purpose destroy, cancel, or obliterate the whole or any part of any valuable security, other than a document of title to lands, shall be guilty of felony, of the same nature and in the same degree and punishable in the same manner as if he had stolen any chattel of like value with the share, interest, or deposit to which the security so stolen may relate, or with the money due on the security so stolen, or secured thereby and remaining unsatisfied, or with the value of the goods or other valuable thing represented, mentioned, or referred to in or by the security."

By s. 28, "Whosoever shall steal, or shall for any fraudulent purpose destroy, cancel, obliterate, or conceal the whole or any part of any document of title to lands, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement."

See also as to the fraudulent concealment of documents of title, *supra*, p. 380.

Form of indictment.] By the same section, "In any indictment for any such offence relating to any document of title to lands, it shall be sufficient to allege such document to be or to contain evidence of the title or of part of the title of the person or of some one of the persons having an interest, whether vested or contingent, legal or equitable, in the real estate to which the same relates, and to mention such real estate or some part thereof."

Stealing, injuring, or concealing wills.] By s. 29, "Whosoever shall, either during the life of the testator or after his death, steal, or for any fraudulent purpose destroy, cancel, obliterate, or conceal the whole or any part of any will, codicil, or other testamentary instrument, whether the same shall relate to real or personal

estate, or to both, shall be guilty of felony, and being convicted thereof, shall be liable, at the discretion of the court, to be kept in penal servitude for life, or for any term not less than three years,—or to be imprisoned *for any term not ex- [*893] ceeding two years, with or without hard labor, and with or without solitary confinement; and it shall not in any indictment for such offence be necessary to allege that such will, codicil, or other instrument, is the property of any person."

Effect of disclosure.] By the same section, "No person shall be liable to be convicted of any of the felonies in this and the last preceding section mentioned, by any evidence whatever in respect of any act done by him, if he shall at any time previously to his being charged with such offence have first disclosed such act on oath in consequence of any compulsory process of any court of law or equity in any action, suit, or proceeding which shall have been *bonâ fide* instituted by any party aggrieved, or if he shall have first disclosed the same in any compulsory examination or deposition before any court upon the hearing of any matter in bankruptcy or insolvency."

* *Stealing records or other legal documents.*] By s. 30, "Whosoever shall steal, or shall for any fraudulent purpose take from its place of deposit for the time being, or from any person having the lawful custody thereof, or shall unlawfully and maliciously cancel, obliterate, injure, or destroy the whole or any part of any record, writ, return, panel, process, interrogatory, deposition, affidavit, rule, order, or warrant of attorney, or of any original document whatsoever of or belonging to any court of record, or relating to any matter, civil or criminal, begun, depending, or terminated in any such court, or of any bill, petition, answer, interrogatory, deposition, affidavit, order, or decree, or of any original document whatsoever of or belonging to any court of equity, or relating to any cause or matter begun, depending, or terminated in any such court, or of any original document in anywise relating to the business of any office or employment under her majesty, and being or remaining in any office appertaining to any court of justice, or in any of her majesty's castles, palaces, or houses, or in any government or public office, shall be guilty of felony, and being convicted thereof shall be liable, at the discretion of the court, to be kept in penal servitude for the term of three years, or to be imprisoned for any term not exceeding two years, with or without hard labor, and with or without solitary confinement; and it shall not in any indictment for such offence be necessary to allege that the article in respect of which the offence is committed is the property of any person."

What instruments are within the statute.] At common law, larceny could not be committed of deeds or other instruments concerning land. 1 Hale, P. C. 510. Thus it was held, that stealing a commission, directed to commissioners to ascertain boundaries, was not a felony, the commission concerning the realty. R. v. Westbeer, 1 Leach, 12; 2 East, P. C. 596; 2 Str. 1134. But the parchment upon which the records of a court of justice are inscribed, if it do not relate to the realty, may be the subject of larceny. R. v. Walker, 1 Moo. C. C. 155. Bonds, bills, and notes, which concern mere choses in action, were also at common law held not to be such goods whereof felony might be committed, being of no intrinsic value, and not importing any property *in possession* of the party from whom they are taken. 4 Bl. Com. 234; 2 East, P. C. 597. It was even held, that larceny could not be committed of the box in which charters concerning *the land was held. 3 Inst. 109; 1 Hale, P. C. [*894] 510. Mortgage deeds being subsisting securities for the payment of money, are "choses in action," and not "goods and chattels." Where, therefore, the prisoner

was indicted for a burglary, in breaking into a house at night, "with intent to steal the 'goods and chattels' therein," and the jury found that he broke into the house with intent to steal mortgage deeds only, the conviction was quashed. "This was ruled," said Jervis, C. J., in delivering judgment, "in R. v. Calye, 8 Co. 33 (*a*); 3 Inst. 109; and Channell v. Robotham, Yelv. 68, where it was decided that a bond could not be included under the words *bona et catalla*, though it was objected that the parchment and box were such, and might pass by that name, yet, forasmuch as the debt included and wrote upon it is the principal, the words of the grant ought to comprehend the name of the principal." R. v. Powell, 2 Den. C. C. R. 403.

It was held that a pawnbroker's ticket was a "warrant for the delivery of goods" which a prisoner may be convicted of stealing under the 7 & 8 Geo. 4, c. 29, s. 5. R. v. Morrison, 1 Bell, C. C. 158.

Whether the paid reissuable notes of a banker can be properly described as *valuable securities*, does not appear to be well settled; the safe mode of describing them is to treat them as goods and chattels. The prisoner was indicted in several counts for stealing a number of promissory notes, and in others for stealing so many pieces of paper, stamped with a stamp, &c. It appeared that the notes consisted of country bank notes, which, after being paid in London, were sent down to the country to be reissued, and were stolen on the road. It was objected that these were no longer promissory notes, the sums of money mentioned in them having been paid and satisfied, and that the privilege of reissuing them, possessed by the bankers, could not be considered the subject of larceny. The judges, however, held that the conviction on the counts for stealing the paper and stamps was good, the paper and stamps, and particularly the latter, being valuable to the owners. R. v. Clark, Russ. & Ry. 181; 2 Leach, 1036; 1 Moo. C. C. 222. In a later similar case, where reissuable banker's notes (paid in London) had been stolen from one of the partners on a journey, the prisoner having been convicted upon an indictment charging him in different counts with stealing valuable securities called promissory notes, and also with stealing so many pieces of paper stamped with a stamp, &c., the judges held the conviction right. Some of them doubted whether the notes could properly be called "valuable securities;" but if not, they all thought they were goods and chattels. R. v. Vyse, 1 Moo. C. C. 218. "In R. v. Vyse," said Jervis, C. J., in passing judgment in R. v. Powell, 2 Den. C. C. R. 403, "the notes had been paid, and though reissuable, were not at the time of the larceny securities for the payment of money. The paper and stamp on which they were written were, therefore, properly described as goods and chattels."

Lord Ellenborough is said to have ruled that it was not a felony under 2 Geo. 2, c. 25, to steal banker's notes which were completely executed, but which had never been in circulation, because no money was due upon them: Anon. 4 Bl. Com. by Christian, 234 (*n*); but upon this decision it has been observed, that such notes would [*895] probably be deemed valuable property and the subject of larceny, at *common law. 2 Russ. by Grea. 79 (*n*). See R. v. Clark and R. v. Vyse, *supra*.

If the halves of promissory notes are stolen, they should be described as goods and chattels. R. v. Mead, 4 C. & P. 535: 19 E. C. L. R.

An incomplete bill of exchange or promissory note, is not as such a valuable security so as to be the subject of larceny. In consequence of seeing an advertisement, A. applied to the prisoner to raise money for him. The latter promised to procure 5000*l.*, and producing ten blank 10*s.* stamps, induced A. to write an acceptance across them. The prisoner then took them, without saying anything, and afterwards filled them up as bills of exchange for 500*l.* each, and put them into circulation. It

was held (at the Old Bailey), that these were neither "bills of exchange," "orders for the payment of money," nor "securities for money," and that a charge of larceny for stealing the paper and stamps could not be sustained, the stamps and paper not being the property of A., or in his possession. R. v. Minter Hart, 6 C. & P. 106: 25 E. C. L R.; see also R. v. Phipoe, 2 Leach, 673; 2 East, P. C. 599; *ante*, p. 836.

A check upon a banker, drawn more than twenty miles from London, and not stamped, has been held not to be a *bill* or *draft* within the 7 Geo. 3, c. 50; being of no value nor in any way available. R. v. Pooley, Russ. & Ry. 12. So a check on a banker, made payable to A. B., and not to bearer, not being stamped, has been decided by the judges not to be a valuable security within the meaning of the 7 & 8 Geo. 4, c. 29, the banker being subject to a penalty of 50*l.* by paying it. R. v. Yates, 1 Moo. C. C. 170. But where A. was indicted in one count for stealing a check, and in another count for stealing a piece of paper; and it was proved that the Great Western Railway Company drew in London a check on their London bankers, and sent it to one of their officers at Taunton, to pay a poor-rate there, who at Taunton gave it to the prisoner, a clerk of the company, to take to the overseer, but instead of doing so, he converted it to his own use; it was held that even if the check was void under the 13th section of the statute 55 Geo. 3, c. 184, the prisoner might be properly convicted on the count for stealing a piece of paper. R. v. Perry, 1 Den. C. C. 69; 1 C. & K. 725; see also the same case, reserved for the consideration of the judges, and similarly decided, 1 Cox, C. C. 222; and the cases of R. v. Welsh and R. v. Metcalf, *ante*, p. 601; also R. v. Heath, 2 Moo. C. C. 33.

See, as to the meaning of the term "*valuable security*," *supra*, p. 561.

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*WORKS OF ART. [*896]

Injuring works of art.] By the 24 & 25 Vict. c. 97, s. 39, "Whosoever shall unlawfully and maliciously destroy or damage any book, manuscript, picture, print, statue, bust, or vase, or any other article or thing kept for the purpose of art, science, or literature, or as an object of curiosity, in any museum, gallery, cabinet, library, or other repository, which museum, gallery, cabinet, library, or other repository is either at all times or from time to time open for the admission of the public or of any considerable number of persons to view the same, either by the permission of the proprietor thereof or by the payment of money before entering the same, or any picture, statue, monument, or other memorial of the dead, painted glass, or other monument or work of art, in any church, chapel, meeting-house, or other place of divine worship, or in any building belonging to the queen, or to any county, riding, division, city, borough, poor law union, parish, or place, or to any university or college, or hall of any university, or to any inn of court, or in any street, square, churchyard, burial-ground, public garden or ground, or any statue or monument exposed to public view, or any ornament, railing, or fence surrounding such statue or monument, shall be guilty of a misdemeanor, and being convicted thereof, shall be liable to be imprisoned for any term not exceeding six months, with or without hard labor, and if a male under the age of sixteen years, with or without whipping."

*GENERAL MATTERS OF DEFENCE.

THERE are certain general matters of defence, the evidence with regard to which it will be convenient to comprise under the three following heads: Infancy, Insanity, and Coercion by Husband.

INFANCY.

Infancy, ... 897
In case of misdemeanors and offences not capital, ... 897
In cases of capital offences, ... 897

AN infant is, in certain cases, and under a certain age, privileged from punishment by reason of a presumed want of criminal design.(1)

In cases of misdemeanors and offences not capital.] In certain misdemeanors an infant is privileged under the age of twenty-one, as in cases of *nonfeasance* only, for laches shall not be imputed to him. 1 Hale, P. C. 20. But he is liable for misdemeanors accompanied with force and violence, as a riot or battery. Id. So for perjury. Sid. 253. So he may be convicted of a forcible entry. 4 Bac. Ab. 591; see *ante*, p. 465.(2)

In cases of capital offences.] Under the age of seven years, an infant cannot be punished for a capital offence, not having a mind *doli capax*: 1 Hale, P. C. 19; nor for any other felony, for the same reason. Id. 27. But on attaining the age of fourteen, he is obnoxious to capital (and of course to any minor) punishment, for offences committed by him at any time after that age. 1 Hale, P. C. 25.

With regard to the responsibility of infants between the ages of seven and fourteen, a good deal of doubt formerly prevailed, but it is now quite clear that where the circumstances of the case show that the offender was capable of distinguishing between right and wrong, and that he acted with malice and an evil intention, he may be convicted even of a capital offence; and accordingly there are many cases, several of them very early ones, in which infants, under the age of fourteen, have been convicted and executed.(3) Thus, in 1629, an infant, being eight or nine years of age, was convicted of burning two barns in the town of Windsor, and it ap- [*898] pearing that he had *malice, revenge, craft, and cunning, he was executed. R. v. Dean, 1 Hale, P. C. 25 (*n*).

So Lord Hale mentions two instances to the same effect: one of a girl of thirteen, executed for killing her mistress, and another of a boy of ten, for the murder of his

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(1) Wheeler's C. C. 231.

(2) See Wood v. The Commonwealth, 3 Leigh, 743.

An infant only a year or two old, upon whose lands a nuisance is erected, cannot be made criminally answerable for it. The People v. Townsend et al., 3 Hill, 479.

Although a minor, within the age of twenty-one years, cannot be made responsible *civiliter* for goods obtained by false pretences, he may be proceeded against *criminaliter*, under the statute. People v. Kendall, 25 Wend. 399.

(3) Commonwealth v. Keagy, 1 Ashmead, 248; State v. Aaron, 1 Southard, 231; Commonwealth v. Krouse, O. & T. Philad., Sept., 1835, before Judge King.

companion. 1 Hale, P. C. 26; Fitz. Ab. Corone, 118. In the year 1748, a boy of ten years of age was convicted of murder, and the judges, on a reference to them, were unanimously of opinion that the conviction was right. R. v. York, Foster, 70.

An infant, under the age of fourteen years, is presumed by law unable to commit a rape, and though in other felonies, *malitia supplet ætatem*, yet, as to this fact, the law presumes the want of ability as well as the want of discretion. But he may be a principal in the second degree, as aiding and assisting, though under fourteen years, if it appears that he had a mischievous intention. 1 Hale, P. C. 630; R. v. Eldershaw, 3 C. & P. 396; see further, *ante*, title Rape.

It is necessary, says Lord Hale, speaking of convictions of infants between the years of seven and twelve, that very strong and pregnant evidence should be given to convict one of that age. 1 Hale, P. C. 27; 4 Bl. Com. 23. And he recommends a respiting of judgment till the king's pleasure be known. Ibid.

See 10 & 11 Vict. c. 82, 13 & 14 Vict. c. 37, for the speedy and summary trial, conviction, and punishment of juvenile offenders.

Power is now most wisely and justly given to all courts of justice to send juvenile offenders convicted before them to reformatory schools; although, unfortunately, a child must still be subjected to at least a fortnight's imprisonment in gaol before he can be sent to the reformatory. The 17 & 18 Vict. c. 86, s. 2, enacts as follows: "Whenever, after the passing of this act, any person under the age of sixteen years, shall be convicted of any offence punishable by law, either upon an indictment or on summary conviction before a police magistrate, or before two or more justices of the peace, or before a sheriff or magistrate in Scotland, then and in every such case it shall be lawful for any court, judge, police magistrate of the metropolis, stipendiary magistrate, or any two or more justices of the peace, or in Scotland for any sheriff or magistrate of a borough, or police magistrate, before or by whom such offender shall be so convicted, in addition to the sentence then and there passed as a punishment for his offence, to direct such offender to be sent, at the expiration of his sentence, to some of the aforesaid reformatory schools, to be named in such direction, the directors or managers of which shall be ready to receive him, and to be there detained for a period not less than two years, and not exceeding five years, and such offender shall be liable to be detained pursuant to such direction: provided always, that no offender shall be directed to be so sent and detained as aforesaid, unless the sentence passed as a punishment for his offence, at the expiration of which he is directed to be so sent and detained, shall be one of imprisonment for fourteen days at least: provided also, that the secretary of state for the home department may at any time order any such offender to be discharged from any such school." This statute has been amended by 19 & 20 Vict. c. 87, sect. 1 of which enacts, that "It shall not be necessary at the time of passing sentence for any court," &c., "to name the particular school to which any youthful offender is to be sent; but it shall be sufficient for such *court, &c., to direct that such youthful offender be sent to such school, [*899] being a school duly certified, &c., and the directors and managers of which shall be willing to receive him, as may thereafter, and before the expiration of the term of imprisonment to which he or she has been sentenced, be directed by the said court," &c.

*INSANITY.

Cases in which the prisoner has been held not to be insane, ... 901
in which the prisoner has been held to be insane, ... 903
Opinions of the judges on questions propounded by the House of Lords, . . . 905
Cases of insanity caused by intoxication, ... 910

THE defence of insanity is one involving great difficulties of various kinds, and the rules which have occasionally been laid down by the judges, with regard to the nature and degree of aberration of mind which will excuse a person from punishment, are by no means consistent with each other, or as it should seem with correct principle.(1) That principle appears to be well laid down in the following passage.

To amount to a complete bar of punishment, either at the time of committing the offence, or of the trial, the insanity must have been of such a kind as entirely to deprive the prisoner of the use of reason, *as applied to the act in question*, and the knowledge that he was doing wrong in committing it. If, though somewhat deranged, he is yet able to distinguish right from wrong, *in his own case*, and to know that he was doing wrong in the act which he committed, he is liable to the full punishment of his criminal acts. Alison's Princ. Crim. Law. Scotl. 645, 654.

The *onus* of proving the defence of insanity, or in the case of lunacy, of showing that the offence was committed when the prisoner was in a state of lunacy, lies upon the prisoner. See Alison's Princ. Crim. Law of Scotl. 659; and for this purpose the opinion of a person possessing medical skill is admissible. R. v. Wright, Russ. & Ry. 456; *ante*, p. 135.

The disposal of persons found to be insane at the time of the offence committed, is regulated by the statute 39 & 40 Geo. 3, c. 94, *ante*, p. 183.

The mode of arraignment and trial of such persons have also been stated, *ante*, p. 183.

If the jury are of opinion that the prisoner did not in fact do all that the law requires to constitute the offence charged, supposing the prisoner had been sane, they

(1) Wheeler's C. C. 48; Jackson v. Van Dusen, 5 Johns. 158; Commonwealth v. Rogers, 7 Metcalf, 500.

On a trial for murder, a physician having stated on examination in chief that the prisoner was insane, he may be asked on cross-examination, whether, in his opinion, the prisoner knew right from wrong, or that it would be wrong for him to commit murder, rape, or arson. Clark v. The State, 12 Ohio, 483.

It is not every kind or degree of insanity which exempts from punishment. If the accused understood the nature of his act, if he knew it was wrong and deserved punishment, he is responsible. United States v. McGlue, 1 Curtis's C. C. 1; United States v. Shults, 6 McLean, 121; The State v. Huting, 21 Missouri, 464.

To sustain the defence of insanity, it must appear that the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or if he did understand them, that he did not know he was doing what was wrong. Kelly v. The State, 3 Smed. Marsh, 518; The State v. Spencer, 1 Zabriskie, 197.

On questions of sanity, the rule as to reasonable doubt does not apply, but it is for him that alleges insanity to prove it. The State v. Starling, 6 Jones's Law, 366; Newcomb v. The State, 37 Mississippi, 383; Loeffner v. The State, 10 Ohio, 598; Fisher v. The People, 23 Illinois, 283; Bonfanti v. The State, 2 Minnesota, 123; Graham v. The Commonwealth, 16 B. Monroe, 587.

The prisoner is entitled to the benefit of any doubt upon the question of sanity. The People v. McCann, 2 Smith, 58.

If the jury entertain a reasonable doubt of the sanity of the prisoner, he shall be acquitted. The State v. Marler, 2 Alabama, 43. *Contra:* To excuse crime, the jury ought to be satisfied of the insanity beyond reasonable doubt. The State v. Spencer, 1 Zabriskie, 197.

Insanity at the time of the trial may be proved with a view to establish the defence of insanity when the act was committed. Freeman v. The People, 4 Denio, 9. The subsequent as well as previous acts and declarations of the prisoner are admissible to show his true mental condition at the moment of the crime. McLean v. The State, 16 Alabama, 672.

must find him not guilty generally, and the court have no power to order his detention under the act, although the jury should find that he was in fact insane. Where therefore on an indictment for treason, which stated as an overt act, that the prisoner discharged a pistol loaded with powder and a bullet at her majesty, the jury found that the prisoner was insane at the time when he discharged the pistol; but whether the pistol was loaded with ball or not, there was no satisfactory evidence; the court expressed a strong opinion that the case was not within the statute. *Lord [*901] Denman, C. J., Patteson, J., and Alderson B. R. v. Oxford, 9 C. & P. 525: 38 E. C. L. R.; 1 Russ. by Grea. 16 (*n*).

The above and a similar outrage led to the passing of the 5 & 6 Vict. c. 51, an act for the protection of the queen's person.

A man was indicted for shooting at his wife with intent to murder her, &c., and was defended by counsel, who set up for him the defence of insanity. The prisoner, however, objected to such a defence, asserting that he was not insane; and he was allowed by the judge, Mr. Justice Bosanquet, to suggest questions, to be put by the learned judge to the witnesses for the prosecution, to negative the supposition that he was insane; and the judge also, at the request of the prisoner, allowed additional witnesses to be called on his behalf for the same purpose. They however failed in showing that the defence was an incorrect one; on the contrary, their evidence tended to establish it more clearly; and the prisoner was acquitted on the ground of insanity. R. v. Pearce, 9 C. & P. 667.

Cases in which the prisoner has been held not to be insane.] In the following cases, the defence of insanity was set up, but without effect, and the prisoners were convicted. The prisoner was indicted for shooting at Lord Onslow. It appeared that he was to a certain extent deranged, and had misconceived the conduct of Lord Onslow, but he had formed a regular design to shoot him, and prepared the means of effecting it. Tracy, J., observed, that the defence of insanity must be clearly made out; that it is not every idle or frantic humor of a man, or something unaccountable in his actions, which will show him to be such a madman as to exempt him from punishment; but that where a man is totally deprived of understanding and memory, and does not know what he is doing any more than an infant, a brute, or a wild beast, he will be properly exempted from punishment. R. v. Arnold, Collinson on Lunacy, 475; 16 How. St. Tr. 764, 765. The doctrine of the learned judge in this case may, perhaps, be thought to be carried too far; for if the prisoner, in committing the act, is deprived of the power of distinguishing between right and wrong with relation to that act, it does not appear to be necessary that he should not know what he is doing. *Vide, post.*

Lord Ferrers was tried before the House of Lords for the murder of his steward. It was proved that he was occasionally insane, and fancied his steward to be in the interest of certain supposed enemies. The steward being in the parlor with him, he ordered him to go down on his knees, and shot him with a pistol, and then directed his servants to put him to bed. He afterwards sent for a surgeon, but declared he was not sorry; and that it was a premeditated act; and he would have dragged the steward out of the bed, had he not confessed himself a villain. Many witnesses stated that they considered him insane, and it appeared that several of his relations had been confined as lunatics. It was contended for the prosecution, that the complete possession of reason was not necessary in order to render a man answerable for his acts; it was sufficient if he could discriminate between good and evil. The peers unanimously found his lordship guilty. R. v. Earl Ferrers, 19 How. St. Tr. 886.

The prisoner was indicted for shooting at and wounding W. B., and the defence was insanity, arising from epilepsy. He had been attacked with a fit on the 9th [*902] July, 1811; and was brought home *apparently lifeless. A great alteration had been produced in his conduct, and it was necessary to watch him, lest he should destroy himself. Mr. Warburton, the keeper of a lunatic asylum, said that in insanity caused by epilepsy, the patient often imbibed violent antipathies against his dearest friends, for causes wholly imaginary, which no persuasion could remove, though rational on other topics. He had no doubt of the insanity of the prisoner. A commission of lunacy was produced, dated 17th June, 1812, with a finding that the prisoner had been insane from the 30th of March. [The date of the offence committed does not appear in the report.] Le Blanc, J., concluded his summing up, by observing that it was for the jury to determine whether the prisoner, when he committed the offence with which he stood charged, was capable of distinguishing between right and wrong, or under the influence of any illusion in respect of the prosecutor, which rendered his mind at the moment insensible of the nature of the act which he was about to commit, since in that case he would not be legally responsible for his conduct. On the other hand, provided they should be of opinion that when he committed the offence he was capable of distinguishing right from wrong, and not under the influence of such an illusion as disabled him from discovering that he was doing a wrong act, he would be answerable to the justice of the country, and guilty in the eye of the law. The jury, after considerable deliberation, pronounced the prisoner guilty. R. v. Bowler, Collinson on Lunacy, 673 (*n*).

The prisoner was indicted for adhering to the king's enemies. His defence was insanity. He had been accounted from a child a person of weak intellect, so that it surprised many that he had been accepted as a soldier. Considerable deliberation and reason, however, were displayed by him in entering the French service, and he stated to a comrade that it was much more agreeable to be at liberty, and have plenty of money, than to remain confined in a dungeon. The attorney-general in reply, said, that before the defence could have any weight in rebutting a charge so clearly made out, the jury must be satisfied that at the time the offence was committed, the prisoner did not really know right from wrong. He was convicted. R. v. Parker, Collinson on Lunacy, 477.

The direction of Mansfield, C. J., to the jury in R. v. Bellingham, seems not altogether in accordance with the correct rules on the subject of a prisoner's insanity. He said that in order to support such a defence, it ought to be proved by the most distinct and unquestionable evidence, that the prisoner was incapable of judging between right and wrong; that in fact it must be proved beyond all doubt, that at the time he committed the act, *he did not consider that murder was a crime against the laws of God and nature*, and that there was no other proof of insanity which would excuse murder or any other crime. That in the species of madness called lunacy, where persons are subject to temporary paroxysms, in which they are guilty of acts of extravagance, such persons committing crimes when they are not affected by the malady, would be answerable to justice, and that so long as they could distinguish good from evil, they would be answerable for their conduct; and that in the species of insanity in which the patient fancies the existence of injury and seeks an opportunity of gratifying revenge by some hostile act, if such person be capable *in other respects*, of distinguishing between right and wrong, there would be no excuse for [*903] any act of atrocity which he *might commit under this description of derangement. The prisoner was found guilty and executed. R. v. Bellingham, 1 Collinson on Lunacy, 637; Shelford on Lunacy, 462; see Offord's Case, 5 C. & P. 168:

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24 E. C. L. R. The above direction does not appear to make a sufficient allowance for the incapacity of judging between right and wrong *upon the very matter in question*, as in all cases of *monomania*. The following observations of an eminent writer on the criminal law of Scotland, are applicable to the subject. Although a prisoner understands perfectly the distinction between right and wrong, yet if he labors, as is generally the case, under an illusion and deception in his own particular case, and is thereby incapable of applying it correctly to his own conduct, he is in that state of mental aberration which renders him not criminally answerable for his actions. For example: a mad person may be perfectly aware that murder is a crime, and will admit that, if pressed on the subject; still he may conceive that a homicide he has committed was no wise blamable, because the deceased had engaged in a conspiracy, with others, against his own life, or was his mortal enemy who had wounded him in his dearest interests, or was the devil incarnate, whom it was the duty of every good Christian to meet with weapons of carnal warfare. Alison's Princ. Crim. Law. Scotl. 645, citing 1 Hume, 37, 38. And see the observations on R. v. Bellingham, Alison, 658; R. v. Oxford, *post*, p. 905.

It has been justly observed that the plea of insanity must be received with much more diffidence in cases proceeding from the desire of gain, as theft, swindling, or forgery, which generally require some art and skill for their completion, and argue a sense of the advantage of acquiring other people's property. On a charge of horse-stealing, it was alleged that the prisoner was insane, but as it appeared that he had stolen the horse in the night, conducted himself prudently in the adventure, and ridden straight by an unfrequented road to a distance, sold it, and taken a bill for the price, the defence was overruled. R. v. Henderson, Alison's Princ. Crim. Law Scotl. 655, 656.

Causes in which the prisoner has been held to be insane.] James Hadfield was tried in the Court of K. B., in the year 1800, on an indictment for high treason, in shooting at the king in Drury Lane Theatre, and the defence made for the prisoner was insanity. It was proved that he had been a private soldier in a dragoon regiment, and in the year 1793 received many severe wounds in battle near Lisle, which had caused partial derangement of mind, and he had been dismissed from the army on account of insanity. Since his return to this country, he had been annually out of his mind from the beginning of spring to the end of the dog-days, and had been under confinement as a lunatic. When affected by his disorder, he imagined himself to hold intercourse with God: sometimes called himself God, or Jesus Christ, and used other expressions of the most irreligious and blasphemous kind, and also committed acts of the greatest extravagance; but at other times he appeared to be rational and discovered no symptom of mental incapacity or disorder. On the 14th May preceding the commission of the act in question, his mind was very much disordered, and he used many blasphemous expressions. At one or two o'clock on the following morning, he suddenly jumped out of bed, and, alluding to his child, a boy of eight months old, of *whom he was usually remarkably fond, said he was [*904] about to dash his brains out against the bedpost, and that God had ordered him to do so; and, upon his wife screaming and his friends coming in, he ran into a cupboard, and declared he would lie there, it should be his bed, and God had said so; and when doing this, having overset some water, he said he had lost a great deal of blood. On the same and the following day he used many incoherent and blasphemous expressions. On the morning of the 15th May he seemed worse, said that he had seen God in the night, that the coach was waiting, and that he had been to dine

with the king. He spoke very highly of the king, the royal family, and particularly of the Duke of York. He then went to his master's workshop, whence he returned to dinner at two, but said that he stood in no need of meat, and could live without it. He asked for tea between three and four o'clock, and talked of being made a member of the Society of Odd Fellows; and after repeating his irreligious expressions, went out and repaired to the theatre. On the part of the crown it was proved that he had sat in his place in the theatre nearly three-quarters of an hour before the king entered: that at the moment when the audience rose on his majesty's entering his box, he got up above the rest, and presenting a pistol loaded with slugs, fired it at the king's person, and then let it drop; that when he fired, his situation appeared favorable for taking aim, for he was standing upon the second seat from the orchestra, in the pit; and he took a deliberate aim, by looking down the barrel as a man usually does when taking aim. On his apprehension, amongst other expressions, he said that he knew perfectly well that his life was forfeited; that he was tired of life, and regretted nothing but the fate of a woman who was his wife, and would be his wife a few days longer, he supposed. These words he spoke calmly, and without any apparent derangement; and with equal calmness repeated that he was tired of life, and said that his plan was to get rid of it by any means; that he did not intend anything against the life of the king, for he knew the attempt only would answer his purpose.

The counsel for the prisoner put the case as one of a species of insanity in the nature of a *morbid delusion* of the intellect, and admitted that it was necessary for the jury to be satisfied that the act in question was the immediate unqualified offspring of the disease. Lord Kenyon, C. J., held, that as the prisoner was deranged immediately before the offence was committed, it was improbable that he had recovered his senses in the interim; and although, were they to run into nicety, proof might be demanded of his insanity at the precise moment when the act was committed, yet there being no reason for believing the prisoner to have been at that period a rational and accountable being, he ought to be acquitted, and was acquitted accordingly. R. v. Hadfield, Collinson on Lunacy, 480; 1 Russ. by Grea. 13.

The prisoner was indicted for setting fire to the cathedral church of York. The defence was that he was insane. It was proved that he was much under the influence of dreams, and in court he gave an incoherent account of a dream that had induced him to commit the act, a voice commanding him to destroy the cathedral on account of the misconduct of the clergy. Several medical witnesses stated their opinions that he was insane, and that, when laboring under his delusion, he could not distinguish right from wrong. One surgeon said that such persons, though inca- [*905] pable on a particular subject of *distinguishing right from wrong, seek to avoid the danger consequent upon their actions, and that they frequently run away and display great cunning in escaping punishment. The jury acquitted the prisoner on the ground of insanity. R. v. Martin, Shelford on Lunacy, 465; Annual Register, vol. 71, pp. 71, 301.

In R. v. Oxford, Lord Denman, C. J., made the following observations to the jury: Persons must be taken to be of sound mind till the contrary is shown. But a person may commit a criminal act and not be responsible. If some controlling disease was in truth the acting power within him, which he could not resist, then he will not be responsible. It is not more important than difficult to lay down the rule. . . . On the part of the defence it is contended that the prisoner was *non compos mentis*, that is (as it has been said), unable to distinguish right from wrong, or in other words, that from the effect of a diseased mind, he did not know at the time that the

act he did was wrong. . . . Something has been said about the power to contract and to make a will. But I think that those things do not supply any test. The question is, whether the prisoner was laboring under that species of insanity which satisfies you that he was quite unaware of the nature, character, and consequence of the act he was committing, or, in other words, whether he was under the influence of a diseased mind, and was really unconscious at the time he was committing the act, that it was a crime. 9 C. & P. 525: 38 E. C. L. R.

Opinions of the judges on questions propounded by the House of Lords.] In consequence of the acquittal on the ground of insanity of Daniel McNaughten for shooting Mr. Drummond, the following questions of law were propounded by the House of Lords to the judges. See 8 Scott's N. R. 595; 1 C. & K. 130: 47 E. C. L. R.(1)

"1. What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one or more particular subjects or persons; as, for instance, where at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?

"2. What are the proper questions to be submitted to the jury when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons is charged with the commission of a crime (murder, for example), and insanity is set up as a defence?

"3. In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?

"4. If a person under an insane delusion as to existing facts commits an offence in consequence thereof, is he hereby excused?

"5. Can a medical man conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial, and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime; or his opinion whether the prisoner was conscious at the time of doing the act that he was acting contrary to law, or whether he was laboring under any and what delusion at the time?"

*Maule, J.—I feel great difficulty in answering the questions put by your [*906] lordships on this occasion: First, because they do not appear to arise out of and are not put with reference to a particular case, or for a particular purpose, which might explain or limit the generality of their terms, so that full answers to them ought to be applicable to every possible state of facts not inconsistent with those assumed in the questions; and this difficulty is the greater, from the practical experience both of the bar and the court being confined to questions arising out of the facts of particular cases; secondly, because I have heard no argument at your lordships' bar or elsewhere on the subject of these questions, the want of which I feel the more, the greater is the number and the extent of questions which might be raised in argument; and, thirdly, from a fear of which I cannot divest myself, that, as these questions relate to matters of criminal law of great importance and frequent occurrence, the answers to them by the judges may embarrass the administration of justice when they are cited in criminal trials. For these reasons I should have been glad if my learned

(1) Sanches v. The People, 4 Parker, C. R. 535; Bovard v. The State, 30 Mississippi, 600; The State v. Windsor, 5 Harrington, 512.

brethren would have joined me in praying your lordships to excuse us from answering these questions; but, as I do not think they ought to induce me to ask that indulgence for myself individually, I shall proceed to give such answers as I can, after the very short time which I have had to consider the questions, and under the difficulties I have mentioned, fearing that my answers may be as little satisfactory to others as they are to myself.

The first question, as I understand it, is, in effect, what is the law respecting alleged crime, when at the time of the commission of it the accused knew he was acting contrary to the law, but did the act with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit? If I were to understand this question according to the strict meaning of its terms, it would require, in order to answer it, a solution of all questions of law which could arise on the circumstances stated in the question, either by explicitly stating and answering such questions, or by stating some principles or rules which would suffice for their solution. I am quite unable to do so, and, indeed, doubt whether it be possible to be done; and therefore request to be permitted to answer the question only so far as it comprehends the question whether a person, circumstanced as stated in the question, is for that reason only to be found not guilty of a crime respecting which the question of his guilt has been duly raised in a criminal proceeding; and I am of opinion that he is not. There is no law that I am aware of that makes persons in the state described in the question not responsible for their criminal acts. To render a person irresponsible for crime on account of unsoundness of mind, the unsoundness should, according to the law as it has long been understood and held, be such as to render him incapable of knowing right from wrong. The terms used in the question cannot be said (with reference only to the usage of language) to be equivalent to a description of this kind and degree of unsoundness of mind. If the state described in the question be one which involves or is necessarily connected with such an unsoundness, this is not a matter of law, but of physiology, and not of that obvious and familiar kind as to be inferred without proof.

Secondly. The questions necessarily to be submitted to the jury are those questions [*907] of fact which are raised on the record. In a criminal *trial the question commonly is, whether the accused be guilty or not guilty; but, in order to assist the jury in coming to a right conclusion on this necessary and ultimate question, it is usual and proper to submit such subordinate or intermediate questions as the course which the trial has taken may have made it convenient to direct their attention to. What those questions are, and the manner of submitting them, is a matter of discretion for the judge—a discretion to be guided by a consideration of all the circumstances attending the inquiry. In performing this duty, it is sometimes necessary or convenient to inform the jury as to the law; and if, on a trial such as is suggested in the question, he should have occasion to state what kind and degree of insanity would amount to a defence, it should be stated conformably to what I have mentioned in my answer to the first question, as being, in my opinion, the law on this subject.

Thirdly. There are no terms which the judge is by law required to use. They should not be inconsistent with the law as above stated, but should be such as, in the discretion of the judge, are proper to assist the jury in coming to a right conclusion as to the guilt of the accused.

Fourthly. The answer which I have given to the first question is applicable to this.

Fifthly. Whether a question can be asked, depends, not merely on the questions of fact raised on the record, but on the course of the cause at the time it is proposed to ask it; and the state of an inquiry as to the guilt of a person charged with a

crime, and defended on the ground of insanity, may be such that such a question as either of those suggested is proper to be asked and answered, though the witness has never seen the person before the trial, and though he has been present and heard the witnesses; these circumstances of his never having seen the person before, and of his having been present at the trial, not being necessarily sufficient, as it seems to me, to exclude the lawfulness of a question which is otherwise lawful, though I will not say that an inquiry might not be in such a state as that these circumstances should have such an effect.

Supposing there is nothing else in the state of the trial to make the questions suggested proper to be asked and answered, except that the witness had been present and heard the evidence, it is to be considered whether that is enough to sustain the question. In principle it is open to this objection, that, as the opinion of the witness is founded on those conclusions of fact which he forms from the evidence, and, as it does not appear what those conclusions are, it may be that the evidence he gives is on such an assumption of facts as makes it irrelevant to the inquiry. But such questions have been frequently asked, and the evidence to which they are directed has been given, and has never, that I am aware of, been successfully objected to. Evidence, most clearly open to this objection, and on the admission of which the event of a most important trial probably turned, was received in the case of the Queen v. McNaughten, tried at the Central Criminal Court in March last, before the Lord Chief Justice, Mr. Justice Williams, and Mr. Justice Coleridge, in which counsel of the highest eminence were engaged on both sides; and I think the course and practice of receiving such evidence, confirmed by the very highest authority of these judges, who not only received it, but left it, as I understand, to the jury, without any remark derogating from its weight, ought to be held to warrant its reception, notwithstanding *the objection in principle to which it may be open. In [*908] cases even where the course of practice in criminal law has been unfavorable to parties accused, and entirely contrary to the most obvious principles of justice and humanity, as well as those of law, it has been held that such practice constituted the law, and could not be altered without the authority of Parliament.

Tindal, C. J.—My lords, her majesty's judges, with the exception of Mr. Justice Maule, who has stated his opinion to your lordships, in answering the questions proposed to them by your lordships' house, think it right, in the first place, to state that they have forborne entering into any particular discussion upon these questions, from the extreme and almost insuperable difficulty of applying those answers to cases in which the facts are not brought judicially before them. The facts of each particular case must of necessity present themselves with endless variety, and with every shade of difference in each case; and as it is their duty to declare the law upon each particular case, on facts proved before them, and after hearing arguments of counsel thereon, they deem it at once impracticable, and at the same time dangerous to the administration of justice if it were practicable, to attempt to make minute applications of the principles involved in the answers given by them to your lordships' questions.

They have, therefore, confined their answers to the statement of that which they hold to be the law upon the abstract questions proposed by your lordships; and, as they deem it unnecessary, in this peculiar case, to deliver their opinions *seriatim*, and as all concur in the same opinion, they desire me to express such their unanimous opinion to your lordships.

The first question proposed by your lordships is this: "What is the law respecting alleged crimes committed by persons afflicted with insane delusion in respect of one

or more particular subjects or persons: as, for instance, where at the time of the commission of the alleged crime, the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some supposed public benefit?"

In answer to which question, assuming that your lordships' inquiries are confined to those persons who labor under such partial delusions only, and are not in other respects insane, we are of opinion, that notwithstanding the party accused did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable according to the nature of the crime committed, if he knew, at the time of committing such crime, that he was acting contrary to law; by which expression we understand your lordships to mean the law of the land.

Your lordships are pleased to inquire of us, secondly, "What are the proper questions to be submitted to the jury, when a person alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with a crime (murder, for example), and insanity is set up as a defence?" And, thirdly, "In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?" And, as these two questions appear to us to be more conveniently answered together, we have to submit our opinion to be, that [*909] the jury *ought to be told in all cases that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes, until the contrary be proved to their satisfaction; and that, to establish a defence on the ground of insanity, it must be clearly proved that at the time of the committing of the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury on these occasions has generally been, whether the accused, at the time of doing the act, knew the difference between right and wrong; which mode, though rarely, if ever, leading to any mistake with the jury, is not, as we conceive, so accurate when put generally and in the abstract, as when put with reference to the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused, solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction; whereas the law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it. If the accused was conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable; and the usual course, therefore, has been to leave the question to the jury, whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong; and this course we think is correct, accompanied with such observations and explanations as the circumstances of each particular case may require.

The fourth question which your lordships have proposed to us is this: "If a person under an insane delusion as to existing facts commits an offence in consequence thereof, is he thereby excused?" To which question the answer must of course depend on the nature of the delusion; but, making the same assumption as we did before, viz., that he labors under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation as to responsibility as if

the facts with respect to which the delusion exists were real. For example, if, under the influence of his delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man, as he supposes, in self-defence, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.

The question lastly proposed by your lordships is, "Can a medical man, conversant with the disease of insanity, who never saw the prisoner previously to the trial, but who was present during the whole trial and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious at the time of doing the act that he was acting contrary to law, or whether he was laboring under any and what delusion at the time?" In answer thereto, we state to your lordships that we think the medical man, under the circumstances supposed, *cannot [*910] in strictness be asked his opinion in the terms above stated, because each of those questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide; and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But where the facts are admitted, or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as a matter of right.

Cases of insanity caused by intoxication.] Intoxication is no excuse for the commission of crime. The prisoner, after a paroxysm of drunkenness, rose in the middle of the night and cut the throats of his father and mother, ravished the servant-maid in her sleep, and afterwards murdered her. Notwithstanding the fact of his drunkenness, he was tried and executed for these offences. R. v. Dey, 3 Paris & Fonbl. M. J. 140 (*n*). There are many men, it is said in an able work on medical jurisprudence, soldiers who have been severely wounded in the head especially, who well know that excess makes them mad; but if such persons wilfully deprive themselves of reason, they ought not to be excused one crime by the voluntary perpetration of another. 3 Paris & Fonbl. M. J. 140. But if, by the long practice of intoxication, an habitual or fixed insanity is caused, although this madness was contracted voluntarily, yet the party is in the same situation, with regard to crimes, as if it had been contracted involuntarily at first, and is not punishable. 1 Hale, P. C. 32.(1)

Though voluntary drunkenness cannot excuse for the commission of crime, yet where, as upon a charge of murder, the question is, whether an act was premeditated, or done only from sudden heat and impulse, the fact of the party being intoxicated has been held to be a circumstance proper to be taken into consideration.(2)

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(1) United States v. Drew, 5 Mason, 28; 3 American Jurist, 5; Burnet v. The State, Mason & Yerger, 133; Cornwell v. The State, Ibid. 147; State v. McCants, 1 Spears, 384.

Long-continued inebriety, although resulting in occasional insanity, does not require proof of a lucid interval to give validity to the acts of the drunkard, as is required when general insanity is proved. When the indulgence has produced general derangement of mind, it would be otherwise. Gardiner v. Gardiner, 22 Wend. 526.

(2) Pennsylvania v. McFall, Addis. 257.

Mere intoxication is no excuse for crime. Evidence of it may be admissible to the question of malice. Kelly v. The State, 3 Smedes & Marsh. 518.

If a person, while sane and responsible, makes himself intoxicated, and while in that condition commits murder by reason of insanity, which was one of the consequences of intoxication and one of the attendants on that state, he is responsible. United States v. McGlue, 1 Curtis C. C. 1; The People v. Robinson, 2 Parker C. R. 235; The People v. Hamill, Ibid. 223; The State v. Harlowe, 21

Per Holroyd, J., R. v. Grindley, 1 Russ. by Grea. 8. And where the prisoner was tried for attempting to commit suicide, and it appeared that at the time of the alleged offence she was so drunk that she did not know what she did, Jervis, C. J., held that negatived the attempt to commit suicide. R. v. Moore, 3 C. & K. 319.

See, as to the disposal of criminal lunatics, 23 & 24 Vict. c. 75.

[*911] *COERCION BY HUSBAND.

In certain cases a married woman is privileged from punishment, upon the ground of the actual or presumed command and coercion of her husband compelling her to the commission of the offence. But this is only a presumption of law, and if it appears upon the evidence that she did not in fact commit the offence under compulsion, but was herself a principal actor and inciter in it, she must be found guilty. 1 Hale, P. C. 516. In one case it appears to have been held by all the judges, upon an indictment against a married woman for falsely swearing herself to be next of kin, and procuring administration, that she was guilty of the offence, though her husband was with her when she took the oath. R. v. Dick, 1 Russ. by Grea. 19. Upon an indictment against a man and his wife for putting off forged notes, where it appeared that they went together to a public house to meet the person to whom the notes were to be put off, and that the woman had some of them in her pocket, she was held entitled to an acquittal. R. v. Atkinson, 1 Russ. by Grea. 19.

Evidence of reputation and cohabitation is in these cases sufficient evidence of marriage. Ibid. But where the woman is not described in the indictment as the wife of the man, the *onus* of proving that she is so, rests upon her. R. v. Jones, Kel. 37; 1 Russ. by Grea. 24.

But where on the trial of a man and woman it appeared by the evidence, that they addressed each other as husband and wife, and passed as such, and were so spoken of by the witnesses of the prosecution; Patteson, J., held that it was for the jury to say whether they were satisfied that they were in fact husband and wife, even though the woman had pleaded to the indictment, which described her as a "single woman." R. v. Woodward, 8 C. & P. 561: 34 E. C. L. R. See also R. v. Good, 1 C. & K. 185: 47 E. C. L. R.

The presumption of coercion on the part of the husband does not arise, unless it appear that he was present at the time of the offence committed. 1 Hale, P. C. 45. Thus where a wife by her husband's order and procurement, but in his absence, knowingly uttered a forged order and certificate for the payment of prize money, all the judges held, that the presumption of coercion at the time of uttering did not arise, and that the wife was properly convicted of uttering, and the husband of procuring. R. v. Morris, Russ. & Ry. 270.

So where the husband delivered a threatening letter ignorantly, as the agent of the wife, she alone was held to be punishable. R. v. Hammond, 1 Leach, 447.

Missouri, 446; Commonwealth v. Hawkins, 3 Gray, 463; Mercer v. The State, 17 Georgia, 146; Carter v. The State, 12 Texas, 500; The People v. Willey, 2 Parker C. R. 19.

As to intent or malice. The State v. Cross, 27 Missouri, 332; Golden v. The State, 25 Georgia, 527; Jones v. The State, 29 Ibid. 594; Mooney v. The State, 33 Alabama, 419; O'Herrin v. The State, 14 Indiana, 420; Dawson v. The State, 16 Indiana, 428.

As to the cases of delirium tremens, see The State v. Sewall, 3 Jones's Law, 245; The People v. McCann, 3 Parker C. R. 272; Macconebey v. The State, 5 Ohio, 77.

The prisoner, Martha Hughes, was indicted for forging and uttering Bank of England notes. The witness stated that he went to the shop of the prisoner's husband, where she took him into an inner room and sold him the notes; that while he was putting them into his pocket the husband put his head in and said, "Get on with you." On returning to the shop he saw the husband, who, as well as the *wife, desired [*912] him to be careful. It was objected, that the offence was committed under coercion, but Thompson, B., thought otherwise. He said the law, out of tenderness to the wife, if a felony be committed in the presence of her husband, raises a presumption, *primâ facie*, and *primâ facie* only, as is clearly laid down by Lord Hale, that it was done under his coercion, but it was absolutely necessary in such case that the husband should be actually present, and taking a part in the transaction. Here it is entirely the act of the wife; it is, indeed, in consequence of a previous communication with the husband that the witness applies to the wife, but she is ready to deal, and has on her person the articles which she delivers to the witness. There was a putting off before the husband came, and it is sufficient if, before that time, she did that which was necessary to complete the crime. The coercion must be at the time of the act done; but when the crime has been completed in his absence, no subsequent act of his (though it might possibly make him an accessory to the felony of the wife), can be referred to what was done in his absence. R. v. Hughes, 1 Russ. by Grea. 21; 2 Lew. C. C. 229. But where on an indictment against a woman for uttering counterfeit coin it appeared that the husband accompanied her each time to the door of the shop, but did not go in, Bayley, J., thought it a case of coercion. R. v. Conolly, 2 Lew. C. C. 229; Anon. Math. Dig. C. L. 262.

Where husband and wife were convicted on a joint indictment for receiving stolen goods, it was held, that the conviction of the wife was bad. R. v. Archer, 1 Moo. C. C. 143, *ante*, 823; R. v. Matthews, 1 Den. C. C. R. 596. And where the stolen goods are found in a man's house, and his wife in his presence makes a statement exonerating him and criminating herself, it appears that with respect to the admissibility of this statement against her the doctrine of presumed coercion may apply. R. v. Laugher, 2 C. & K. 225: 61 E. C. L. R. And see R. v. Brooks, 1 Dears, C. C. R. 184, *ante*, p. 824; R. v. Wardroper, Id.

There are various crimes, from the punishment of which the wife shall not be privileged on the ground of coercion, such as those which are *mala in se*, as treason and murder. 1 Hale, P. C. 44, 45; R. v. Manning, 2 C. & K. 903. "Some of the books also except robbery." Per Patteson, J., R. v. Cruse, 8 C. & P. 545: 34 E. C. L. R.; S. C. 2 Moo. C. C. 54, *infra*. The learned judge afterwards said, "It may be, that in cases of felony, committed with violence, the doctrine of coercion does not apply."

In the above case, where a husband and wife were indicted under the 7 Wm. 4 & 1 Vict. c. 85, s. 2, for the capital offence of inflicting an injury dangerous to life; Patteson, J., seemed of opinion, that as the wife took an active part in the transaction, she might be found guilty of the offence with her husband, but said he would reserve the point, if upon further consideration he thought it necessary. The prisoners, however, were acquitted of the felony and convicted of an assault.

See also R. v. Buncombe, 1 Cox, C. C. 183, where Coleridge, J., expressed his intention, if the prisoner were convicted, of reserving this point for the consideration of the judges.

And in offences relating to domestic matters and the government of the house, in which the wife may be supposed to have a principal share, the rule with regard to coercion does not exist, as upon an *indictment for keeping a disorderly [*913]

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house.(1) Hawk. P. C. b. 1, c. 1, s. 12, *ante*, p. 735, or gaming house. R. v. Dixon, 10 Mod. 336.

And the prevailing opinion is said to be, that the wife may be found guilty with the husband in all misdemeanors. Arch. C. L. 17, 10th ed.; 4 Bl. Com. by Ryland, 29 (*n*); R. v. Ingram, 1 Salk. 384.

But where a husband and wife were jointly indicted for a misdemeanor for uttering counterfeit coin, and it appeared that the wife uttered the base money in the presence of her husband; Mirehouse, C. S. (after consulting Bosanquet and Coltman, JJ.), held that she was entitled to an acquittal. R. v. Price, 8 C. & P. 19: 34 E. C. L. R.; and see R. v. Conolly, *ante*, p. 912, which was also a case of misdemeanor; see also 8 C. & P. 21 *n.* (*b*).

However, in R. v. Cruse, *ante*, p. 912, where the jury convicted a husband and wife of an assault, under the 7 Wm. 4 & 1 Vict. c. 85, s. 11; the judges on a case reserved affirmed the conviction, being unanimously of opinion, that the point with respect to the coercion of the wife did not arise, as the ultimate result of the case was a conviction for misdemeanor.

Where the wife is to be considered as merely the servant of her husband, she will not be answerable for the consequences of his breach of duty, however fatal, though she may be privy to his conduct. Thus where the husband and wife were indicted for the murder of an apprentice of the husband, who had died for the want of proper nourishment, Lawrence, J., held that the wife could not be convicted, for, though equally guilty *in foro conscientiæ*, yet, in point of law, she could not be guilty of not providing the apprentice with sufficient food. R. v. Squire, 1 Russ. by Grea. 19; see further, *ante*, p. 667.

A woman cannot be indicted as an accessory by rescuing her husband. 1 Hale, P. C. 47. Nor can she be guilty of larceny in stealing her husband's goods. 1 Hale, P. C. 514, *ante*, p. 589. But if she and a stranger steal the goods, the stranger is liable. R. v. Tolfree, 1 Moo. C. C. 243; see further, *ante*, p. 599. So it has been held that she was not guilty of arson within the 7 & 8 Geo. 4, c. 30, s. 2, by setting her husband's house on fire. R. v. Marsh, 1 Moo. C. C. 182, *ante*, p. 271.

(1) Commonwealth v. Lewis, 1 Metcalf, 151.
A feme covert upon whose lands her husband erects a nuisance, is not criminally responsible. The People v. Townsend et al., 3 Hill, 479.
If a married woman commits a misdemeanor with the concurrence of her husband, the husband is liable to indictment. Williamson v. The State, 16 Alabama, 431.

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